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The entrepreneurial theory of ownership

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Abstract

This paper introduces a theory of ownership that is rooted in Israel Kirzner's theory of entrepreneurship – The Entrepreneurial Theory of Ownership. Its central idea is that natural resources are not available to us automatically as other approaches to justice implicitly assume. Before we can use a resource, we need to do preparatory work in the form of making an entrepreneurial judgement on it. This fact, as I argue, makes it possible to put private ownership as a natural right on a firm normative ground and answer many traditional challenges to private property.

Keywords: Nozick; Locke; libertarianism; private ownership; distributive justice

1. Introduction

In *Anarchy, State and Utopia* (Nozick 1974: 159–182) Robert Nozick discussed the potential of ‘theories of historical entitlements’ (ETs) as an alternative to traditional approaches to distributive justice. Theories of distributive justice are typically concerned with a particular pattern of distribution of resources which they aim to achieve and sustain. From this perspective property rights have no intrinsic value and should be evaluated and justified instrumentally, on the basis of the impact they have on the desired pattern.¹

Instead, ETs claim that certain historical events – such as acts of just appropriation or just transfer – can create morally significant relationships between individuals and objects. Resultantly, individuals acquire a moral right to decide how said objects should be used – the right of private ownership. Legal property rights are seen as legal manifestation of this deeper moral right.

Though Nozick did not offer more than the conceptual form of ETs, specific ETs have been proposed by others who followed him (Lomasky 1987: 111–151;

¹In different forms this view is articulated in e.g. Thomson (1990: 322–347), Rawls (1999: 235, 242–251), Murphy and Nagel (2002) and Nili (2019). But it could be argued that any non-libertarian approach to distributive justice implicitly relies on such assumptions.

Mack 1990, 2010; Sanders 2002; Otsuka 2003; Narveson 2010; Van der Vossen 2015; Christmas 2019, 2021; Wendt 2022). Some older theories also fit this template, the Lockean theory of property rights most prominently (Locke 1980[1689] II: sec. 22–51).

In this paper I am going to present another take on Nozick's idea of historical entitlements as the foundation of property rights: the Entrepreneurial Theory of Ownership (ETO). ETO finds inspiration in the ideas of Israel Kirzner (1978, 1989). He pointed out that the debates surrounding the issues of distributive justice have a blind spot: they start with the assumption of full knowledge concerning the resources which are up for distribution. In reality, however, this knowledge is not present by default but has to be acquired and a proper approach to distributive justice should account for that.

ETO builds on these ideas and develops them into a full-fledged analytical theory that views appropriation as similar to the activities of entrepreneurs as described in Kirzner (1973). Beyond Kirzner, ETO borrows a great deal from the theory of property acquisition developed by Billy Christmas (2021). There are also certain parallels between ETO and Hegel's theory of property (Hegel 1991 [1820]: 72–103).

As a way of presenting ETO's advantages over other, more traditional approaches to Nozick's project, I will show here how it gives a powerful response to one of the most well-known objections against ETs – the so-called Private Duty Imposition Objection (PDIO). This objection says that ETs necessarily come in conflict with our deeply held moral intuitions as they give private persons the power to unilaterally impose duties on others.

The paper will be structured as follows. I will start with my presentation of PDIO (section 2). In sections 3 and 4 I will develop the main categories of ETO and then in sections 5–7 I will apply them to the problems of appropriation and transfer, respectively. Section 8 will provide a summary view on ETO's conception of property acquisition and show how it defeats PDIO.

2. Private Duty Imposition Objection

PDIO capitalizes on the fact that when an appropriator makes a thing her own, she does not just create a relationship between herself and the thing. She also unilaterally creates a moral relationship between herself and all others in the form of a duty to obey her decisions insofar as they are related to this thing.²

Unilateral duty imposition constitutes a moral problem that is, to my knowledge, best explained in Dorfman (2014: 439). The author argues, in a slightly different context, that the natural right of private ownership would necessarily violate the principle of moral equality between persons because it places some individuals in a position to alter the normative status of others without their will. This argument can be used for my purposes in the following manner.

All persons are morally equal. But by appropriation we impose duties on others without their consent. To be able to bind another person with a duty without her consent is to have power over her. But for one private individual to have power over

²In different forms this objection has been advanced in Gibbard (1976), Waldron (1988: 253–283), Wenar (1998), Harris (2002: 202–203), Attas (2003), Ripstein (2009: 148–159) and Spafford (2021).

the other is incompatible with the principle of moral equality we initially assumed. Therefore, any moral theory that allows private duty imposition violates the principle of moral equality. ETs are such moral theories. Therefore, they violate the principle of moral equality. Therefore, they are unjustified.

One typical response to PDIO is that the possibility of unilateral appropriation does not make non-appropriators worse off in practical terms or even make them better off (for example, because it allows them to reap the alleged benefits of an economic system based on private property rights).³ Notice, however, that the argument above does not depend upon any contingent features of ETs such as whether they make those who fail to appropriate worse off: the violation of moral equality is intrinsically bad, even when it does not lead to negative consequences.

