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Rejoinder to Dominiak on Crime, Punishment, and Libertarianism

Abstract: My learned colleague and I tangle with each other on the libertarian analysis of crime, punishment, property rights, and unjust enrichment. I maintain an objective four-part theory of punishment: two teeth for a tooth (first one tooth and then a second tooth), third, costs of capture, and then, finally, fourth, payment for scaring the victim. But no more. Once the miscreant has undergone his full, very draconian punishment, no more should be taken from him. If he wins a lottery for \$1 million after paying for the ticket with a stolen \$5, he may keep this money, provided he has fully paid his punishment debt. Dominiak maintains, in contrast, that the law-breaker may not benefit from his crime, and this would appear to be a paradigm case of just that.

Keywords: proceeds of crime, libertarianism, restitution, punishment, property rights

Introduction

Consider the following claim: “The criminal should not benefit from his crime”. This sounds utterly reasonable upon first examination, but a little probing beneath the surface will expose its fallaciousness. It is in direct conflict with “ought implies can”, and the latter expression must prevail. It makes the point that something is not morally required if it is impossible to attain. For example, it is invalid to claim that the sale of square circles is ethical, since it is impossible to draw a square circle in the first place, and thus, it is a downright logical contradiction to insist upon the virtue of so doing, let alone selling it.

What does this have to do with criminality? The miscreant necessarily benefits from his crime, at least *ex ante*. All human action, without exception, is beneficial in the *ex ante* sense.¹ Whenever any activity is undertaken, the human actor is attempting to substitute a lesser desired state of affairs that would unfold in the future in the absence of this behavior for a greater desired one. I purchase a shirt for \$20. Why do I do so? I engage in this act since I expect I will prefer a future in which I have the shirt, and not the money. Similarly, the person who sells me the shirt anticipates a preference for the cash, not the article of clothing.

Jones now engages in a crime. Why does he do so? For the same exact reason as anyone else does anything at all: He imagines that the future will be more to his liking if he engages in this illegal activity than if he does not do so. He has alternative options. He could have read a book instead, or gone for a swim. But he is of the opinion that these alternative opportunities will garner him less welfare, all things considered, than committing the crime.

Can the statement with which we began be saved by adding to it thusly: “The criminal should not benefit from his crime, when punishment is added to the mix?” Again, no. And this for several reasons. The wrongdoer full well realizes that he may be caught, and, if so, tried by a jury of his peers, and, then, possibly, punished for it. Given all of these considerations, the benefits as well as the possible costs, he pursues this course of action. From that state

¹ Ludwig von Mises, *Human Action. Scholars' Edition* (Auburn: Mises Institute 1998 [1949], <http://www.mises.org/humanaction.asp>; <http://mises.org/books/humanaction.pdf>).

of affairs we are still logically required to deduce that, all things considered, he gains, at least *ex ante*,² from the commission of his crime.

Can we, even, save this claim by further editing: "The criminal should not benefit from his crime when punishment is added to the mix, and we posit that he will necessarily be caught and severely punished?" We must again answer in the negative. For one thing, he may enjoy the prospect of harming his victim to a greater degree than even were the death penalty to be imposed upon him. For another, he may welcome an execution. He may be a masochist and relish this *per se*. Or, possibly, he wants to commit suicide, is unable to do so on his own, cannot find a doctor who will do this for him, and "commits suicide by cop". That is, purposefully aims to be killed during the commission of his misconduct.

There is horizontal justice in punishment for crime and then there is vertical. In the latter case, if rights violation A is doubly serious than rights violation B, then the perpetrator ought to be punished twice as severely.³ Apart from not having any metrics to measure the severity of misbehavior, I have no problem with this notion. I do with the former. Here, if two people commit the same exact crime, they ought to be not only treated in the same exact manner, but, also, since "the criminal should not benefit from his crime", their economic welfare ought to be identical. A and B both steal \$5. A puts his new found wealth under his mattress. B purchases a winning lottery ticket with that amount of money, and now has \$1 million. Obviously, B gained from his transgression in a manner in which A did not. Horizontal equity is not maintained in this case. I take the position that it is a chimera to try to equalize such horizontal results. B should be punished in an equal manner to A, but should be allowed to keep his fortune. Dominiak takes the opposite viewpoint.

Both my critic and I are libertarians. Briefly, this means we both subscribe to the notion that this doctrine is a philosophy of law. Its one task, its only task, is to discern just law. In answer to that challenge, classical liberals such

² Ex post of course is an entirely different matter, in the case of all human action.

³ I realize it may be difficult, even next to impossible, to quantify such measures. But at least this way of looking at the matter gives us some little guidance in what otherwise would be an intellectual morass.

as the two of us adhere to the non-aggression principle (NAP):⁴ all actions should be legal, except to threaten or engage in coercive acts against innocent people. Secondly, we need a theory of property rights, since if two people are fighting or disputing over a specific item, we need to know who is the rightful owner and who is not. For libertarians, private property rights stem from homesteading virgin territory⁵ and any subsequent licit interaction, such as

⁴ For a critique of the NAP, see Michael Huemer, “2019. NAPs Are for Babies”, *Fake Notis*, 21 Sep 2019; <https://fakenous.substack.com/p/naps-for-babies>; for a defense, Walter E. Block, “Defending Absolutist Libertarianism”, *The Emergence of a Tradition: Essays in Honor of Jesús Huerta de Soto, Volume II* (Cham: Palgrave Macmillan, 2025), 45–52.

