The Entrepreneurial Theory of Ownership

I

In his book "Anarchy, State and Utopia" (1974, pp. 159-182) Nozick discussed the potential of a so-called "theory of historical entitlements" (ET) which he presented as an alternative to distributive justice theories of his time. He claimed that instead of starting from a certain idealized pattern of distribution of resources and then crafting the rules of distribution in such a way that this pattern could then be achieved (or, at least, approximated), we might instead start with a set of inherently just rules of acquisition, transfer and rectification and then accept as fair any distribution which emerges from consistent application of such rules.

To put it in a different way, traditional theories of distributive justice view certain pattern of distribution of resources as intrinsically valuable. Property rights, in their view, are nothing more than a legal tool that can be used to achieve the desired distributive pattern and are valuable only insofar as they are helpful in that regard.[1] By contrast, ETs does not see any value in patterns of distribution of resources. What is held intrinsically valuable is a specific moral connection between an individual and the objects she acquired in a certain way. In virtue of this connection the individual has the right to decide what should be done with said objects – the right of private ownership.[2] Property rights are seen as a legal manifestation of this deeper moral right, just like a law that criminalizes murder is a legal manifestation of our right to life.[3]

Nozick himself did not offer any specific ET – he was more interested in the form of these family of theories than in their content. Some other philosophers, however, developed theories more or less along his blueprints (Christmas 2018, 2019, 2021; Lomasky 1990, 111-151; Narveson 2002, 2010; Sanders 2002; Mack 1990, 1995, 2010; Van der Vossen 2015). There are, of course, older theories of a similar kind – Lockean theory of property rights fitting this bill most clearly.[4] There are also hybrid approaches which, though cannot be characterized as

[1] This view is articulated in (Murphy and Nagel 2002, 188; Rawls 1999, 235, 242-251; Nili 2019).
[2] This is how Nozick defines the right of ownership (Nozick 1974, 171). This definition of ownership is also accepted by Waldron (1988, 39) and, more recently, Nili (2019, 354). Within the philosophy of law, similar approaches to the concept of ownership have been recently defended by Dorfman (2010, 2014) and Katz (2008).
[3] Contrast it with Waldron's (1988) theory. He also sees the right of private property as a moral right. But for him it's a general right – the right to have certain quantity of possessions under owner's exclusive control but not the right to control specific objects. It is other way around for ETs: rights are acquired in respect to specific objects but there is no requirement that everyone has possessions.
[4] In recent decades a number of scholars tried to reintroduce Lockean theory of property rights in the modern context, most importantly Jaworski (2011), Kramer (2004), Simmons (1992, 222-306), Sreenivasan (1995) and Tully (1980).

pure ETs, share with them some important elements (e. g. Otsuka 2003; Ripstein 2009, 86-106; Stiltz 2018).

This essay is a contribution to this body of literature. I am going to present here a brief outline of yet another ET. I call it "the entrepreneurial theory of ownership" (ETO) and see it as a development of the ideas of Kirzner (1978) who argued that initial appropriation is importantly similar to the activities of entrepreneurs and could be justified along similar lines. Other predecessors of ETO are papers by Russel (2004) and Williams (1992) where they reinterpreted Lockean "labor-mixing" in a way which is very similar to how ETO describes appropriation. None of these authors, however, developed any systematic theory on the basis if these insights.[5] In this paper I intend to start fulfilling this task.

Now, one might wonder whether yet another attempt to develop Nozick's project has any value. I believe, however, that modern scholarship on this matter has a critical gap. It is often assumed, that the act by which objects are appropriated is not particularly important: it matters that we are able to appropriate in some way but does not matter, in which particular way we appropriate. What bears normative weight are the benefits of the very practice of appropriation.[6] I believe that this approach has some merits but leaves ETs vulnerable in an important way. The notion of appropriation is deeply problematic and, in its naïve form, open to certain critical objections. The most important of those is what I call Duty Imposition Objection: the charge that ETs allow private individuals to impose duties on others without their consent. This objection is considered fatal by many philosophers and is a big part of the reason why ETs do not see much success.

ETO offers an improved formulation of the theory of appropriation which, I believe, makes it possible to answer Duty Imposition Objection and some other important criticism usually advanced against ETs. If proven to be correct, ETO can lead to a dramatic shift in current debates around distributive justice by forcing political thinkers to once again consider ETs seriously.

In this essay I will not try to provide a full systematic exposition of ETO. Nor will I provide an exhaustive argument which would be able to convince even the staunchest skeptic. None of

[5] As a result, Kirzner's approach has been rejected without much discussion (see Cohen 1995, 185; Waldron 1988, 200-201).
[6] Christmas describes this view as "agnosticism" or "conventionalism" (Christmas 2019, 9).

that is possible to do in the format of a journal article. My purpose here is not to prove ETO but to show its potential. This is why I will mostly focus on outlining its advantages over competing ETs and the way it can answer objections with which ETs typically struggle.