For example, in modern market conditions those who fail to appropriate can profit by selling their labour to others with relative ease, hence, the duties, imposed on them by more successful appropriators, arguably are not onerous. It is nonetheless true, however, that wage-earners occupy such a position that their ability to provide for themselves is defined by others. They can earn their wages only insofar as there is market demand for their skills. Their freedom is limited by the whims of their employers in a way that the freedom of the ancient hunter-gatherer was not. This very fact puts the wage-earner at a disadvantage, even though the hunter-gatherer was much poorer in practical terms.

Van der Vossen (2015: 69–76) offers an alternative response to PDIO. He points out that when a man grows hair on his head, he imposes a duty on others not to touch the hair. Yet this case hardly constitutes a violation of moral equality. Drawing on this example, Van der Vossen distinguishes between creating a duty on one hand and altering or activating a previously existing duty on the other hand. Only the former, according to him, is morally problematic. He claims that growing hair is not a violation of equality because it only alters the content of an already existing duty not to touch the body of another person without consent: the body in question now also includes hair but the duty remains essentially the same. He further argues that this analysis also applies to the case of appropriation: it only activates an already existing duty to respect property rights but does not create any new duties. Appropriation, therefore, is as morally unobjectionable as growing hair.

The distinction Van der Vossen makes does not answer to PDIO because the difference between imposing a new duty and making an already existing one more onerous is unimportant. We can represent all duties that apply to us as a set of actions that are prescribed or prohibited. It is immaterial how exactly we would break this set into specific duties. What is material is the size of this set, the overall number of actions with respect to which we are bound by a duty. Anything that adds new actions to this set worsens, other things equal, our normative situation, irrespective of whether we describe it as creating new duties or as extending those that exist.

If the argument above refutes Van der Vossen's solution to PDIO, we still need to explain his hair case, as one could hardly doubt that nothing wrongful happens in this scenario. For this purpose, let me introduce additional complexity to the analysis above. We already have a distinction between actions we are *allowed* to

³See Locke (1960 II: sec. 37–41), Nozick (1974: 181–182), Schmidtz (1994: 45–46) and Mack (1995: 70–76).

perform and actions we are *forbidden* to perform. In addition to that, actions can be broken down into those that are *possible* to perform and those that are *impossible* to perform.

As long as an action cannot be performed, it has no practical significance whether its performance is allowed. For that reason, I would only say that an individual is free to perform a particular action when it is *both* allowed and possible to perform.

Now, as we are armed with these considerations, let us get back to the hair case. Before the hair was grown, touching it was impossible – there was no hair. After it was grown it has become possible to touch it, but this possibility is cancelled out by a normative prohibition imposed on this act. What was earlier impossible physically has become impossible normatively for no net change in freedom. Therefore, even though we can represent growing hair as an imposition of a duty to not touch it, this action does not make anyone's normative situation worse.⁴

The case of appropriation appears to be different as appropriation imposes a prohibition on actions that have been possible before it. Appropriation, therefore, does seem to diminish the set of actions available to others, thus reducing their freedom.

In this way PDIO appears to be resistant to responses advanced by the proponents of ETs. In the final section of this paper, I will show how ETO defeats PDIO but I will need to introduce ETO first. I will start with its basic categories.

3. Brute Objects and Resources

Imagine yourself walking through a forest. You stop at a small glade and decide to have a quick lunch. You spot a large and unusually flat boulder at the centre of the glade and a stump near it. 'Good', you think. 'This boulder would make an excellent table and the stump could be my chair.' After that, you proceed to unpack your food, put it on the boulder, and have your meal while sitting on the stump.

ETO maintains that through this process you have become an owner of the boulder and the stump. The event that generated the right of ownership ensued when you judged them to be suitable substitutes for, respectively, a table and a chair and acted on this judgement. At that moment you stopped seeing them as mere natural objects and started seeing them as tools.

⁴An anonymous reviewer to this paper suggested the possibility of a pre-emptive ban that would be a counterexample to this claim. Suppose the government forbids everyone to read a book on the Entrepreneurial Theory of Ownership I will write in the future. It is still impossible to read it now because such a book does not exist but intuitively the ban appears to result in an objectionable loss of liberty.

I would argue that contrary to the intuition a pre-emptive ban does not by itself lead to the loss of liberty. Imagine that the government would add a clause to this regulation that the ban would be immediately lifted as soon as I write the book. And, alternatively, imagine that it does not issue any pre-emptive prohibition but simply announces that it will ban my book the moment it is written. I think most people would feel that there is no loss of liberty in the former case but there is a loss of liberty in the latter case.

What I believe these scenarios show is that our intuition reacts not to the ban per se but rather to the anticipation that the ban would remain in place after the activity becomes possible: we do not perceive the situation as objectionable if we remove the element of anticipation but still see a problem if we keep *only* the element of anticipation.

This case can be generalized. Before you start using any object, you must first judge this object to be useful.⁵ In the boulder and stump case, it is especially obvious because such a judgement is all that you have to do before you can start using them. But if you decided to make an actual table from the wood found in the forest around the glade, you would still need to first judge that these particular pieces of wood are suitable as materials for a table. And the moment you make this judgement, the chosen pieces of wood will become, from your perspective, distinct from all other pieces of wood around. They will no longer be mere natural objects, they will be means to your end.