⁵ Per Bylund, “Man and Matter: A Philosophical Inquiry into the Justification of Ownership in Land from the Basis of Self-Ownership”, Master’s thesis (2005), Lund University, http://perbylund.com/academics_polsci_msc.pdf; Per Bylund, “Man and matter: how the former gains ownership of the latter”, *Libertarian Papers* 4(1) (2012); David Gordon, “Locke vs. Cohen vs. Rothbard on Homesteading”, *Mises Wire*, 8 Nov 2019, <https://mises.org/wire/locke-vs-cohen-vs-rothbard-homesteading>; David Gordon, “Violence, Homesteading, and the Origins of Private Property”, *Mises Wire*, 13 Dec 2019, <https://mises.org/wire/violence-homesteading-and-origins-private-property>; Hugo Grotius, *De Jure Belli ac Pacis* (The Law of War and Peace) (1625); Hans-Hermann Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Boston: Kluwer, 1993); Hans-Hermann Hoppe, “Of Private, Common, and Public Property and the Rationale for Total Privatization”, *Libertarian Papers* 3(1) (2011): 1–13; Stephan N. Kinsella, “A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability”, *Journal of Libertarian Studies* 17(2) (2003): 11–37; Stephan N. Kinsella, “Thoughts on Intellectual Property, Scarcity, Labor-ownership, Metaphors, and Lockean Homesteading”, 26 May 2006, <https://mises.org/wire/thoughts-intellectual-property-scarcity-labor-ownership-metaphors-and-lockeanhomesteading>; Stephan N. Kinsella, “How We Come to Own Ourselves”, 7 Sept 2006, <https://mises.org/story/2291>; Stephan N. Kinsella, “Thoughts on the Latecomer and Homesteading Ideas; or, Why the Very Idea of ‘Ownership’ Implies that Only Libertarian Principles are Justifiable”, 15 Aug 2007, <https://mises.org/wire/thoughts-latecomer-and-homesteading-ideas-or-why-very-idea-ownership-implies-only-libertarian>; Stephan N. Kinsella, “What Libertarianism Is”, 21 Aug 2009, <https://mises.org/library/what-libertarianism>; Stephan N. Kinsella, “What Libertarianism Is”, in: *Property, Freedom, and Society: Essays in Honor of Hans-Hermann Hoppe*, ed. Jörg Guido Hülsmann, Stephan Kinsella (Auburn, AL: Mises Institute, 2009); Stephan N. Kinsella, “Homesteading, Abandonment, and Unowned Land in the Civil Law”, 22 May 2009, <http://blog.mises.org/10004/homesteading-abandonment-and-unowned-land-in-the-civil-law/>; John Locke, “An Essay Concerning the True Origin, Extent and End of Civil Government”, in: *Social Contract*, ed. E. Barker, (New York: Oxford University Press, 1948), 17–19; Ryan McMaken, “How the Feds Botched the Frontier Homestead Acts”, *Mises Wire*, 19 Oct 2016, <https://mises.org/wire/how-feds-botched-frontier-homestead-acts>; Ellen Frankel Paul, *Property Rights and Eminent Domain* (Livingston, NJ: Transaction Publishers, 1987); Samuel Pufendorf, *De officio hominis et civis prout ipsi praescribuntur lege naturali* (1673) (reprint edn., Buffalo, NJ: Hein;

purchase, sale, investment, gambling, or gift giving.⁶ Is there a punishment theory that can be deduced from these two principles? Yes.

In my view, following Rothbard,⁷ this implies a four part punishment theory. It is “two teeth for a tooth” plus costs of capture and then compensation for the fright engendered in the victim by the perpetrator. The first “tooth” is to compel the offender to return to his victim exactly what he stole.⁸ The second is to penalize him to the extent that he violated the rights of his target. So, if the perpetrator stole a car from his quarry, compel him to return to him two automobiles. Three, bill the felon for the costs of capturing him. Four, mandate that the culprit play Russian Roulette against himself, with the number of bullets and chambers, and the part of his body he must aim at, proportional to his crime. Whatever flaws there are in this system, it cannot be denied that these are objective criteria. All culprits are to be treated in the same manner, one which can be spelled out beforehand.⁹

reprint of New York: Oxford Univ. Pr., 1927); Murray N. Rothbard, “Confiscation and the Homestead Principle”, *The Libertarian Forum* 1(6) (1969), <https://www.panarchy.org/rothbard/confiscation.html>; Murray N. Rothbard, *For a New Liberty* (New York: Macmillan, 1973); Michael S. Rozeff, “Original Appropriation and Its Critics”, 1 Sept 2005, <http://www.lewrockwell.com/rozeff/rozeff18.html>; Carl Watner, “The Proprietary Theory of Justice in the Libertarian Tradition”, *Journal of Libertarian Studies* 6(3–4) (1982): 289–316.

⁶ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

⁷ Murray N. Rothbard, *The Ethics of Liberty* (New York–London: New York University Press, 2002).

⁸ If it is no longer available, then the monetary equivalent

⁹ On libertarian punishment theory, see: Walter E. Block, “Market Inalienability Once Again: Reply to Radin”, *Thomas Jefferson Law Review* 22(1) (1999): 37–88; Walter E. Block, “Berman on Blackmail: Taking Motives Fervently”, *Florida State University Business Review* 3(1) (2002–2003): 57–114; Walter E. Block, “Libertarianism vs. Objectivism: A Response to Peter Schwartz”, *Reason Papers* 26 (2003): 39–62; Walter E. Block, “The Non-Aggression Axiom of Libertarianism”, 17 Feb 2003, <http://archive.lewrockwell.com/block/block26.html>; Walter E. Block, “Austrian Law and Economics: The Contributions of Adolf Reinach and Murray Rothbard”, *Quarterly Journal of Austrian Economics* 7(4) (2004): 69–85; Walter E. Block, “Reply to Frank van Dun’s ‘Natural Law and the Jurisprudence of Freedom’”, *Journal of Libertarian Studies* 18(2) (2004): 65–72; Walter E. Block, “Radical Libertarianism: Applying Libertarian Principles to Dealing with the Unjust Government, Part II”, *Reason Papers* 28 (2006): 85–109; Walter E. Block, “Libertarian Punishment Theory: Working for, and Donating to, the State”, *Libertarian Papers* 1 (2009); Walter E. Block, “Does Rothbard contradict himself on punishment theory?”, 7 May 2016, <https://www.lewrockwell.com/lrc-blog/rothbard-contradict-punishment-theory-no/>; Walter E. Block, “Russian Roulette: Rejoinder to Robins”, *Acta Economica*

We should not be worried about that \$1 million. Presumably, if the offender bargains with his victim over the Russian Roulette game that the former owes the latter, the crook will end up paying his prey a goodly proportion of that amount of money. However, from the libertarian perspective, we should not add on any adventitious penalties. If we do, we violate having a principled four part punishment theory in the first place. Indeed, it is incompatible with any objective theory of retribution.