The essay will be structured as follows. I will give a brief overview of the core of the theory – its conception of appropriation - in Section II. In Section III I will respond to several concerns which the reader might have with respect to proposed approach. In Section IV I will show how Lockean notion of appropriation has a critical weakness which only ETO can avoid. In Section V I will demonstrate how ETO can respond to Duty Imposition Objection and some other objections. To do this I will have to present some elements of ETO's conception of transfer. I will summarize my findings in Section VI.

II

Let me start my presentation of the concept of appropriation with an analogy. Imagine yourself travelling 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 center 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.

I maintain that through this process you have become an owner of the boulder and the stump. The event that generated the right of ownership happened when you judged the boulder to be a suitable table. At that moment you stopped seeing it as a mere natural object and started seeing it as a tool, as something that could be used. This judgement changed your attitude to this thing, allowed you to see it under a certain guise. And, from your perspective, this judgement transferred the boulder from one category of things into another. Before this judgement, the boulder had most in common with other boulders which we can imagine lying around in the same glade. After the judgement, however, it starts to stand out among them. It becomes specifically important to you because of the function it can fulfil. This function is similar to that served by normal tables. Hence, it is natural for you to refer to it mentally as "a table" and to treat it as a member of the set of tables (by putting your food on it).

This boulder case can be generalized. Before you start using any object, you need to first judge this object to be useful. In the boulder case, it is especially obvious because making this judgement is pretty much all you are doing. But if you decided to make an actual table from

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 the table. And the moment you make this judgement, the pieces of wood you have chosen become, from your perspective, distinct from all other pieces of wood around.[7]

These considerations allow me to introduce four categories which will be necessary for our subsequent discussion. Two of these categories 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 which stand to at least one agent in the relation of being perceived as useful. Brute objects can be converted into resources by a specific judgment in which an agent judges a particular resource as useful. Such a judgement will be called *a use-judgement,* and this is the third category I want to introduce. A use-judgement puts an object on the one hand and a human end on the other into a certain relationship: the object has the capacity to be a means to that end.[8] This relation is called *the value* of the object – the fourth category.[9]

The work which an appropriator does when she makes a use-judgement is similar to the work done by an entrepreneur, as the latter is conceived in Kirzner's theory of entrepreneurship (Kirzner, 1973). Kirzner sees entrepreneurship as a specific awareness of the resources, available on the market, the needs that require satisfaction, and the ways in which these resources can satisfy these needs. Or, to use the terminology I just introduced: entrepreneurship is the awareness of value. As value is a relational property, the same object can be valued differently by different people without any of them being in error. This gives rise to the possibility of mutually beneficial exchanges.

Let me illustrate this by an example. Imagine that Bill has an apple and Anna has an orange. But Bill does not eat apples, he much prefers oranges and for Anna the opposite is true: she

[7] This view on appropriation bears certain similarities with the one of Ripstein who relates appropriation to seeing external objects as means (Ripstein 2009, 88, 91, 103-104). But still, he claims that appropriation happens when one takes physical control over the object, not when a respective mental event takes place (2009, 104-105). This is a critical difference, the importance of which will become clear in the later sections.

[8] Observe, that use-judgements need to be made separately about every token of a particular type of a resource. Even if I know that blueberries are edible, I still need to identify a particular object as a blueberry each time I see one and connect it to my need to eat. This means that the vast majority of use-judgements are very easy to make even though others (i.e. those which concern an entirely new type of resource) will be very difficult to make. The difference between identifying a new type of resource and a new token of an already existing type might be fundamental for a theory of intellectual property. But I will not go into this matter any further in the current essay.

[9] Economists know this concept of value as use-value. It should not be confused with exchange-value which is the market price of a good.

prefers oranges to apples. As the value is the ability of resources to satisfy human needs, both Bill and Anna control relatively little value now as the fruits they both have do not really serve any need. But if they exchange the apple for the orange, the amount of value they both control increases: it happens not because of any intrinsic property of respective resources would change but because the resources would become much better coordinated with the needs they can satisfy.

Kirzner's insight was that for an exchange to happen both Bill and Anna need to possess quite a lot of knowledge: they need to know of each other's existence, and they need to know that the other controls the resource they desire. It is even possible that Bill or Anna would not know that oranges (or apples) exist and that they would like to eat them. All this knowledge is a precondition for a mutually beneficial exchange to take place but it does not just appear in our mind automatically: it comes as a result of specific activity that Kirzner called entrepreneurship. In this way Kirzner argued that entrepreneurial activity is necessary for exchanges to happen and for markets to function.

The theory of original appropriation that I propose is essentially an extension of Kirzner's theory of entrepreneurship. Once we concede that we need a specific type of knowledge to reallocate resources that are already present on the market (which means that they are controlled by market participants who are willing to exchange them), we also need to concede that this kind of knowledge should also be necessary for initial allocation of unused resources. Use-judgements are claims of which this knowledge is composed of and to make a use-judgement means to add to this knowledge.

