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# **SAVING LOCKE FROM MARX: THE LABOR THEORY OF VALUE IN INTELLECTUAL PROPERTY THEORY**

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## **Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory**

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The labor theory of value is fundamental to John Locke's justification for property rights, but philosopher Edwin Hettinger argued in an oft-cited article that it fails to justify intellectual property rights. In making this critique, though, Hettinger redefined Locke's theory into a theory about proportional physical labor creating economic value, just as Robert Nozick, G.A. Cohen and other philosophers have done. In response, this article describes Locke's labor theory of value and how Locke himself applied it to intellectual property rights. It does so by analyzing the actual text of the *Second Treatise*, including many oft-neglected sections, and by integrating Locke's property theory within the context of his natural law ethical theory, as presented in *An Essay Concerning Human Understanding* and in other works. In its proper context, Locke's concept of labor refers to production, which for individuals is both an intellectual and physical activity. His concept of value refers to what serves the flourishing life of a rational being, which is a conception of the good that is more robust than merely physical status or economic wealth. Locke's own text and philosophical arguments answer the absurdities imposed on him by Hettinger, Nozick, Cohen and others. Even more important, understanding his labor theory of value explains why Locke approves of inventions in presenting his labor-based property theory and why he explicitly argues that authors have property rights (copyrights) in their writings, which are arguments that are seemingly lost on his modern critics.

### I. INTRODUCTION

John Locke's labor theory of value is a significant part of his argument for property in the *Second Treatise of Government*,<sup>1</sup> and legal scholars and philosophers widely agree that it fails to justify intellectual property rights. The consensus is that his argument is weak or backwards in

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<sup>1</sup> References to Locke's writings will be made in the main text using the following convention: "TT II.28" refers to John Locke, *Two Treatises of Government*, Peter Laslett ed. (Cambridge: Cambridge Univ. Press, student ed. 1988), second treatise, section 28. "ECHU II.28.6" refers to John Locke, *An Essay Concerning Human Understanding*, ed. Peter H. Nidditch (Oxford: Clarendon Press, 1979), book 2, chapter 2, section 6. "STCE 185-186" refers to John Locke, *Some Thoughts Concerning Education*, Ruth W. Grant and Nathan Tarcov eds. (Indiana: Hackett Publishing Co., 1996), sections 185-186. "QCLN 153" refers to John Locke, *Questions Concerning the Law of Nature*, trans. and ed. Robert Horwitz, Jenny Straus Clay & Diskin Clay (Ithaca: Cornell University Press, 1990), page 153.

its claim that property rights secure pre-existing values created through labor.<sup>2</sup> Law professors in particular deride the “fallacies in the fundamental assumptions . . . [in] this ‘if value, then right’ theory,” and, as a prudential matter, they express concern that this theory “lacks a coherent limit” in defining the scope of legal protection of intellectual property rights.<sup>3</sup> Since the early twentieth century, American legal scholars have assumed that Locke’s labor theory of value is incoherent, viciously circular, and indeterminate,<sup>4</sup> and this judgment prevails in intellectual property theory as much as it does in traditional property theory.

These scholars have found ample support in many assessments of Locke’s labor theory of value by contemporary philosophers. Interestingly, while philosophers have spilt much ink on how Locke’s “mixing labor” argument applies to intellectual property rights, there has been comparatively very little attention paid to his labor theory of value.<sup>5</sup> Even within general philosophical commentary on Locke’s property theory—such as the canonical texts by James Tully, Robert Nozick, C.B. Macpherson, and Richard Ashcraft—it has been observed that Locke’s labor theory of value has been “relatively neglected.”<sup>6</sup> One exception is Edwin

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<sup>2</sup> See Richard A. Epstein, “Liberty versus Property: Cracks in the Foundation,” *San Diego Law Review* 42, no. 1 (2005): 14-15; Lloyd Weinreb, “Custom, Law and Public Policy: The INS Case as an Example of Intellectual Property,” *Virginia Law Review* 78, no. 1 (1992): 144.

<sup>3</sup> Rochelle Cooper Dreyfuss, “Expressive Genericity: Trademarks as Language in the Pepsi Generation,” *Notre Dame Law Review* 65, no. 3 (1990): 405. Given this problem with defining limits, Larry Lessig writes that “the ‘if value, then right’ theory of creative property has never been America’s theory of creative property. It has never taken hold within our law.” Lawrence Lessig, *Free Culture* (New York: The Penguin Press, 2004): 19.

<sup>4</sup> I discuss this critique among realist legal scholars in Adam Mossoff, “The Use and Abuse of Intellectual Property at the Birth of the Administrative State,” *University of Pennsylvania Law Review* 157, no. 6 (2009): 2015-18.

<sup>5</sup> Some examples of recent philosophical scholarship addressing how Locke’s property theory applies to intellectual property rights includes Jonathan Peterson, “Lockean Property and Literary Works,” *Legal Theory* 14, no. 1 (2008): 257-80; Seana Valetine Shiffrin, “Lockean Arguments for Private Intellectual Property,” in Stephen R. Munzer, ed., *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge Univ. Press, 2001): 138-167; Adam Moore, “A Lockean Theory of Intellectual Property,” *Hamline Law Review*, 21, no. 1 (1997): 65-108.