If we do this, we can have our cake and eat it too. We need not relinquish libertarian principle in order to satisfy our sense of justice that the criminal should not gain from his crime. This works out well in the case where he gains \$1 million from his lottery ticket.

Suppose, instead of winning a lottery with that stolen \$5, the wrongdoer used it for a dating service and thereby met the love of his life. Should we take that away from him? Should we forbid him to see his lady-love? He gained from his illicit behavior, in a way that the lottery winner simply did not. Nor did the malefactor who stuck that \$5 under his mattress. If we take

et Turistica 1(2) (2016): 197–205; Walter E. Block, “Libertarian punishment theory and unjust enrichment”, *Journal of Business Ethics* 154(1) (2019): 103–108; Walter E. Block, “The Case for Punishing Those Responsible for Minimum Wage Laws, Rent Control and Protectionist Tariffs”, *Revista Jurídica Cesumar – Mestrado* 18(1) (2018): 235–263; Walter E. Block, “Rejoinder to Ayres on defense, punishment and gentleness”, *Revista de Investigações Constitucionais* 9(3) (2022): 495–513; Walter E. Block, “Some Prospects of Libertarian Punishment Theory: Rejoinder to Blasco and Marcos”, *Studia Humana* 11(2) (2022): 20–24; Walter E. Block, “How does libertarian punishment theory deal with the doctrine of unjust enrichment?”, *Bosconi Legal Papers*, 24 Oct 2023, <https://blp.egeaonline.it/it/102/papers/75/how-does-libertarian-punishment-theory-deal>; Walter E. Block, Alan G. Futerman, “Israel’s critics don’t know what they are talking about”, *Israel Hayom*, 14 Nov 2023, <https://www.israelhayom.com/opinions/is-it-reasonable-to-demand-proportionality-of-isarel/>; Walter E. Block, Alan G. Futerman, “Are you sure you want ‘proportionality?’”, *American Thinker*, 18 January 2024, https://www.americanthinker.com/articles/2024/01/are_you_sure_you_want_proportionality.html; David Gordon, “Rothbard and Double Restitution”, *Mises Wire*, 4 September 2020, <https://mises.org/wire/rothbard-and-double-restitution>; Anthony Gregory, Walter E. Block, “On Immigration: Reply to Hoppe”, *Journal of Libertarian Studies* 21(3): 25–42; Mancur Olson, “On Getting Really Full Employment without Inflation”, in: *Solutions to Inflation*, ed. David C. Colander (New York: Harcourt Brace Jovanovich, 1979); Murray N. Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998 [1982]); Roy Whitehead, Walter E. Block, “Taking the Assets of the Criminal to Compensate Victims of Violence: A Legal and Philosophical Approach”, *Wayne State University Journal of Law in Society* 5(1) (2003): 229–254,

that \$1 million away from him, and we want to engage in a bit of logical consistency, we should forbid this new love interest liaison of his. If we do, we are treading dangerously far away from any resemblance to libertarian punishment theory, or indeed, any notion of justice from any quarter. The theory works out not at all when he gains true love. Unless, that is, we are willing as a libertarian court to ban him from seeing his lady-love, and it is difficult to see any justice in that.

If we are going to have any principles of punishment, libertarian or otherwise, we cannot also have horizontal equity. That is because people are so different, and will react in different ways to the same stimuli. Consider left-wing punishment theory: therapy sessions of one year for all criminals, no matter how severe their crime.¹⁰ Some criminals will love this, some will hate it, others will be indifferent. Horizontal equity will be impossible to reach.

An equal result for the same crime is a will-o'-the-wisp. This sort of "horizontal equity" is dead from the neck up. Two people steal a car. They are consigned to a five-year jail sentence. One of them hates his incarceration. The other, a masochist, revels in it. He enjoys the brutality he must endure. What is the justice system to do to equate these two results? Maybe, instead of jail for the masochist, we should first free him from prison and then give him ice cream, which he hates? On a more serious note, utility, or happiness units, let alone interpersonal comparisons of utility called for by "equity", are impossible to measure. It is thus impossible to ensure that criminals of equally serious crimes are treated equally apart from objective considerations, such as years incarcerated, or the four-stage theory. Since this is what horizontal equity requires, so much the worse for that doctrine. Nor is it possible to ensure that the evildoer does not benefit from his perpetrations, given masochism. The point, here, is that while ordinal utility is a valid concept, cardinal utility is not. In the former case, I like my bicycle more than my ice cream and I like my ice cream more than my paper clip. This is eminently reasonable. If forced to give up on of these three items, that latter would be the first to go, and then the desert. I would keep the bike and give up the other two. Howev-

¹⁰ I exaggerate but only slightly.

er, what are we to make of the following: the two-wheeler gives me 20 utils,¹¹ the sweet, 10 and the stationary aid 5 utils. Therefore, I like the bike twice as much as the ice cream, the ice cream twice as much as the paper clip and the first of these four times as much as the third mentioned. That is not even nonsense; rather, it is “nonsense on stilts”. But that is precisely the will-o’-the-wisp of trying to equalize punishment in any way other than objective measures.

With these introductory remarks, we are now ready to consider Dominiak (2023), which is a critique of my own essay.¹² In section II, I quote widely from the former author and intersperse what he writes with my critical commentary. The conclusion is section III.

The case for relieving the criminal of gains made in connection with crime*

In the view of Dominiak:

It is commonly believed that gains made in connection with crime should be forfeited from their beneficiaries. But would such disgorgement be consistent with the libertarian ethics? Recently, one of the most prominent libertarian scholars, professor Walter Block, took up the question of whether indirect proceeds of crime should be held by their beneficiaries under libertarianism. In favour of the thesis that disgorgement of assets acquired indirectly from crime is incompatible with the libertarian ethics, Block argued, inter alia, that, since the libertarian principle of horizontal proportionality.¹³

* I am grateful to Dominiak for characterizing me as “one of the most prominent libertarian scholars...” I hereby return the compliment: I regard him as one of the most gifted of all young theoreticians of this philosophy.

¹¹ Units of happiness.

¹² Walter E. Block, “Libertarian punishment theory and unjust enrichment”, *Journal of Business Ethics* 154(3) (2019): 103–108.

¹³ Łukasz Dominiak, “Proceeds of Crime, Punishment, and Libertarianism”, *Archiwum Filozofii Prawa i Filozofii Społecznej* 2(35) (2023): 20.