Use-judgements in this way are essentially similar to entrepreneurial judgements. There is, however, one important difference: when we make an entrepreneurial judgement, we say that a resource that is already used by a different market agent can be used in an even more efficient way. This judgement could be true, or it could be false. If we act in accordance with the judgement that happened to be false, the resource will be used less efficiently than it was before and the overall amount of value that exist in society will decrease. By contrast, when we make a use-judgement, we say that there is a way to use a resource that is currently unused at all. In this way a use-judgement can never decrease the amount of value in society: in the absolutely worst-case scenario it will remain unchanged (and will increase in most plausible cases).

Under the proposed theory by making a use-judgement about a brute object, an appropriator simultaneously converts this object into a resource and makes herself the owner of this resource. This, however, is not the whole story: there is one further twist in it. Let us return once again to the glade with the boulder. Imagine that you have finished your lunch, packed your things and left, never to return. A year later another person comes to this glade, sees the very same boulder and, just like you, decides to use it as a table. Would it be true that this new person violated your rights?

ETO gives a negative answer to this question. Transforming brute objects into resources is, in most cases, easy – you need nothing more than a single thought. The flipside of this is that a resource can transform back into a brute object just as easily. What distinguishes a resource from a brute object is a particular attitude which at least one agent has towards it. This attitude doesn't persist all on its own – it should be actively maintained. And the moment we stop maintaining it, the moment we stop perceiving the resource as useful, it reverts back to the status of a brute object and our ownership of it ends. After that, the object is free to be appropriated by a new person. This is exactly what happens with the boulder after you leave the glade.[10]

The relationship of ownership, therefore, needs to be actively maintained. The most obvious way to do so is to keep using the object. It seems natural to say, that, at the very least, as long, as I am sitting at the boulder and dining, this boulder is in my use exclusively.

However, the range of ways in which we can maintain ownership of an object is broader than that. Imagine that you have one thousand dollars stashed away in a safe. You view them as your emergency fund and resolve to use them only under the most dire of circumstances. The emergency, however, never comes, and the money keeps lying idle. Would it be true to say that as you are not using them, you have forfeited your right of ownership? The answer, I believe, should be negative. Even though you do not use the money directly, the very awareness of the fact that you have it affects the way you behave. You make riskier choices and spend your other money more freely. Just by lying idly in your safe, emergency dollars affect your behavior. I want to offer, therefore, a very relaxed requirement for the maintenance of the

[10] This reasoning goes in close parallel with Locke's spoilation proviso: "if either the grass of his enclosure rotted on the ground, or the fruit of his planting perished without gathering, and laying up, this part of the earth, notwithstanding his enclosure, was still to be looked on as waste, and might be the possession of any other" (II, 38).

relationship of ownership: it is maintained as long as it in any way generates value for the owner, even if the owner does not directly do anything with the respective object.

Theory of appropriation, therefore, could be summarized as such: individuals become owners of resources by making a use-judgement about them. This act simultaneously creates a resource out of a brute object and appropriates it. After this initial act of appropriation, the owner needs to continuously extract value from a resource. If she ever stops doing it, the resource transforms back into a brute object and the right of ownership is lost.

What I have offered so far is a descriptive account of the theory of appropriation. It still needs a normative foundation – an explanation of how use-judgements generate duties for others. I will not explore this topic in this essay for two reasons. Firstly, I do not have much original to say here. I believe that the right of ownership acquired by appropriation is ultimately grounded in the right to pursue one's projects without interference by outside parties – but this was already argued by others to a satisfactory degree (Christmas 2018, 2019; Lomasky 1990, 111-151). Of course, the method of appropriation that I propose here is quite unusual and I owe some explanation in respect to how use-judgements specifically are connected with the right to non-interference. But this debt will have to be paid in a different work.

My second reason for avoiding the topic of normative foundations is that I want to focus here on advantages that ETO has over other ETs and, in particular, on the ways it can resist some common objections to this family of theories. And this is not the topic where ETO can distinguish itself.

The only peculiar feature of ETO I want to mention here is that the right of ownership does not arise from use-judgements directly. What is normatively important is not a use-judgement itself but the fact that by making a use-judgement one discovers a particular value. The connection between use-judgements and the right of ownership is, therefore, roundabout: making a use-judgement leads to value discovery which, in turn, generates rights. This feature puts ETO in contrast with some other ETs, for example, Lockean one - at least, under its most common interpretation. Locke believed that the very fact of mixing one's labor with an unowned object gives an appropriator the ownership of this object, not any kind of beneficial consequences which this act might have.[11] This point will become important in later sections.

[11] This contrast is explored in finer detail in (Cohen 1995, 177; Kramer 204 146-150).

That concludes my overview of the way appropriation is structured under ETO. In sections IV and V I will show how this peculiar approach allows ETO to deal with objections that are fatal to other ETs. But firstly, I want to respond to some concerns that I expect my reader to have by that point. I will proceed to do so in the next section.

III

ETO relies on the assumption that mental events that happen in the mind of one individual can generate normative consequences for other individuals. Not only use-judgements are such, but also the additional work that is required to maintain the relationship of ownership could be, as I argued, primarily mental. I take that this assumption is hard to accept and in this section I will try to make it more persuasive.