These considerations allow me to introduce three categories that will be necessary for our subsequent discussion. The first two are *brute objects* and *resources*. *Brute objects* are simply all the objects that are around us. *Resources* are the very same objects once seen as useful. Or, more formally, resources are brute objects that stand to at least one agent in the relationship of being perceived as useful. Brute objects can be converted into resources by a mental act which puts a brute object on the one hand and a human end on the other hand into a certain relationship: the object can be means to that end. This act will be called a *use-judgement* – the third category I need to introduce.

To grasp the important contrast between brute objects and resources ask: what is meant under ‘resources’ in the sentence ‘resources are scarce’? We cannot mean ‘all that exists’ as this is not scarce in any practical sense: there is more matter and energy in the universe than we can plausibly consume. To speak of scarcity coherently, we require a narrower conception of resources than ‘all that exists’. ETO proposes such a conception: ‘resources’ are objects with which a person can purposefully interact. Meaning the following must apply:

- (a) at least one individual knows how to reach them;
- (b) that same individual believes that interacting with them serves as a means to her end.

These are the necessary conditions for any purposeful interaction. The first one is unambiguous: you cannot interact with something you cannot touch, directly or indirectly (through tools or assistance of others). Notice that this condition requires knowledge while for the second a mere belief suffices. This is because you cannot interact with an object if it is physically unreachable, even if you mistakenly believe it is within your reach. By contrast, a false belief that something can help you achieve your ends, still allows you to perceive it as useful (though mistakenly), thus making the interaction possible.

‘To know how to reach’ denotes knowledge of a sequence of actions, performable by the agent, which would make an interaction with the object possible. For example, objects on Mars are reachable if we know what steps we need to take to send an expedition there and bring them to Earth. ETO assumes that all objects are in principle reachable; the only factor which makes something unreachable is the

⁵This is not always the case. For example, we breathe air instinctively. Such unconscious use does not count as use under ETO and does not lead to normative consequences within the theory.

lack of respective knowledge on our behalf (this assumption may be false, but we cannot know it until we are omniscient).

While the first condition makes the interaction physically possible, the second one supplies the agent with the motive for action. The end to which this condition refers is the end the agent is actively pursuing in that particular moment, not some theoretically possible end: otherwise, it would fail to motivate the action. However, the anticipation of future ends can generate ends in the present, thus making it possible to interact with objects that might be seen as useful in the future.

To explain this last point by example. Suppose I am thirsty, and I have a bottle of milk nearby. This bottle is a resource for me: I know I can use it to satisfy my thirst. But even if I am not thirsty right now, I can still anticipate being thirsty in the future which creates for me a goal to prepare supplies I can use to satisfy my future thirst. This goal enables certain interactions with milk for me, like putting it in a fridge so that it does not spoil. In this way, the milk would still be a resource.

Resources are scarce while brute objects are not. But the property that distinguishes resources from brute objects is us holding particular beliefs about them. Scarcity of resources, therefore, is not a feature of the external world but a byproduct of our ignorance. Hence it should come as no surprise that the scarcity of resources can be overcome by mental acts that uncover the missing knowledge: use-judgements.⁶

One might object that this conception of resources depends on equivocation. I define resources in a formal way: we need to believe that they are useful but it is not necessary for them to be in fact useful. However, resources are commonly viewed as something substantively valuable – and indeed, this idea is strongly implicit in what I said above, and I will rely on it in the subsequent discussion.

To this objection I will respond as follows. Resources should not be considered from a hypothetical omniscient viewpoint where it can be known for certain whether they are in fact useful or not: it is the main distinctive feature of ETO that this perspective is rejected. Instead, we need to consider resources from the viewpoint of an individual agent whose knowledge is limited and uncertain. From this viewpoint, the true usefulness of resources is always a matter of probability. But having at least a chance to achieve one's goal remains superior to having no such chance. For that reason, even in this situation of uncertainty resources are valuable.

A reader might see parallels between the concept of 'resources' as presented here and the way mereological idealism views objects. The core idea of mereological idealism is that composite objects are constituted by our ideas and do not exist independently of them (Pearce 2017). One might wonder whether such objects are what I mean when I speak of resources and whether brute objects are just lumps of atoms that are not yet 'made' into an object by an observer. This is not the case. 'Resources' in ETO is a *relational* concept. It picks out objects that stand in a certain relationship to an observer, namely, in the relationship of being perceived as a means to an end. But there is no claim that objects are *constituted* by this relationship. Outside of this relationship objects will still be objects – just brute objects, not resources.

⁶This view on scarcity is inspired by Simon (1981, 1996).

It is still possible that we ‘make’ brute objects through mental acts and that brute objects are also constituted by some kind of relationship between them and agents. But those would be not the acts and the relationships with which ETO is concerned. ETO does not say anything about what counts as ‘object’ ontologically speaking. The relationships on which it is focused appear *on top* of any ontological structure.

At that point I anticipate the objection that the distinction between brute objects and resources becomes blurred. It is often (and maybe always) the case that our understanding of how a particular object can be used is ‘embedded’ into the very conception of it. For example, chairs are by definition used for sitting on them and if I recognize an object as a chair, I would immediately and automatically realize that I can sit on it. There is no distinction between an act of recognizing something as a chair and understanding how it can be used. And that, in turn, means that there is no distinction between identifying a chair as a brute object and identifying it as a resource.