Dominiak notes that according to Herbert Broom,¹⁴ “a fundamental legal maxim has it that ‘no man should take advantage of his own wrong’”. My debating partner cites McClean¹⁵ to the effect that “every legal system would accept as axiomatic that an offender should not enjoy the profits of his criminal activities”.¹⁶

Dominiak then states the following: “The question might immediately arise: What is the libertarian ethics or libertarianism for that matter? Taking into consideration the fact that there are two main versions of libertarianism, that is, left- and right-wing-libertarianism, and that within each of these versions there are many individual thinkers who differ from one another, let alone across the two versions, it might not be entirely clear what libertarianism as such or the libertarian ethics is”.¹⁷

Here, I diverge from this world class libertarian theorist. In my view, there is only one correct libertarian perspective, neither left wing nor right wing; the only correct view is plain old libertarianism, neither left nor right. Bleeding Heart Libertarians¹⁸ are the main candidate for “left wing libertarians”. But they hold the view that “social justice” is for some obscure reason part and parcel of the essence of this philosophy. To be sure, the goals and practices of this left-wing philosophy should be entirely legal, when undertaken in a voluntary manner, but have anything at all to do with libertarianism properly understood, as adumbrated above. A right wing libertarian would be Hoppe¹⁹ who maintains that homosexuals, democrats, and perverts should be excluded from society, even though they have not been convicted of any crimes, and their acts should be entirely legal, again while undertaken voluntarily, by consenting adults.²⁰

¹⁴ Herbert Broom, *A Selection of Legal Maxims, Classified and Illustrated* (Philadelphia: T. & J. W. Johnson' American edn., 7th American from 5th London ed.), 279.

¹⁵ David McClean, “Seizing the Proceeds of Crime: The State of the Art”, *International & Comparative Law Quarterly* 38(2) (1989): 334.

¹⁶ Dominiak, “Proceeds of Crime, Punishment, and Libertarianism”: 20.

¹⁷ Ibidem.

¹⁸ Bleeding Heart Libertarians: <https://bleedingheartlibertarians.com/>.

¹⁹ Hans-Hermann Hoppe, *Democracy, the God That Failed: The Economics and Politics of Monarchy, Democracy and Natural Order* (New Brunswick, NJ: Transaction Publishers, 2001).

²⁰ For a critique, see Walter E. Block, “The State Was a Mistake”, book review of Hans-Hermann Hoppe, *Democracy: The God That Failed: The Economics and Politics of Monarchy, De-*

Happily, Dominiak follows neither of these two questionable paths. Instead, he bases his “present paper [on] the concept of the libertarian ethics [which] is simply understood to mean the ethics put forward by the main opponent herein, that is, Walter Block. This ethics stems from the libertarianism of Murray Rothbard (2002) as expressed mainly in his *The Ethics of Liberty* and further developed by Block himself in his numerous writings”.

I am delighted that this learned friend of mind states that I “deployed a series of ingenious thought experiments that were supposed to both pump the intuition that indirect proceeds of crime should be kept by the criminals and demonstrate how confiscating such gains would clash with various tenets of libertarianism”. However,“(t)he present paper argues – contra Block – that forfeiture of assets acquired indirectly from crime is compatible with the libertarian ethics”.²¹

Our author argues that Rothbardian (2002) punishment theory “and John Locke’s (1948) labour theory of property²² would provide, together with the fact that an offence has been committed in the first place, a sufficient basis for justifying disgorgement of indirect proceeds of crime”.²³

However, how are the authorities going to stop miscreants from enjoying psychic income which is surely an “indirect proceed of crime”? The criminal says to himself, “hey, I stole from Jones. I’m a great guy”. He brags about this episode to his friends. They buy him a beer. If it is impossible to impose a punishment, this greatly, even fatally, undermines the case for imposing it. A possible rejoinder is, well, let us execute him. Execute all criminals, even those who steal but one stick of bubble gum. That would be even more draconian than libertarian punishment theory, which is pretty severe, what with Russian Roulette as an aspect of it. Moreover, even that might not work. For this criminal gains not only in terms of reputation on the part of other elements of the underworld for his theft, but, like icing on the cake, his reputation amongst these bad people is even further enhanced by his very execution.

mocracy and Natural Order, Mises Daily (Mises Institute), 25 May 2004, <https://mises.org/mises-daily/state-was-mistake>.

²¹ Dominiak, “Proceeds of Crime, Punishment, and Libertarianism”: 21.

²² Both of which I heartily support.

²³ Ibidem.

As we have seen, “ought implies can”. If it is impossible to deprive the criminal of the “indirect proceeds of crime”, then it is difficult to make the case that the law should require it. This is an especially difficult case to make when we consider the to be sure rare masochist who even welcomes execution.

Our author “draws a distinction between punishment of the criminal and restitution of the victim’s property, showing that confiscation of direct proceeds of crime falls predominantly within the latter category”.²⁴ While categorization is to be sure an important element of philosophy, indeed of all science, I cannot see my way clear to acknowledging the great importance he places upon it in this particular case. It is surely of lesser moment whether we call it punishment or restitution. The devil is in the details, not the categorization.

Professor Dominiak maintains that “horizontal equity requires that A and A’, C and C’, be treated exactly equally. After all, they committed precisely the same crime. To deal with them differently, for something that occurs after the crime, would be unjust. It would be to treat equals unequally. It is unlibertarian. It violates horizontal equity”.

These four lawbreakers diverge, not in the commission of their crime, but rather in the luck they encounter afterwards. But to treat them all the same, to erase the divergence that different luck provides for them²⁵ is not really libertarian. Rather, it is egalitarian. Once criminals have paid their full debt not to “society” but to their victims, it is only rampant leftist egalitarianism that wishes to pursue them even further if matters turn out unequal. If this notion is given credence, it spells the end of any and all theories of just punishment, such as the four-part series I advocate.

Next, Dominiak addresses an interesting and important case:

Following Block, suppose that B owns a typewriter that is then stolen by A. Why is it that ‘clearly part of the proper restitution is to take the typewriter from A and give it back to B? Certainly, it is because B still owns the typewriter and the fact that this item is now in A’s possession does not change this state of affairs. It does not change it, because according to the libertarian ethics one can become an owner of a resource only in one of the following ways: (1) by homesteading it, that is,

²⁴ Ibidem.