I believe that there are three specific problems with this assumption. The first one is the fact that the content of individual mind is not publicly available. If ownership rights are created (and destroyed) by mental events, there is no direct way of knowing whether a particular right exist at any particular moment. I will call this problem the Intractability Objection. The second problem is that use-judgements are made not about reality but about its representation. We conceive the world as consisting of discrete objects but in reality everything is deeply interconnected and the object about which the owner made a use-judgement is a part of a greater whole. This fact gives rise to a well-known boundary problem: the object of ownership is inherently indeterminate.[12] The problem, however, goes deeper than a mere epistemic difficulty: the right of ownership cannot be exercised in respect to one object only, the consequences of what we do with our property would inevitably spread out to neighboring objects, thus infringing on the rights of others. I will call this concern the Boundary Objection.

Previous two objections are mostly epistemic in nature: they point out the difficulties with knowing which rights which individuals have. The third one, however, is more fundamental. It relies on the observation that ownership rights are a response to the problem of scarcity of resources: in the world where resources are not scarce, there would be no need for ownership. But the problem of scarcity is an external one, it is a state of the world that in no way depends on our consciousness. It seems odd that the supposed solution to this problem relies primarily on internal events. There is an ontological gap between the facts which constitute ownership

[12] On the boundary problem see (Mautner 1982, 261; Nozick 1974, 174; Varden 2012, 420-422).

rights and the facts that justify them under ETO and it is unclear if ETO has a way to bridge it. I will call it the Ontological Gap Objection.

Let me start with the Intractability Objection. It is true that events that ground property rights cannot be observed directly but they are of such a character that they would leave distinct observable traces. Use-judgement that has not been followed by an actual use does not create any lasting relationship of ownership. Recall that ownership needs to be maintained; if there is no follow-up to use-judgement, it just means that ownership was claimed and then immediately abandoned. For practical purposes it is no different from the situation where ownership had not been created at all.

Maintaining ownership could also be a mostly internal process, as I have argued in the previous section. Still, to maintain ownership is to extract value from the owned object and it is difficult to conceive a scenario under which it would not have any external manifestation at all. This whole problem is, therefore, reduced to a technical issue of properly tracking those manifestations and assigning property rights in accordance with them. This problem is by no means trivial, but I do not see why it is unsolvable in principle, especially in the light of certain considerations I want to present in response to the Boundary Objection. With that in mind, let me proceed.

I will now turn to the Boundary Objection. I largely agree with its assumptions. It is indeed true that there is a structural difference between reality and its mental representation and for that reason our mental acts cannot fully determine rights and duties we acquire in respect to external objects. If we would ever want to implement ETO in the form of practicable legal rules, we would not be able to infer these rules from ETO alone. We would need to take into account the fact that objects of property rights are interconnected and borders between them are somewhat arbitrary. ETO is silent on these issues which means that in drawing these borders lawmakers and judges would need to go beyond ETO. I even grant that to a certain extent these borders would be grounded in a government sanctioned convention, not in any objective moral facts.

Some authors would infer from this concession that there is no duty to respect property rights in the state of nature (Ripstein 2009, 168-176). But I do not believe that it follows. Consider such legal institution as the age of consent. From a certain point of view, it is a pure convention: hardly anyone would seriously argue that there is an important moral difference between

having sex with someone on her eighteenth birthday and having sex with the same person on the day before. But it should not stop us from saying that this legal institution is based on an objective moral rule: thou should not have sex with children. The absence of any laws in respect to age of consent would not make this moral rule any less valid and would not make the duty to refrain from having sex with children any less binding. The absence of public determination of who is considered a child for this purpose is hardly a free license for pedophiles to satisfy their desires with impunity. The situation with property rights could be seen as similar: the duty not to steal is meaningful even without any publicly determined borders of property titles. The Boundary Objection, therefore, should not be seen as a fatal objection against natural character of ownership rights.

Let me now turn to the Ontological Gap Objection. I would respond to it by rejecting the assumption that scarcity of resources is an external problem. Scarcity of brute objects could be called an external problem, but we are manifestly not facing it. Brute objects are a collection of all matter that exists in universe, including the matter in distant galaxies. The scenario under which its scarcity would be a genuine problem is too remote to entertain. The real problem is that we do not know how to make the stuff in far away galaxies useful for us – as a matter of fact, we do not know how to use most of the stuff that exists here, on Earth. In other words, when we say that resources are scarce, resources are meant in exactly the technical sense that was introduced earlier in this essay. Scarcity of resources, therefore, is nothing more than a scarcity of knowledge – knowledge how to use things around us. But this problem is primarily internal and the work necessary to solve it is also primarily internal. It should not be surprising, therefore, that a normative theory of ownership would give a lot of weight to internal events.[13]

If my framing of the problem of scarcity as a problem of a lack of knowledge is still not intuitive for you, let me illustrate it with the following scenario. Imagine a tribe of hunter-gatherers starving in the middle of rich arable land because there are no edible plants or animals in vicinity. From their perspective the problem they are facing is external – there is simply no stuff around that they can eat. But from our perspective their problem is the lack of knowledge of agriculture: if they knew how to cultivate land and grow crops, they would not be starving. Their deficit not physical but mental. I see no reason why we should believe ourselves – or our descendants – to be in a different situation from these hunter-gatherers.