I will respond as follows. A resource is a brute object that is perceived by someone as a means to an end. The end in question is a *token*, not a *type*. Recall that the motivation behind the concept of resources is to pick out a class of objects with which it is possible to purposefully interact. To purposefully interact with a chair, it is not enough to abstractly know that chairs can be used for sitting. It should be your current end to find a place to sit or to prepare an opportunity for sitting in the future and there should be no better alternatives than this particular chair. Only under these conditions would you acquire a reason to use the chair.

In this way it is possible to see chairs and understand that they can be used for sitting without turning them into resources. In that case you would understand that chairs serve a particular *type* of end but you would not see them as serving any *specific* end you are currently pursuing.

Now, with the distinction between brute objects and resources clarified, let me explore the properties of the act that transforms one into the other – a use-judgement.

4. Use-judgements

Resources are characterized by agents having a certain mental state which is *about* these resources: they are seen as means to an end. This mental state is not something present in an agent’s mind by default; it needs to be *acquired*.

An agent acquires this mental state when she *discovers the value* of a particular resource. The concept of discovery is central for Kirzner’s work and is analysed by him in detail (Kirzner 1989: 20–44). ETO instead works with a slightly different concept: a *use-judgement*.

Use-judgements are *the mental form* that the act of discovery takes. To discover the value of an object is to make a use-judgement on it. ‘Discovery’ focuses on the consequences of the act, on the fact that some value has been discovered. ‘Use-judgement’ brings the focus to the act itself. In most contexts, however, ‘discovery of value’ and ‘making a use-judgement’ can be treated as synonymous.

Use-judgements have the following structure: ‘*I might achieve X by doing Y to Z in my current circumstances.*’ This structure follows from their function: to provide us with a reason to perform a purposeful interaction with an object.

'Might' emphasizes the probabilistic character of use-judgement: when unsure our action will succeed, entertaining this possibility is often a sufficient motive to perform the action. X is the end pursued: it should be the end of the author of the use-judgement as a third party's end would not serve as a motivator. Y is the interaction through which the purpose is achieved. Z is the object with which the action needs to be performed.

Z is always a *token* and never a *type*. Use-judgements are always made on particulars as one can only interact with particulars. 'Blueberries are edible' is not a use-judgement – it would not motivate you to act by itself, if there are no blueberries around or you are not hungry. 'I can sate my hunger by eating *this* blueberry' is.

Finally, the qualifier 'in my current circumstances' emphasizes the fleeting character of use-judgements. Use-judgements are made not just for particular agents but also for particular circumstances in which the agents find themselves. This is because in different circumstances an agent's view on what her ends and appropriate means to achieve them are might change and the previous use-judgement would become obsolete.

Observe, however, that new use-judgements typically make use of cognitive work made in the earlier ones, often even made by different agents. Once it is discovered that blueberries are edible, making use-judgements on particular blueberries would be much easier. In this way, each use-judgement is *reliant* on previously made use-judgements, creating with them a complex web of epistemic dependencies.

A use-judgement is considered *productive* if the respective statement 'I might achieve X by doing Y to Z in my current circumstances' is true; a use-judgement is considered *unproductive* if this statement is false. Productive use-judgements can be ranked between each other as more or less productive depending on the relative value of X.

Performing Y is called the *enactment* of the use-judgement. For the purposes of enactment, performance needs to be understood in the broadest sense possible. It includes, for example, *planning* the action. The intention of the concept of enactment is to cover any act, including mental acts, that can be said to be *caused* by the use-judgement.

To understand how 'enactment' is a broader concept than 'use' as it is understood in everyday language, consider the following example. Imagine that you have one thousand dollars stashed away in a safe. You view this as your emergency fund and resolve to use it only under the direst of circumstances. The emergency, however, never comes, and the money remains lying idle. Still, the very awareness that you have it affects your behaviour. You make riskier choices and spend your other money more freely. In this way, the emergency money still generates value for you by simply being in your possession. Even though the money is not 'used', the respective use-judgement is being enacted.

Enactment is a form in which use-judgement manifests itself in the material world. Or, to put it in a different way, enactment is a certain *process* while use-judgement is an *event* which starts this process. A use-judgement is only consequential if followed by the enactment. This is because perceiving a resource as a means to an end should be understood in a concrete sense: it is something useful for the end you pursue *right now*. If you do not proceed immediately with using the resource or preparing to use it or laying down plans to use it then you either do not

really pursue the respective end or do not really see the respective resource as a means to it.

For that reason, a resource can only exist if someone enacts a use-judgement made on it. If no enactment takes place, it means it is not a resource for anyone in particular and that, in turn, means it is not a resource at all. Such a resource reverts back to the state of a brute object. In this way resources are *created* by making use-judgements and *maintained as such* by their enactment.

Now, as the main background concepts are established, let me turn to ETO's conception of appropriation.

5. Owner's Liberty

In Hohfeldian terms the right of ownership consists of the following components:

- (1) Owner's Liberty; a *liberty* to use the object.
- (2) Owner's Claim-Right; a *claim-right* to demand that others not use the object.
- (3) Owner's Power; a *power* to transfer said rights to others.⁷

ETO proposes a conception of property acquisition that shows how all these components can be unilaterally acquired by the authors of use-judgements.