²⁵ Let us stipulate, *arguendo*, that it is possible to do so.

by mixing one's labour with a resource that is unowned; (2) by receiving it via voluntary transfer from someone who owns it; (3) by producing it, that is, by mixing one's labour with a resource one already owns and thereby improving or changing it, or (4) by acquiring it as a matter of rectification of injustice. Since A did not acquire the typewriter in any of these ways, A could not have become its owner by taking it into his possession. Thus, even if dispossessed, B never stopped being its owner. Hence, returning the typewriter to B is simply enabling B to repossess the resource that has never ceased to be his rightful property. Specifically, returning the typewriter to B is not enabling B to acquire ownership thereof via the fourth method, that is, as matter of rectification of the injustice committed by A, for that would falsely imply that A divested B of the latter's title to the typewriter by stealing it so that B could now reacquire such title as a matter of rectification. Nothing of this sort happened. Neither B lost his title to the typewriter, nor A acquired it via theft, nor, finally, A forfeited it as a matter of rectification. Brilliant from world-class scholar. Hence, crucially, whatever proportional punishment A deserves for his crime, recovering the typewriter is not in itself part of it. Of course, not allowing for the recovery of the typewriter would be unjust, but recovering it does not in itself punish A.²⁶

I regard this as a brilliant analysis. However, I have a minor critique of it. Perhaps it is no more than a verbal quibble, but this philosopher places great importance on this matter, so perhaps this response will be of help.

Do I really need to amend my four-part punishment theory on the basis of the foregoing? If I do, I can say that the proper response is, instead, two teeth for a tooth rectification, and they a two part punishment: costs of capture plus Russian roulette. No, I can stick to my four part theory. B did not lose his title to the object, nor did A gain it. However, B lost his actual possession of it and A gained it, and, surely, it is punishment for A to lose the two teeth. His economic well-being plummeted. Why am I not allowed to call that a punishment?

To be sure, A never had any right to that typewriter. However, from the time he stole it from B, to when he was forcibly relieved of it by the police, he was, contrary to Dominiak, the actual²⁷ owner of it.

²⁶ Ibidem, 23.

²⁷ Albeit never the proper.

Norman Malcolm said of his teacher and mentor, Ludwig Wittgenstein, “on one walk he ‘gave’ to me each tree that we passed, with the reservation that I was not to cut it down or do anything to it, or prevent the previous owners from doing anything to it: with those reservations it was henceforth *mine*”.²⁸

Is it or is it not true that from the time that A stole the writing implement from B, until he was forced by the police to give it back, the former could prevent the latter from “do(ing) anything to it?” Yes, it is true. Is it or is it not true that from the time that A stole the writing implement from B, until he was forced by the police to give it back, A could “prevent the previous owner... from doing anything to it?” This, too, cannot be denied. Thus, A was temporarily the owner.

Let me put this into other words. Did A have or did A not have the ability to do anything to it that he wanted to do? He did. Did A have or did A not have the ability to prevent B, the previous owner from doing anything to it. A did indeed have that ability. Contrary to Dominiak, A was indeed the owner of this writing implement, for a time.

States our author: “[...] it simply enables the victim to recapture his rightful property and therefore takes nothing from the offender that would belong to him as a matter of right”.²⁹ True, but it does take something from A that he now has as a matter of fact, albeit, of course, not right. Thus A is indeed penalized, not to say punished, despite Dominiak’s very insightful analysis.

Our author persists in the notion “[...] that recovery of stolen property is not in itself a proper part of punishment...”. Are we merely having a verbal debate over the word “punishment”? What about horizontal equity? This constitutes treating in the same way criminals who do the same crime. Perhaps it matters little how we characterize relieving A of his ill-gotten gains of a typewriter, restitution, or punishment.

A referee of this journal puts forth the following challenge: “(did) A also (have) the ability to successfully sell the stolen typewriter. And if no (as I suppose A did not have such an ability under libertarianism), would he be still

²⁸ Norman Malcolm, *Ludwig Wittgenstein: A Memoir* (Oxford: Oxford University Press, 1958), 31–32.

²⁹ *Ibidem*.

willing to say that ‘A was indeed the owner of this writing implement, for a time?’”.

My response is as follow. Yes, A most certainly did have the *ability* to make this sale, but had no *right* to do any such thing. A was indeed the *actual owner* of the property in question but surely not the *rightful owner* of it. It cannot be denied that for a time this property was in the *possession* of A, but of course not *rightfully so*. Possession is merely an empirical fact. Does the criminal control stolen property? Of course he does. That is an element in positive economics. Whether or not he has the right to do so is, in sharp contrast, an aspect of the normative realm. And never the twain shall meet, as Hume (1739) demonstrated that values cannot be logically deduced from empirical facts.

We are now, thanks to Dominiak, able to look at this issue through different eyeglasses. He states, in criticism of Rothbard: “Since the libertarian theory of proportional punishment unequivocally states [...] that proportional punishment consists in depriving the criminal of his rights, then it clearly implies that recovering stolen property is not a part of proportional punishment, for doing so does not in itself deprive the criminal of his rights”.³⁰

This is a good critique of Rothbard. It constitutes yet another excellent insight of Dominiak’s. Rothbard merely states that the criminal should be deprived of his “rights”. He should have said, instead, “property”. Dominiak properly points out that the criminal had no “right” to that which he stole, so, compelling him to return to the victim what he stole from him does not at all deprive him of any “right” he ever had. So much for the first of the two teeth. However, Dominiak does not lay a glove on Rothbard with regard to the second tooth, the car of his own, properly owned by the thief. To this vehicle, the carjacker certainly had a right, and only lost it when he stole the victim’s car.

Let us now consider this statement of Dominiak’s: “After all, he [the thief] did not acquire ownership of the stolen property and so he cannot now be deprived of it”.³¹

Here, I must diverge from my learned colleague. The thief most certainly did “acquire ownership” of the car. It is now parked in the carjacker’s garage.

³⁰ Ibidem, 24.

³¹ Ibidem.