[13] For a detailed exposition of a similar view see (Simon 1981, 1996).

Much of the contemporary thought on the problem of ownership rights is motivated by concerns most articulately voiced by Hillel Steiner – that a group of people would appropriate all resources in the world, living to others nothing (Steiner 1981). But, surely, Steiner could not seriously consider appropriating the entire universe. He, most likely, was only speaking about appropriating the part of the universe which is available for our use at our current state of knowledge, thus implicitly assuming that the extent of this knowledge is fixed. But for ETO this scenario is simply irrelevant because the act of appropriation is specifically the act of expanding our knowledge. Once we assume that this knowledge is no longer possible to expand, appropriation also becomes impossible. There is, therefore, no direct conflict between ETO and the views of Steiner and his likes. ETO just rejects the relevance of their ontological basis.

On that note I will finish my response to concerns that one might have with ETO's unusual conception of appropriation. In the next section I will show how this conception gives ETO an important advantage over traditional ETs.

IV

Traditional ETs, I believe, face a fatal problem. Their normative foundations are such that they need to satisfy a certain standard which they inevitably fail. In this section I will explore this problem and show how ETO avoids it.

It would be better to explain the problem I have in mind using Locke's labor theory of property as an example. Recall that according to Locke private property rights are initially established through performing labor on an object (II, 28). But performing labor can possibly generate normative consequences only if it is within your right to perform this labor at the first place. Therefore, Lockean ownership cannot emerge from a normative vacuum. It presupposes a prior existence of a different right which, at the very least, should have the following two properties:

(1) It should at minimum allow the right-holder to perform actions on objects (which I take here as synonymous to "using the objects"): otherwise, appropriation would be impossible.

(2) It should be equally shared between all agents who are able to appropriate and exist in respect to all unowned objects in the world that can in principle be appropriated.[14]

[14] I will hereinafter refer to this right as the right of common ownership. For the purposes of this essay the scope of this right is limited to non-exclusive use of unappropriated objects because this is what Locke is forced to

Locke recognized this right by claiming that originally the Earth and all its resources belonged to "mankind in common" (II, 25, 26). But this notion creates for him the following difficulty: the right of private ownership, that emerges after appropriation, is (among other things) the right of exclusive use belonging to one particular individual that is incompatible with the right of non-exclusive use of all. It means that when appropriators claim objects as their own by mixing labor with them, they displace the previously existing right which all others had towards these objects.[15]

Such a displacement harms others and, what makes it even worse, does this without their consent. This fact means that appropriation incurs certain normative cost which Lockean theory needs to justify. In other words, it needs to do more than just show that appropriation has normative significance. It needs to show that this significance is high enough to, in Locke's words, "over-balance the community of land" (II, 40). In that sense Lockean theory sets forth a certain standard which its normative foundations have to satisfy.

Now, one might try to argue that this cost can be easily paid. The right of common ownership is a right of non-exclusive use. This right is unsuitable for using resources for any kind of long-term projects as it does not stop others from interfering with the project and repurposing the resource in question for their own goals. Without the possibility to appropriate, the right of common ownership is, therefore, of little use; it gains most of its value exactly from the fact that it allows appropriation. But it means that if you protest against appropriation by appealing to the fact that it displaces the right of common ownership, you cannot argue that in so doing appropriation causes any serious harm.

This argument relies on the assumption that unilateral appropriation is the only possible way to transform the right of non-exclusive use into the right of exclusive use. This assumption is, however, mistaken. Instead of relying on unilateral appropriation, we might simply say that the problem of efficient use of resources is not supposed to be solved in the state of nature at all. The right of common ownership is retained up until the moment when civil society is

assume to make appropriation possible. For a more detailed exploration of the concept of original common ownership and its possible forms see (Cohen 1995, 92-115; Kramer 2004, 99-109; Simmons 1992, 236-241).

[15] Some libertarian authors claim that there is a conceptual problem with original common ownership because before appropriation resources are by definition unowned (Feser 2005, 58-59; Narverson 1998, 10-11). But "unowned" here means that no one has the right of exclusive use to this resource. It still leaves room for the right of non-exclusive use.

established. At that moment everyone transfers their share in this right to the government. In this way, the right of common ownership gets transformed into the right of public ownership.[16]

This right of public ownership is a moral right, not a legal right: I will hereinafter call this right *deep public ownership* to avoid confusion.[17] The public might decide to retain this right for itself, thus further converting it into a legal right of public ownership, or it can give it back to individuals in the form of more or less limited private property rights, or it can employ any combination of these approaches. What is important in this scenario is that private property rights are justified by the decision of the government that, in turn, is authorized by deep public ownership. In this way the complaint that private ownership displaced common ownership without the consent of other co-owners is unavailable: the consent was presumably given at the stage of creation of civil society when the right of deep public ownership was formed.