Appropriation under ETO takes place over two stages. The first one is where a use-judgement is made. As a result, the respective brute object becomes a resource *for the author* of the use-judgement, and she acquires Owner's Liberty. The second one happens when the author enacts her use-judgement. At this stage she acquires Owner's Claim-Right. These stages, a reader needs to keep in mind, are just an analytic distinction because, as I explained above, in reality enactment and use-judgement are inseparable. The two stages, therefore, are more like two aspects of the same event or the same event looked at from different perspectives. For didactic purposes, however, it would be useful to look at them as if they were two distinct steps, taken consequently one after the other.

I will explore the former stage in this section and will focus on the latter stage in the next one.

Owner's Liberty finds its foundation in what I call natural liberty. Natural liberty is a principle according to which a person is free to do anything she wants unless there is a normative reason against her doing it. In other words, individuals are free *by default* and what needs to be justified are limitations on their freedom, but not the freedom itself. I will assume that no reader of this text would find this principle controversial.

Consider now, in the light of the principle of natural liberty, the normative situation of the author of the very first use-judgement made on a brute object – let's say it is Jane making a use-judgement on a stump in the forest. From that point on it becomes possible for her to use it, which means she acquires a default liberty to do it as an aspect of her natural liberty.

⁷This is a simplified and streamlined version of the analysis presented in Hohfeld (1917: 746–747). I assume that other components of the right of ownership are either reducible to those or can rely on a similar justification.

Observe now that as Jane was the very first person to make a use-judgement on this object, no one else, by definition, even knows that this object is a resource. Corollary: no one else has a way to use it and, therefore, can claim any *right* to use it. Jane's default liberty to use this object is, therefore, unrivalled. This is how her Owner's Liberty comes into being.

One may regard this conclusion as hasty. Perhaps, the lack of ability to carry out an action does not equate to the absence of a right to attempt it. If people other than Jane cannot use the stump it does not need to mean that they have no right to do it. For example, it is impossible to teleport to Mars, but would we say that individuals have no right to teleport to Mars?⁸

I do not think this objection holds. There is a reason to distinguish between this case and the alleged right to use brute objects. The right to use brute objects is a logical, not physical, impossibility: it is a right to use something that is by definition unusable. It is similar not to the right to teleport to Mars but to the right to draw a square circle. There is no such right as the expression 'to draw a square circle' does not describe any action and, therefore, has no meaning. By contrast, the meaning of the right to teleport to Mars is transparent.

With this established, let me move on to Owner's Claim-Right.

6. Owner's Claim-Right

Let us go back to the scenario where Jane makes a use-judgement on a stump and acquires Owner's Liberty with respect to it. I will now introduce another agent – Bill – who makes his own use-judgement on the same stump.

Let me assume that Bill's use-judgement is exclusive which means it cannot be enacted simultaneously with Jane's use-judgement.⁹ Suppose, for example, that Jane is using the stump as a chair and Bill also wants to take a sit on it. So, he waits until Jane would briefly get up to, say, pick up a nearby blueberry and quickly gets on the stump while it is vacated.

In this scenario Jane's freedom will be diminished: Jane's pre-existing opportunity to sit on the stump was stolen away from her by Bill. Now, Bill can try to argue that he is in a symmetrical position: if Jane would continue to sit on the stump, she would deny Bill the opportunities created by Bill's use-judgement and Bill's freedom would also get diminished. This response, however, faces the following problem.

Let us suppose that when Bill discovered the stump and made his use-judgement, he saw Jane enacting hers (Scenario I). His use-judgement in this scenario will be *reliant* on Jane's: he saw her sitting on the stump and got the idea that he also could sit on it. In this sense, his opportunity to make the use-judgement and, by extension, to use the stump was created by Jane. If Jane would take this opportunity away by keeping the stump for herself, there would be no net change in Bill's freedom. This, in fact, is fully analogous to my interpretation of Van der Vossen's hair-growing scenario. In that scenario the same act of growing hair made touching it physically

⁸A somewhat similar argument is made in Spafford (2020).

⁹There is no space here to deal with non-exclusive use-judgements but ETO takes them to establish a common ownership in a manner similar to what is described in Christmas (2021: 254–295).

possible but normatively prohibited and these two effects cancelled each other out. Similarly, Jane here made it possible for Bill to make a use-judgement – and forbade him to enact it.

Let us now consider Scenario II where Bill does not see Jane sitting on the stump. Suppose she went away to pick blueberries and that was the moment when Bill wandered into the glade and came with the idea of sitting on the stump all by himself.

ETO claims that in Scenario II Jane has no claim-right against Bill unless when she goes away she marks the stump as her own in some way, thus creating a publicly visible evidence that the stump is under her use-judgement which is being enacted.

The reason for this is as follows. The core assumption of ETO is that resources are not known automatically but have to be discovered. Therefore, the shape of property rights is also not known automatically: if agents do not know what resources exist in the world, they cannot be expected to know who owns which resources. Therefore, when the author of the first use-judgement discovers a resource, she cannot expect others to respect her right to it as they do not know that the right even exists. It means it is the author's duty to communicate this knowledge to the wider society.

To put the point in a different way, as long as Jane's use-judgement is private, the resource exists only for her. But when others learn about the resource from her, this knowledge can be utilized on the social level. Jane's neighbours can now make their own use-judgements, building on Jane's initial discovery. The resource now belongs not to Jane, a private person, but to Jane, a member of a community. This fact creates an obligation for all other members of the same community to respect her control over the resource.