He has the key to it. He uses it whenever he wishes to do so. He is now the owner of it. True, he has no “right” to it; it is a stolen automobile. But he is still the owner of it, albeit on an illegitimate basis.

Of course, repossessing stolen property might involve additional actions, for example, entering the criminal’s house or compelling him to return stolen property, that have to be authorized by the libertarian principle of rectification, that is, justified by the undeniable fact of the criminal having committed an offence in the first place and thereby forfeiting his rights.

However, according to my learned friend, recovering stolen property as such does not in itself require that the criminal loses any of his rights and therefore cannot be a proper part of punishment as understood by the libertarian theory of punishment. Yes, the criminal does not lose any of his rights, and it is a point to which I owe to Dominiak. I have never before quite appreciated this insight of his. However, I continue to insist that the car thief loses his property, an entirely different matter, and I continue to fail to see why this cannot be considered a “punishment”.

Next, consider this statement of our author:³²

[...] in cases of theft ‘the criminal must pay “double” the extent of theft: once, for restitution of the amount stolen, and once again for loss of what he had deprived another’. And this is also why in cases such as ‘bodily assault, where restitution does not even apply, we can again employ our criterion of proportionate punishment’. It therefore follows that recovering direct proceeds of crime, specifically stolen property, is not governed by the principle of proportional punishment. It is instead authorized by the principle of restitution that in turn depends on the question of who is the rightful owner of what, the question settled by the libertarian principles of property acquisition.³³

This is yet another attempt of Dominiak’s to clarify the principles of libertarianism. I continue to wonder whether he and I are not for the most part having a mere verbal dispute. He wants to draw a gigantic chasm between “punishment” and “rectification”. For him, these are two entirely different

³² I have removed his footnotes in all of my quotes to the publication of this author.

³³ Ibidem.

concepts, and never the twain shall meet. For me, these are virtual synonyms. Seizing the ill-gotten gains of the thief and returning them to their rightful owner is a punishment to the miscreant. True, he never had a right to these goods, but he did indeed have ownership power over them. Ask the thief himself if he resents his stolen property being taken from him and returned to the rightful owner. If he is a truthful thief,³⁴ he will certainly regard it as a punishment. Did he not steal it “fair and square”?³⁵ And now he is being deprived of his ill-gotten gains! Life is unfair, from the robber’s point of view. If this does not constitute a punishment, I do not know what “punishment” means, and I am a native speaker of the English language. The fact, brilliantly pointed out by Dominiak that the robber has no right to the product of his robbery does not in the slightest undermine that when we the forces of law and order take this automobile from him, we are “punishing” him.³⁶

As for crimes of bodily injury, not theft of property, libertarian punishment theory can of course still apply. Take the case of rape. In the movie “The Godfather” the baker asks this Mafia leader for justice when his daughter has been sexually assaulted. He wants the rapist executed. The Godfather, a good libertarian in this one regard, refuses, maintaining that this extreme punishment would not fit the crime. Instead, he orders a harsh beating for the guilty party, a rough approximation of justice.

Whereupon Dominiak takes me to task for, in effect, contradicting myself.

[...] consider the following case offered by Block. The curious thing about this case is that Block presents it as an instance of unjust enrichment, while it is clearly an example of indirect proceeds of theft. Moreover, thinking that he is arguing against the doctrine of unjust enrichment, Block contends that the thief should forfeit the statue carved of the stolen granite, not realizing that by arriving at such a verdict, he is implicitly embracing the very institution he explicitly repudiates, that is, forfeiture of indirect proceeds of crime. At any rate, writes Block: ‘Suppose A steals a hunk of granite from B’s quarry. Whereupon A carves a magnificent

³⁴ This is not a logical contradiction.

³⁵ At least in his own evil mind.

³⁶ We may posit that he has become extremely fond of it while it was in his possession.

statue with that stolen material. The implication of “unjust enrichment” is that B may not have that particular piece of granite back from A because he, B, would be unjustly enriched. The value of the carved granite is so much greater than the raw granite of which B was robbed. Instead, A would only have to repay B for the value of the raw granite, plus the other libertarian aspects of punishment. This is clearly unjust, based on the libertarian philosophy.³⁷

I am afraid I cannot see my way clear to agreeing with Dominiak in this criticism of his. By stipulation, there is no separability possible here. B wants returned from A not any old piece of granite, but the very piece of this stone that A stole from him. The fact that it is now embodied in an extremely valuable statue makes no never mind. B is entitled to a return of exactly, precisely, with no exception, whatever it was that was stolen from him. Yes, A’s “blood, sweat and tears” went into fashioning that rock, but it is the proper possession of someone else, B, not him, A. Now, consider the case where it is indeed possible to separate A’s contribution from B’s property. Posit that after creating this magnificent statue, A places a cloth hat upon its head. Would A be entitled to remove that headpiece from the statue before returning it to B, as part of his four stage punishment for theft? Yes, of course. By assumption, he will have paid his debt in full to B after the four-part punishment is imposed upon him. He owes B no more than that. A may properly retain that hat.

Dominiak is not without a response to this claim of mine. He avers:

Block inadvertently justifies confiscation of indirect proceeds of crime rather than a rejection of the doctrine of unjust enrichment. This in turn stands in clear contradiction with Block’s explicit pronouncements that according to libertarianism indirect proceeds of crime may be kept by criminals. Certainly, if A and A’ both stole analogous hunks of granite but only A transformed it into a magnificent statue, then according to Block’s criterion of horizontal equity, they both should suffer the same loss. Forcing A to return a much more valuable statue while requiring A’ only to return the hunk of granite would violate horizontal equity, as Block understands it. And yet Block believes that A should be compelled to return the statue nonetheless. Hence, Block implicitly rejects his own conclu-

³⁷ Ibidem, 29.

sions that under libertarianism indirect proceeds of crime may be kept by the criminal.³⁸

I appreciate the power of this objection, but, again, I fail to see that it overrides my view. I am indeed willing to concede to Dominiak that if A showed his magnificent statue³⁹ to an audience of 100 people, each of whom paid \$100 to see it in all its glory, that A may keep those funds, even though he could not have done any such thing were it not for B's piece of granite. Thus, I argue, my position is logically coherent. It is only were I to demand that A turn that \$10,000 over to B that Dominiak would be correct in saying that I am contradicting myself. The separability issue is crucial here, and, I contend, my colleague does not give it the full weight to which it is entitled.