Deep public ownership has an important advantage over unilateral appropriation through labor: it gives proper respect to the original right of common ownership. It is not easy for labor theory to counter-balance this factor. Observe, for example, that we can always introduce an additional rule to deep public ownership approach saying that the government is obliged to distribute resources in such a way that this distribution would match the one achieved under Lockean rules. In this way, it seems, deep public ownership can emulate any possible benefits which Lockean theory has to offer while preserving its advantage of leaving the right of common ownership unviolated. It appears, therefore, that deep public ownership would always lead to at least as good consequences as Lockean private ownership while having a better pedigree. In that light, it is unclear why one can possibly ever prefer Lockean approach to deep public ownership model.

I used Lockean theory as an example here. But it is easy to see how any ET can be vulnerable to this logic. As long, as appropriation requires doing something with an object, we need to assume something similar to the right of common ownership for there to be a right to appropriate. And as soon, as we assume this, we allow for the possibility of ceding this right to government, thus enabling deep public ownership approach. Deep public ownership would always have better pedigree than private ownership, emerging from unilateral appropriation,

[16] I believe this is the model which Ripstein follows (2009, 148-159), though he would probably resist such a characterization.
[17] The term is borrowed from Nili (2019) who identified and described the right in question.

due to its inherent respect for the initial right of common ownership. On the other hand, it can emulate any benefits that unilateral appropriation could bring.

Let me now explore how ETO responds to this challenge. In contrast to other ETs, ETO does not need to assume any rights to objects predating appropriation. This is because appropriation happens through an internal act – making a use-judgement – not through doing anything with the object itself. It means that it is not incoherent for ETO to deny that the right of common ownership exists. And that, in turn, means that ETO is not forced to grant deep public ownership its normative advantage in better respect for this right.

The above, of course, only shows that ETO can reject the right of common ownership without contradicting itself. It does not yet mean that such a rejection is motivated. Let us see what kind of arguments ETO has to offer in that respect.

The right of common ownership pertains either to brute objects or to resources. Suppose we say that it applies to brute objects. But the right of common ownership is the right to use and brute objects are by definition unusable – usable brute object is already a resource. And there can be no right to use something that is not usable. Therefore, this right cannot apply to brute objects.

One might say that I am too quick in this conclusion. Surely, the lack of ability to do certain things does not mean that there is no right to do them. If I do not know the rules of chess, it does not follow that I do not have a right to play this game. If I have no legs, it still seems weird to say that I have no right to run a marathon. And it is impossible to teleport to Mars, but would we say that humans have no right to teleport to Mars?

I believe, however, that there is an important difference between these cases and the right to use brute objects. The right to use brute objects is a logical, not physical, impossibility. It is similar to the right to draw a square circle. There is no such right for a simple reason that the expression “to draw a square circle” does not describe any action and there is no way to tell what specifically this right allows us to do. And, by contrast, the meaning of the right to teleport to Mars is quite clear: it means that if the way to do it would be at some point discovered, we would be morally allowed to perform this action.

Let us now suppose that the right of common ownership pertains to resources. But under ET the very same act that converts a brute object into a resource – a use-judgement – also assigns

an owner to this resource. Every resource, therefore, has a private owner from the very first moment of its existence. This leaves very little space for common ownership: it can only emerge at the expense of previously existing private ownership rights, just like under traditional ETs private ownership can only emerge at the expense of the right of common ownership. To affirm the right of common ownership one would need to resolve the very same problem that traditional ETs typically face: she would need to explain how this right has enough normative weight to displace the default right of private ownership.

Of course, the success of this project depends on the strength of normative foundations of ETO. As I excused myself from discussing this matter, I cannot press this argument much further. The only thing I want to point out here is that it is very difficult to argue that resources stand in equal normative relation in respect to all persons. This is because for each resource there is an individual who made a use-judgement about it and in virtue of this very fact stands in unique relationship to it, distinct from the one in which all the others stand. To insist that everyone still has equal rights in respect to this resource is to insist that use-judgements have no normative impact at all. And that is a weird thing to say, given that without use-judgements there would be no resources.

ETO, therefore, at minimum succeeds in shifting the burden of proof to its opponents. Traditional ETs had to show that appropriation have enough normative force to displace the claims of non-appropriators. ETO does not have to do that and instead offers its opponents to show that the right of common ownership – or, indeed, whatever other right they want to argue for – is strong enough to displace the claims of appropriators.

In fact, ETO's rejection of original common ownership can have even more troubling implications for its opponents. It could be argued that deep public ownership is implicitly assumed in all traditional theories of distributive justice: before we even start contemplating the principles of just distribution, we need to accept that distribution is a public matter at all.[18] This is a well-known claim (see e. g. Gerson 2011; Ripstein 2009, 89-90; Sanders 2002, 49-51; Schmidtz 2010) but it was harmless as long, as the case for deep public ownership followed from ETs' own foundations. But for ETO it is no longer the case which opens up a possibility

[18] As Alan Ryan put it "…the moral position implicit in both Mill's and Marx's views – that the right or the power to determine work and production should be determined by the social function of such rights and powers – has become a commonplace except among libertarians. The result is… a consensus that 'it's his' invites the further question, 'What good does its being his do for everyone else?'" (Ryan 1984, 177). This view is what constitutes deep public ownership – and this is exactly the view which ETO calls into question.

to criticize deep public ownership directly. And if the principle of deep public ownership is not able to withstand scrutiny, then all theories of distributive justice that depend on it will collapse.