In a normal case, described in Scenario I, the enactment would manifest itself in some physical action which will by itself communicate all necessary information to others (Jane visibly sitting on the stump). But as the earlier example of emergency money demonstrates, the connection between enactment and resource is not always directly observable. For this reason ETO distinguishes conceptually between the enactment and the *proof of enactment*. They can be and often are co-extensive but when enactment is concealed from the public eye, the proof of it is something that appropriators need to additionally provide.¹⁰

In Scenario II, therefore, Jane is under an obligation to put some sort of mark on the stump when she leaves. The mark should indicate that the stump is employed in her ongoing project, even though she is not using it immediately, and be intelligible for Bill.¹¹ It will communicate to Bill that the stump is Jane's resource but it will do more than that: it will also make Bill aware that this stump can generally be seen as a resource, thus making all Bill's potential use-judgements concerning this stump reliant on Jane's initial one.

¹⁰It is common for historical entitlement theories to require that appropriation is fixed in some socially observable way, so ETO is not original in that respect. See Ripstein (2009: 105), Van der Vossen (2009: 363), Mack (2010: 73–74) and Christmas (2021: 138–141).

¹¹What constitutes a proof is contextual. In a more advanced legal order it can be, for example, an entry in a government-maintained register.

Therefore, as long the proof of enactment is provided, Scenario II is essentially similar to Scenario I. In both cases there is the same fundamental asymmetry between the normative positions of an appropriator and all others. Others would diminish the freedom of the appropriator if they invade her property but the appropriator would not diminish anyone's freedom if she forbids the use of her property as such use was only made possible by her earlier actions. This asymmetry serves as the justification for Owner's Claim-Right.

The significance of this argument can be better understood if we contrast ETO's approach with the one of use-based theories of appropriation, such as the one presented in Christmas (2021). The central claim of these theories is that we appropriate resources when we use them. In a sense, ETO follows the same idea: it claims that appropriation is complete when a use-judgement is enacted and proved and its concept of enactment is similar to the way 'use' is understood by Christmas – as not just an immediate physical engagement with objects but continuous reliance on them over time (Christmas 2021: 209–210).

But use-based theories run into the following problem. Agents need to use resources in order to appropriate them which means that some sort of use-right must exist *before* the appropriation. For this reason, these theories need to assume that there is at least some sort of *universal Hohfeldian liberty* to use unowned objects. But once we assume such a liberty, we need to concede that this liberty gets displaced at the moment of appropriation as it is incompatible with the right of ownership. Therefore, use-based theories need to admit that appropriators take away the liberty of others and face the difficult task of justifying their power to do so.¹²

ETO assumes no universal liberty to use objects that would exist before appropriation. Instead, it requires appropriators to first *acquire* such liberty by making a use-judgement. Only then does it become possible for them, on the basis of this liberty, to interact with resources. At this second stage they enact their use-judgement, produce the proof of enactment, make their previously private knowledge of the resource public and acquire a full-fledged right of ownership.

There is, therefore, no significant difference between the normative recommendations of ETO and use-based theories but ETO offers a more convincing justification of these recommendations. As it assumes no *default* liberty to use resources, it does not need to explain how such liberty gets displaced. One could frame ETO as a more sophisticated variant of use-based theories by saying that ETO breaks the concept of 'use' into three analytically distinct components: making a use-judgement, enacting a use-judgement and providing the proof of enactment, and assigns distinct normative effects to each of them, thus making it clearer why specifically use results in appropriation.

The argument of this section seems to be open to the following objection. ETO relies heavily on the idea that appropriators do not deny any opportunities to others and to argue for this it shows that there is no opportunity to use an object until a use-judgement is made on it and, thusly, no universal liberty of use that pre-dates appropriation. But there seems to be another opportunity which the appropriation displaces. Observe that once Jane marked her stump, she made it impossible for Bill

¹²A similar argument is developed in Epstein (1979: 1227–1228) and Grunebaum (1987: 80–85).

to make any use-judgement on it that would not be reliant on hers. Therefore, per my discussion above, she rendered his use-judgements normatively inconsequential.

What ETO seems to be missing so far is the recognition of the fact that even though there is no universal liberty to use objects, there must be a *universal Hohfeldian power* to appropriate them. And as one cannot appropriate a resource which is already owned by someone else, this power will inevitably be displaced as the result of appropriation. It seems, therefore, it is not the case after all that appropriators do not take away any opportunities from others: they take away their opportunity to appropriate.

I will deal with this objection in Section 8 but it will require me to first acquaint the reader with the core elements of ETO's theory of transfer. I will do this in the next section.

7. Owner's Power

Suppose a new use-judgement was made on a resource with respect to which ownership has already been established by a different, earlier use-judgement. There are two possibilities: the new use-judgement can be more or less productive than the previous one.

Suppose that the new use-judgement is less productive. In this case, its enactment would harm not just the current controller of the resource; it would harm all other members of the community as long as this community practices the division of labour. This is because under the conditions of division of labour any value, obtained by one member, translates into value received by all others: whenever an individual starts to exploit a previously unused resource, she decreases her demand for the respective goods contributed by others and increases the supply of goods she can herself contribute. In this way she makes all others more prosperous. Similarly, if a certain resource comes to be used in a less productive way, the market conditions would become worse for everyone.