Conclusion

I am very grateful to Dominiak for his critique of my earlier work (Block, 2017). With his brilliant analysis he has compelled me to dig deeper, far deeper, into what I regard as the correct Rothbardian punishment theory. On numerous occasions I had to turn to that publication of mine to see if I had really written what Dominiak attributed to me,⁴⁰ so powerful was his critique of my essay. The sheer power of his critique stems from his masterful rendition and elaboration of the view that the criminal should not ever gain from his evil act. This is very much within the spirit of libertarianism. But in the end I had to diverge from his exceedingly well-argued perspective in favor of retaining an objective punishment theory for this philosophy.

These are very important issues. They are also very complicated. I am not sure that either Dominiak or I has achieved last word status on these matters. All we can do, I'm sure I speak for him too on this, is do our best. That is the benefit of friendly dialogues of this sort. They are the best, no, the only way to get that proverbial one billionth of an inch closer to the Truth with a capi-

³⁸ Ibidem, 30.

³⁹ While he still had it

⁴⁰ I had. He is an accurate critic.

tal T. Two of my favorite advocates of the benefits of debate, argumentation are Mill⁴¹ and Hoppe.⁴² Hopefully, Dominiak and I have exemplified our adherence to their emphasis on this matter in this series of essays.

References

- Block Walter E. 1999. "Market Inalienability Once Again: Reply to Radin". *Thomas Jefferson Law Review* 22(1): 37–88.
- Block Walter E. 2002–2003. "Berman on Blackmail: Taking Motives Fervently". *Florida State University Business Review* 3(1): 57–114.
- Block Walter E. 2003. "Libertarianism vs. Objectivism; A Response to Peter Schwartz". *Reason Papers* 26: 39–62.
- Block Walter E. 2003. "The Non-Aggression Axiom of Libertarianism". 17 February 2003. <http://archive.lewrockwell.com/block/block26.html>.
- Block Walter E. 2004. "Austrian Law and Economics: The Contributions of Adolf Reinach and Murray Rothbard". *Quarterly Journal of Austrian Economics* 7(4): 69–85.
- Block Walter E. 2004. "Reply to Frank van Dun's 'Natural Law and the Jurisprudence of Freedom'". *Journal of Libertarian Studies* 18(2): 65–72.
- Block Walter E. 2004. "The State Was a Mistake". Book review of Hans-Hermann Hoppe, *Democracy: The God That Failed: The Economics and Politics of Monarchy, Democracy and Natural Order*. Mises Daily (Mises Institute), 25 May 2004. <https://mises.org/mises-daily/state-was-mistake>.
- Block Walter E. 2006. "Radical Libertarianism: Applying Libertarian Principles to Dealing with the Unjust Government, Part II". *Reason Papers* 28: 85–109.
- Block Walter E. 2009. "Libertarian Punishment Theory: Working for, and Donating to, the State". *Libertarian Papers* 1: 1–31.
- Block Walter E. 2016. "Does Rothbard contradict himself on punishment theory? No.". 7 May 2016. <https://www.lewrockwell.com/lrc-blog/rothbard-contradict-punishment-theory-no/>.
- Block Walter E. 2016. "Russian Roulette: Rejoinder to Robins". *Acta Economica et Turistica* 1(2): 197–205.

⁴¹ John Stuart Mill, *On Liberty* (Northbrook, IL: AHM Publishing, 1947).

⁴² Hans-Hermann Hoppe, "From the Economics of Laissez Faire to the Ethics of Libertarianism", in: *Man, Economy, and Liberty: Essays in Honor of Murray N. Rothbard*, ed. Walter E. Block, Llewellyn H. Rockwell (Auburn, AL: Mises Institute, 1988).

- Block Walter E. 2018. "The Case for Punishing Those Responsible for Minimum Wage Laws, Rent Control and Protectionist Tariffs". *Revista Jurídica Cesumar – Mestrado* 18(1) (Jan/Apr 2018): 235–263. <http://periodicos.unicesumar.edu.br/index.php/revjuridica/article/view/6392/3190>.
- Block Walter E. 2019. "Libertarian punishment theory and unjust enrichment". *Journal of Business Ethics* 154(3): 103–108.
- Block Walter E. 2022. "Rejoinder to Ayres on defense, punishment and gentleness". *Revista de Investigações Constitucionais* 9(3): 495–513.
- Block Walter E. 2022. "Some Prospects of Libertarian Punishment Theory: Rejoinder to Blasco and Marcos". *Studia Humana* 11(2): 20–24.
- Block Walter E. 2023a. "Defending Absolutist Libertarianism". In: *The Emergence of a Tradition: Essays in Honor of Jesús Huerta de Soto. Volume II: Philosophy and Political Economy*, ed. David Howden, Philipp Bagus, 45–52 (Springer Nature Switzerland AG).
- Block Walter E. 2023b. "How does libertarian punishment theory deal with the doctrine of unjust enrichment?". *Bosconi Legal Papers*, 24 October 2023. (Online). <https://blp.egeaonline.it/it/102/papers/75/how-does-libertarian-punishment-theory-deal>.
- Block Walter E., Alan G. Futerman. 2024. "Are you sure you want 'proportionality'?". *American Thinker*, 18 January 2024. https://www.americanthinker.com/articles/2024/01/are_you_sure_you_want_proportionality.html.
- Broom Herbert. 1874. *A Selection of Legal Maxims, Classified and Illustrated*. Philadelphia: T. & J. W. Johnson (American edn., 7th American from 5th London ed.).
- Bylund Per. 2005. "Man and Matter: A Philosophical Inquiry into the Justification of Ownership in Land from the Basis of Self-Ownership". Master's thesis, Lund University, spring semester (June) 2005. http://perbylund.com/academics/pols-ci_msc.pdf.
- Bylund Per. 2012. "Man and matter: how the former gains ownership of the latter". *Libertarian Papers* 4(1): 71–117.
- Dominiak Łukasz. 2023. "Proceeds of Crime, Punishment, and Libertarianism". *Archiwum Filozofii Prawa i Filozofii Społecznej* 2(35): 20–33.
- Futerman Alan G., Walter E. Block. 2023. "Israel's critics don't know what they are talking about". *Israel Hayom*, 14 November 2023, <https://www.israelhayom.com/opinions/is-it-reasonable-to-demand-proportionality-of-isarel/>.
- Gordon David. 2019a. "Locke vs. Cohen vs. Rothbard on Homesteading". 8 Nov 2019. <https://mises.org/wire/locke-vs-cohen-vs-rothbard-homesteading>.
- Gordon David. 2019b. "Violence, Homesteading, and the Origins of Private Property". 13 Dec 2019. <https://mises.org/wire/violence-homesteading-and-origins-private-property>.
- Gordon David. 2020. "Rothbard and Double Restitution". 4 Sep 2020. <https://mises.org/wire/rothbard-and-double-restitution>.