On that note I will wrap up this section. In the next one I will explore how ETO can respond to certain other objections to which traditional ETs are vulnerable.

V

In this section I want to show how ETO provides responses to three important objections to ETs. I have already introduced the Duty Imposition Objection in the first section. The two other objections are what I call the Narrow Right Objection and the Irrelevance Objection. The Narrow Rights objection is the claim that ETs at best can only justify the right of exclusive use in respect to particular objects but not the right to transfer it away. The Irrelevance Objection is the claim that ETs cannot justify property rights that do not have a perfect pedigree, in other words, pretty much all currently existing property rights.

Let me start with the Duty Imposition Objection. To remind, it consists in pointing out that under ETs one individual (the appropriator) forces on the others the duty to respect her property rights by a unilateral act of appropriation. It is argued that such a possibility puts an unacceptable burden on non-appropriators and would violate the principle of moral equality between persons as it would allow one individual to define the moral status of others without their consent.[19]

I want to start my response with calling into question the assumption that private duty imposition is always normatively defective. Observe that each time a woman gives a birth to a child, everyone else acquires a duty not to murder this child – a duty they did not have before. In that sense we might say that the woman imposed a duty on others. I do not think, however, that anyone would see here any wrongdoing on her behalf. And there is a very simple explanation for that: it was impossible to murder a child before she was born. The same action that made the murder possible imposed a prohibition on it. These two effects cancelled each other out and, as a result, the normative position of others remained unchanged.[20]

[19] This objection is advanced in (Attas 2003; Gibbard 1976; Harris 2002, 202-203; Waldron 1989, 253-283; Wenar 1998).

[20] Van der Vossen (2015, 69) offers a similar scenario where a person growth facial hair thus imposing a prohibition to touch it. It would be absurd to complain about such a prohibition for the same reason it is absurd in my childbirth example. Van der Vossen himself explains the absurdity differently, by invoking the alleged distinction between duty creation on one hand and duty alteration or duty activation on the other. I believe this line of reasoning to be a dead end: see (Spafford 2020) for a good response.

What this example shows us is that duty imposition is hardly an offense to our moral sentiments by itself. What actually matters is whether it diminishes the freedom of the affected individuals. Or, to put it into more specific terms, whether it makes any act which was available to them before the imposition, no longer available, at least, normatively. There are cases of duty imposition when freedom of others is not diminished, like childbirth or growing hair. I would argue that under ETO appropriation falls under the same category.

Recall once again that brute objects are unusable by definition. It is impossible to use them in the same sense in which it is impossible to kill an unborn child. And just like childbirth, use-judgement simultaneously makes using them possible – and prohibits using them for anyone but the person who made the use-judgement. No one's freedom is, therefore, diminished which means that private duty imposition, in that particular case, is unobjectionable.

One might find this conclusion surprising. At the very least, a skeptic might say, appropriation deprives others from the opportunity to appropriate the same object. Something seems to be amiss here, let us explore then, what specifically.

Under ETO appropriation is made through use-judgements. This is the only thing one can possibly do with brute objects, so to diminish freedom appropriation need to somehow interfere with this ability. Now, owners have a right to exclude others from using their property but making a use-judgement about an object does not imply using it. Use-judgement is a mental act that does not require any physical interaction with the object about which the use-judgement is made. From that follows that property rights of other people do not interfere with one's ability to make use-judgements. They can be made about owned objects just as well, as about unowned.

The important difference, of course, is that use-judgements about owned objects would be, by themselves, normatively inconsequential. One might think that this is the opportunity of which non-appropriators are robbed: the opportunity to make normatively consequential use-judgements. But this is not exactly so.

Recall, as discussed at the end of section II, that ownership is justified by a deeper right which is the right to control the value one discovered. As I argued earlier, any use-judgement about a brute object, even a very bad one, would generate value: a very poor use is still better than no use. This is the only reason why a freshly made use-judgement about a brute object would establish ownership automatically. But the situation with the resources that are already in use

is more complicated. A use-judgement has already been made about them; they already generate some value. New use-judgement only adds value if it is better than the old use-judgement and only in the amount by which it is better.

These complications are resolved by the institutions of money and market exchange. If your use-judgement is better than the one under which a particular resource is currently used, you would be able to receive it from its current owner in exchange for the monetary equivalent of its current value. If such an exchange happens, you would receive a full control over the resource, but your actual surplus would be equal to the net value you produced because of the money you gave away to the previous owner. In that way your right to control the value you have discovered could be realized even in respect to already owned resources.