Therefore, if the new use-judgement is less productive than the old one, its author would harm everyone if she tries to enact it. It would be absurd, therefore, for the author to ask others to facilitate such an enactment. Therefore, she has no argument for getting either Owner's Liberty or Owner's Claim-Right with respect to the contested resource. Therefore, her use-judgement is normatively inconsequential.

Suppose now that the new use-judgement is more productive. In this case, the entire argument gets flipped on its head: other members of the community now have a reason to support the rights of the new claimant over the rights of the old one. It follows that Owner's Claim-Right and Owner's Liberty have to be transferred to the author of the new use-judgement – for the very same reason they were kept by the earlier owner in the previous case. The position of the prospective owner, however, would be different from the position of the initial appropriator in two ways.

Firstly, the fact that the resource is already owned by someone else is an issue. Recall how the justification of appropriation is based upon the idea that the appropriator does not deny others any more opportunities than she created. This argument is unavailable here as the current owner would lose the opportunity to use

the resource if the ownership is reassigned. Even though the new use-judgement is more productive, there is one person who would be worse off if it is enacted.

The second difference pertains to a lack of epistemic clarity. Where there is only one use-judgement, as is the case in the situation of appropriation, we need not draw a comparison with its rivals. A resource is by definition always more valuable than a brute object, this is the reason why the very first use-judgement establishes ownership automatically. But in this circumstance, we must make a comparison between the amount of value both judgements discover before we determine which of them has more normative weight.

Therefore, the prospective owner in this situation carries additional justificatory burdens. Firstly, she needs to justify her rights to the current owner (special justification). Secondly, she needs to provide evidence that her use-judgement is more productive than the previous one (general justification).

This justificatory task can be completed if we further stipulate the following condition for the transfer of ownership: *the prospective owner owes compensation to the current one in the amount agreed upon by both parties*. This stipulation, firstly, will fulfil the requirement of special justification, as the current owner now only loses her ownership if she agrees to it. Secondly, the very facts that the current owner agreed to part with the resource in exchange for the compensation, and that the prospective owner agreed to appropriate the resource despite the requirement of the compensation, serve as evidence that the current owner assigns less value to the resource than the prospective one: one of them values the resource higher than the compensation and the other values it lower.

There is no one else in the community who is in a better epistemic position to judge the quality of the pair of rival use-judgements than these two individuals. They both have direct knowledge of what kind of value the respective resource can provide and they both have an incentive to make an accurate assessment of respective use-judgements. If they both are in agreement that the new use-judgement is superior, it should serve as conclusive evidence that it, in fact, is.¹³

So, if a more productive use-judgement is made on a resource, the author of the previous use-judgement loses her ownership as the resource gets transferred to the author of the new use-judgement. However, the prospective owner has a duty to compensate the current owner for the value she lost as determined by their agreement.

Let us take a closer look at this duty. One might wonder how exactly it is justified, given that the appropriator does not seem to have a similar duty, so their positions with this respect are asymmetrical.

Observe, however, that the appropriator has a somewhat parallel duty: she needs to provide the proof of enactment. Now, one might say there is still no symmetry as providing the proof of enactment does not involve (at least, does not have to involve) material losses.

Two considerations can be brought forth here. Firstly, a system close to what ETO proposes is in fact practiced in the actual world and we can observe that agents often choose to pay the compensation, even when appropriation of a similar resource is possible. Lots of people buy berries in a grocery store instead of manually

¹³For more on this see Hayek (1945) and Kirzner (1973, 1989: 72–96).

collecting them in the forest. This is because making initial use-judgements typically involve costly preparations, while making subsequent use-judgements is often a simple matter of going to a nearby shop. Initial use-judgements require exploration of the natural world of brute objects, which is not by itself organized around human needs. It is quite a different task from identifying a resource after it was placed in a social context that makes its usefulness apparent. It is harder to find a berry in a forest than in a supermarket (and finding a berry that would not poison you is harder still).

Secondly, recall that when I argue that ownership should be transferred to the authors of more productive use-judgements, I rely on the fact that their use-judgements bring more value to other members of the respective community. But we need to keep in mind that even though the new use-judgement is more productive than the old one, the old one still discovered some amount of value and this value will not be available after the resource is transferred to the new owner. In other words, the benefit which others in the community received equals to the *net* value added by the new use-judgement, not its gross amount. As ownership entails full control over the respective resource, not just added value, it makes sense to ask the prospective owner to make up the difference.

I admit, however, that there are still fringe cases where the duty to provide compensation to appropriators leads to results many readers would see as unfair. Such are cases where the first use-judgement was very easy to make and enact but the respective resource carries a lot of value.

Imagine a pile of gold falls from the sky right in front of Bill and Jane standing together. They both rush towards it but Jane grabs it a split second faster. ETO claims that by doing so Jane appropriated the gold. Making a use-judgement is very easy here and they both made it simultaneously or almost simultaneously. But it was Jane who was the first to enact it, and now, under the rules of ETO, Bill needs to buy gold from Jane if he wants to get it while Jane has it for free. A sceptical reader would say that in this scenario ETO assigned ownership essentially at random.

The response ETO has to such scenarios is that it is tailored to real life, not to fantasy thought experiments. In real life humans need to actively look for resources in order to acquire them. Observe how it was precisely the feature of real-life gold rushes that finding the gold was never guaranteed. Even if you knew abstractly that a certain area has abundant gold deposits (the fact which, once again, had to be discovered by someone), you would still need to explore around before you find an unoccupied goldfield from which the gold could be extracted – and your search could very conceivably fail.