- Grotius Hugo. 1625. *De Jure Belliac Pacis (The Law of War and Peace)*. 3 vols.; English translation by A. C. Campbell [London, 1814].
- Hoppe Hans-Hermann. 1988. "From the Economics of Laissez Faire to the Ethics of Libertarianism". In: *Man, Economy, and Liberty: Essays in Honor of Murray N. Rothbard*, ed. Walter E. Block, Llewellyn H. Rockwell. Auburn, AL: Mises Institute, 1988.
- Hoppe Hans-Hermann. 1993. *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy*. Boston: Kluwer Academic Publishers.
- Hoppe Hans-Hermann. 2001. *Democracy, the God That Failed: The Economics and Politics of Monarchy, Democracy and Natural Order*. New Brunswick, NJ: Transaction Publishers.
- Hoppe Hans-Hermann. 2011. "Of Private, Common, and Public Property and the Rationale for Total Privatization". *Libertarian Papers* 3(1): 1–13.
- Huemer Michael. 2019. "NAPs Are for Babies". 21 Sep 2019. <https://fakenous.substack.com/p/naps-for-babies>
- Hume David. 1739. *A Treatise of Human Nature: Being an Attempt to Introduce the Experimental Method of Reasoning into Moral Subjects*. <http://www.gutenberg.org/ebooks/4705>.
- Kinsella Stephan N. 2003. "A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability". *Journal of Libertarian Studies* 17(2): 11–37.
- Kinsella Stephan N. 2006a. "Thoughts on Intellectual Property, Scarcity, Labor-ownership, Metaphors, and Lockean Homesteading". 26 May 2006. <https://mises.org/wire/thoughts-intellectual-property-scarcity-labor-ownership-metaphors-and-lockean-homesteading>.
- Kinsella Stephan N. 2006b. "How We Come to Own Ourselves". 7 Sep 2006. <https://mises.org/story/2291>.
- Kinsella Stephan N. 2007. "Thoughts on the Latecomer and Homesteading Ideas; or, Why the Very Idea of 'Ownership' Implies that Only Libertarian Principles are Justifiable". 15 Aug 2007. <https://mises.org/wire/thoughts-latecomer-and-homesteading-ideas-or-why-very-idea-ownership-implies-only-libertarian>.
- Kinsella Stephan N. 2009a. "What Libertarianism Is". 21 Aug 2009. <https://mises.org/library/what-libertarianism>.
- Kinsella Stephan N. 2009b. "What Libertarianism Is". In: *Property, Freedom, and Society: Essays in Honor of Hans-Hermann Hoppe*, ed. Jörg Guido Hülsmann, Stephan Kinsella. Auburn, AL: Mises Institute, 2009.
- Kinsella Stephan N. 2009c. "Homesteading, Abandonment, and Unowned Land in the Civil Law". 22 May 2009. <http://blog.mises.org/10004/homesteading-abandonment-and-unowned-land-in-the-civil-law/>.
- Locke John. 1948. "An Essay Concerning the True Origin, Extent and End of Civil Government". In: *Social Contract*, ed. E. Barker, 17–19. New York: Oxford University Press.

- Loo Andy, Walter E. Block. 2017–2018. “Threats against Third Parties: A Libertarian Analysis”. *Baku State University Law Review* 4(1): 52–64.
- Malcolm Norman. 1958. *Ludwig Wittgenstein: A Memoir*. Oxford: Oxford University Press.
- McClellan David. 1989. “Seizing the Proceeds of Crime: The State of the Art”. *International & Comparative Law Quarterly* 38(2): 334–360.
- McMaken Ryan. 2016. “How the Feds Botched the Frontier Homestead Acts”. 19 Oct 2016. <https://mises.org/wire/how-feds-botched-frontier-homestead-acts>.
- Mill John Stuart. 1947 [1859]. *On Liberty*. Northbrook, IL: AHM Publishing.
- Mises Ludwig von. [1949] 1998. *Human Action. Scholars’ Edition*. Auburn: Mises Institute. <http://www.mises.org/humanaction.asp>; <http://mises.org/books/human-action.pdf>.
- Nozick Robert. 1974. *Anarchy, State, and Utopia*. New York: Basic Books.
- Paul Ellen Frankel. 1987. *Property Rights and Eminent Domain*. Livingston, NJ: Transaction Publishers.
- Pufendorf Samuel. 1673. *De officio hominis et civis prout ipsi praescribuntur lege naturali* (Natural Law and the Law of Nations). Reprint edn. Buffalo, NJ: Hein (reprint of New York: Oxford University Press, 1927a).
- Rothbard Murray N. 1969. “Confiscation and the Homestead Principle”. *The Libertarian Forum* 1(6) (15 June 1969). <https://www.panarchy.org/rothbard/confiscation.html>.
- Rothbard Murray N. 1973. *For a New Liberty*. New York: Macmillan.
- Rothbard Murray N. 2002. *The Ethics of Liberty*. New York–London: New York University Press.
- Rozeff Michael S. 2005. “Original Appropriation and Its Critics”. 1 Sep 2005. <http://www.lewrockwell.com/rozeff/rozeff18.html>.
- Watner Carl. 1982. “The Proprietary Theory of Justice in the Libertarian Tradition”. *Journal of Libertarian Studies* 6(3–4): 289–316.
- Whitehead Roy, Walter E. Block. 2003. “Taking the Assets of the Criminal to Compensate Victims of Violence: A Legal and Philosophical Approach”. *Wayne State University Journal of Law in Society* 5(1): 229–254.