For the exchange to happen, of course, you need the consent of previous owner which seems like a substantive difference from the situation of initial appropriation. But in fact, this difference is illusory: if you did not obtain the consent of a previous owner under fair market conditions, it would serve as an indicator that your use-judgement is inferior to the one under which the object is already used which means that you never had a right to this object in the first place. The consent of the previous owner is required not because her will is normatively important by itself but because it serves as an evidence of the very presence of a right.

In this way markets play a double role. Firstly, they serve as some sort of social calculators of value. By means of price mechanism they measure the value of use-judgements we make through accumulating the information dispersed throughout the society.[21] Secondly, they automatically redistribute property rights in accordance with the amount of value produced. Of course, not all actually existing markets can fulfill this function. Markets need to fair and competitive, meaning that they should be able to properly acknowledge the value of all use-judgements, irrespective of the nature of said judgements or social positions of those who made them. They also should provide sellers with the incentive to sell with the smallest possible margin of profit. The question of what conditions make markets fair and competitive is outside the scope of this work.[22]

We can now see how the Duty Imposition Objection can be finally put to rest. Appropriation does not diminish any normative opportunities others have. They can still take control over the

[21] See on this the excellent essay by Hayek (1945) or, for a more detailed exposition, Kirzner (1973).
[22] Notice how these considerations moderate the political implications of ETO as they create potential space for extensive government regulation of property rights, while keeping the commitment to their natural character.

value they discovered by making use-judgements. The only difference is that the amount of value produced by use-judgements made in respect to already owned objects needs to be calculated which happens through the work of markets. But the normative substance of the process remains unchanged.

These considerations also show us the way to respond to the Narrow Right Objection and the Irrelevance Objection. The Narrow Right Objection claims that ETs cannot justify such a component of ownership as the right to transfer it to others. At best they only show that a person can create some sort of exclusive connection between herself and a particular object of external world which gives her certain kinds of exclusive rights to that object. It cannot be further inferred, however, that this kind of connection can be transferred to someone else by the decision of original owner. One has to provide a separate argument for this capacity which ETs typically fail to do (this is articulated in e. g. Christman 1994, 52-53; Cohen 1995, 21-26; Stiltz 2018). But this complaint is hardly applicable to ETO: as I have just demonstrated initial appropriation and transfer are two manifestations of value discovery which is the event that provides the right of ownership with normative grounding.[23]

Let me now turn to the Irrelevance Objection. It claims that almost no actual property rights have a perfect pedigree in a sense that they could be traced through a history of just transfers to a moment of just appropriation which means that they cannot be justified by ETs (see e. g. Mautner 1982, 267-268; Waldron 1988, 259). The assumption here is that the chain of transfers in question is morally sterile in a sense that it does not by itself produce any normative justification: we cannot transfer more rights than we have and if no rights were acquired at the point of appropriation, there would be no rights at the end point (Waldron 1988, 260). But it is not so under ETO. Transfers are manifestations of the same act of value discovery that justifies appropriation. In that sense we can see how transfers are not morally sterile and property rights which were originally defective can be in a way purified through a chain of fair transfers. Which means that to justify current property rights we do not need to go all the way back to the moment of appropriation. We only need to be able to trace the chain of fair transfers back to a certain point.

[23] Some authors take issue with so called "right to income" which is understood as the right to receive income from one's property (Christman 1994; Fried 1995; Taylor 2005). They claim that it cannot be directly inferred from the right of exclusive use, even if we concede that ETs justify this latter right. The whole notion of the "right to income" is, I believe, based on confusion: as Taylor concedes, this is the same right to transfer from the perspective of the receiver (Taylor 2005, 469-471). But it means that once we justify the right to transfer, no separate justification of the right to income is necessary.

Allow me now to conclude this section and turn to a brief summary of my findings.

VI

In this essay I outlined the Entrepreneurial Theory of Ownership. The central insight of this approach is that the value of objects is not something automatically known. It needs to be identified by a specific mental act which I called a use-judgement. This act converts unusable brute objects into usable resources. The individual, who performed this act, becomes the owner of the respective object.

ETO is superior to other ETs because it rests on a firmer normative foundation. It does not allow the right of common ownership to exist prior to appropriation, thus safeguarding itself against the charge that it unjustly displaces said right. Instead, it establishes the right of private ownership as a default right and puts on its opponents the burden of justifying its displacement.

ETO offers answers to some of the traditional objections against ETs. Notably, it defeats the Duty Imposition Objection by showing that appropriation does not limit any normative opportunities that are available to third parties. It also gives a unified justification to property rights originating from appropriation and transfers thus defeating the Narrow Right Objection and the Irrelevance Objection.

Not all possible objections to ETO are covered in this essay and some important aspect of the theory – most notably, its normative foundation – are so far untouched. I do not expect my essay to convince a committed skeptic. My task here was rather to show that objections, which are thought to be conclusive against other ETs, do not necessarily work against ETO and that ETO, if otherwise successful, can pose a serious threat to traditional approaches to distributive justice. In that I, hopefully, succeeded.

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