The gold rush case as presented here is the exact opposite of that: Bill and Jane did not need to find the gold, instead, the gold found them. This goes against ETO's assumptions about how the world operates, so it should be unsurprising that ETO comes up with unintuitive recommendations. And observe – if we try to make this scenario more realistic, if we attribute to Bill and Jane any sort of explorative activity, the recommendations of ETO would immediately become more intuitive as they would depend on what Bill and Jane do and how much success they have in their actions.

The duty to provide compensation to the previous owner, therefore, is grounded in the requirements of general and special justification as discussed above. And, in

turn, this duty serves as grounding for *Owner's Power*: the latter appears as a legal tool through which the former is enforced. Owner's Power, in this way, appears as a response to epistemic demands the system of justice places upon the members of society.

This justification of Owner's Power assumes that the value of resources is discovered in a series of freely agreed exchanges between their owners. This discovery procedure is commonly known as *market process*. This reliance on market process might seem like a liability for ETO, as critics allege that markets have numerous normative defects.¹⁴ Dealing with this body of criticism here is hardly possible but I want to make one point that should make ETO more acceptable to those sceptical towards market forces.

ETO only claims that the market is a viable tool of value discovery *in an idealized case* where it is both efficient and fair – or has whatever other qualities are necessary to allow the choices of market participants to accurately reflect their stance on the value of respective use-judgements. As long as actual markets fall short of this ideal, ETO endorses all regulations that might be necessary to set them straight. In this way, ETO, while advocating for strong private property rights, allows space for expansive taxation and regulations – if it can be shown that those are necessary for the market system to properly function.

With that said, let me move to the final section where I will formulate ETO's rule of property acquisition and show how it responds to the private duty imposition objection.

8. Property Acquisition in ETO

We have explored two cases of property acquisition: appropriation and transfer. The mechanism of the former is making and enacting a use-judgement on a brute object and the mechanism of the latter is making a use-judgement on a resource that is more productive than the one under which it is already used and compensating its previous owner. These two mechanisms can both be described by a single formula: *the ownership of a resource is assigned to an individual, who improved upon the use-judgement under which it was previously used, on the condition that the previous owner is compensated for her loss of ownership*. Transfer is the *paradigm* case covered by this rule and appropriation is a *special* case where there is no previous owner and thus no need to provide the compensation.

Under ETO there is no essential difference between appropriating a resource and *buying* a resource. These are two different manifestations of the same principle and buyers are not in any worse normative position than appropriators. Buyers need to pay for their purchase – but under ETO owners only have a claim over the amount of value *added* by their use-judgement on top of the value discovered by the previous one. In the case of appropriators all the value they discover is the added value but in the case of buyers the equivalent of the previously discovered value needs to be subtracted, hence the need for payment.

¹⁴For the sort of arguments to which I believe a full exposition of ETO would need to answer see e.g. Anderson (1993), Dekker (2010) and Kallhoff (2014).

Now, armed with these considerations, we can respond to the objection I voiced at the end of section 6. The worry was that appropriators deny others the normative power to appropriate the same object. But under ETO such power is only a means to facilitate *the opportunity to obtain exclusive control over the value added by one's use-judgement*. This opportunity is preserved after the appropriation in the form of the opportunity to purchase the respective resource.

Recall now how we established in section 2 that what makes private duty imposition problematic is the reduction of freedom, understood as the loss of opportunities. As Van der Vossen's hair case demonstrates, without this property no one would have any quarrel with it. And ETO, I believe, makes a good argument that in a case of appropriation no opportunities are, in fact, lost. As argued in section 4, there is no opportunity to use the object upon which no use-judgement has been made, so this is not the kind of opportunity appropriators deny. And as I argued in this and previous sections, it is also not the case that appropriators deny others the opportunity to make normatively consequential use-judgements because this opportunity is still present: it just manifests itself not as a power to appropriate resources but as a power to purchase them at free and efficient marketplace.

There is, I believe, one final issue with which I have to deal. It is not immediately clear how ETO applies to situations in which resources get destroyed as a result of enactment. In these cases others would not have an opportunity to improve upon the earlier use-judgement because the respective object does not exist anymore.

There are two possibilities here. The use-judgement that resulted in the destruction of the resource was either more or less productive than other potential use-judgements that could have been made on this resource. If it was more productive, then we have no issue as there never was an opportunity to improve upon it in the first place, so the appropriator did not diminish anyone's freedom. But if it was less productive, then the appropriator would have been better off if she held on to the resource instead of destroying it and sold it to the authors of subsequent, more productive use-judgements. By destroying the resource the appropriator took away profitable opportunities not just from others but also from herself. So, in this scenario ETO does allow appropriators to diminish the freedom of others but it rectifies the resulting injustice by a built-in punishment for such (normally unintentional) abuse of power.

This last consideration concludes my presentation of ETO. This paper is merely a brief outline of the theory: it would be unrealistic to attempt a full exposition and defence of it in the format of a journal article. My task here was much more modest: to familiarize the readers with ETO and show that it offers a unique response to one of the most powerful traditional objections to historical entitlement theories. In that, hopefully, I succeeded.

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