<sup>6</sup> Anderw Williams, “Cohen on Locke, Land and Labour,” *Political Studies* 40, no. 1 (1992): 51. In Stephen Munzer’s *A Theory of Property*, for instance, the labor theory of value receives no attention at all in his chapter on “Labor and desert.” Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge Univ. Press, 1990): 254-91.

Hettinger, who devotes a substantial portion of a philosophy journal article to argue that Locke's labor theory of value fails to justify intellectual property rights,<sup>7</sup> but more often than not one finds expressions of disapproval in at best very brief passages or at worst in offhand references.

These critiques, however, have been misdirected. In their assault on Locke's labor theory of value, philosophers construe Locke's concept of labor in purely *physical* terms and they construe his concept of value in purely *economic* terms, but these are not Locke's concepts of labor or value. His concept of labor refers to production, which has intellectual as well as physical characteristics, and his concept of value serves his moral ideal of human flourishing, which is a conception of the good that is more robust than merely physical status or economic wealth. This is hardly surprising given that his property theory is firmly rooted in his natural law ethical theory, which is imbued with the classical natural law theorists' concern with the flourishing life of a rational being. Although legal scholars might be forgiven for conceptual or analytical mistakes in their philosophical arguments, one finds the same mistaken conceptual assumptions—and, as a result, the same mistaken critique—in the work of political and legal philosophers.

If Locke's property theory justifies intellectual property rights—and Locke himself believes that it does<sup>8</sup>—the principle of interpretative charity demands reconsideration of his labor theory of value on its own terms and in its proper intellectual context. This is particularly important given the significance of intellectual property rights today, as legal scholars and policy

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Munzer writes that his argument for property “has little in common with Locke's views about gaining property rights by mixing one's labor with unowned things. . . . It is, however, somewhat related to his overall thought that since no one would labor without expecting some benefit, it would be unfair to let the idle take the benefit of the laborer's pains.” *Ibid.*, 256, footnote 1. If these benefits are the values created by a laborer, then it would seem that some type of labor theory of value remains a crucial premise of his property theory.

<sup>7</sup> Edwin C. Hettinger, “Justifying Intellectual Property,” *Philosophy & Public Affairs* 18, no. 1 (1989): 36-40.

<sup>8</sup> Mossoff, “Use and Abuse of Intellectual Property at the Birth of Administrative State,” 2048.

activists have increasingly relied on the mistaken philosophical critiques of Locke's labor theory of value in making their own arguments in the raging policy debates. Hettinger's wide-ranging critique of a Lockean theory of intellectual property rights, for instance, has been cited in at least 122 law review articles.<sup>9</sup> It is now imperative to return to both the text and the philosophical context of Locke's property theory in order to better understand what he means in his labor theory of value.

It bears emphasizing at the outset the scope of my thesis about Locke's labor theory of value. This article describes Locke's argument for his labor theory of value in order to expose the strawman attack on his property theory by contemporary philosophers, especially within intellectual property theory, but it does not purport to justify his labor theory of value. This justification, which raises difficult questions about the foundations of value theory, such as whether values are objective, subjective, or intrinsic, must be left for another day.<sup>10</sup> The focus here is solely on explicating the labor theory of value within Locke's property theory, which reveals why Locke thought his property theory applied to writings and inventions.

This article thus makes a small, but important, contribution to philosophical scholarship on Locke's labor theory of value and its application to intellectual property rights: it distinguishes between the *natural law* and *economic* concepts of value, as philosophers today equivocate between these two concepts in their critiques of Locke's property theory. Here, the economic concept of value, whether referred to as "market value," "exchange value," "wealth," or some other economic term, encompasses the mistaken assumption that Locke is arguing in his

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<sup>9</sup> This is based on a search, performed on October 10, 2011, of all of the law journals in the Westlaw legal database.

<sup>10</sup> For some examples of this debate among contemporary philosophers, see Darryl F. Wright, "Evaluative Concepts and Objective Values: Rand on Moral Objectivity," *Social Philosophy & Policy* 25, no. 1 (2008): 149-181; David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986): 21-59; J.L. Mackie, *Ethics: Inventing Right and Wrong* (New York: Penguin Books, 1977): 15-63.

labor theory of value that there is a quantifiable (and thus measurable) relationship between physical exertion and money that justifies property rights. For purposes of shorthand, I refer to this as a distinction between Locke (natural law value) and Marx (economic value).

Identifying how the conventional wisdom equivocates between Locke and Marx is important for philosophers or legal scholars who are interested in either critiquing or resuscitating a labor theory of value in intellectual property theory. Before one can assess the validity of Locke's property theory and its purchase for intellectual property rights, it is necessary to identify why so many philosophers conflate two different concepts of value, resulting in a strawman attack and hasty dismissal of significant elements of Locke's property theory. Without explaining why Locke is not Marx, one is unable to get past the widespread belief that Locke's labor theory of value has been rightly relegated to the dustbin of the history of philosophy.

In explicating why Locke is not Marx, at least in the limited context of their respective labor theories of value, this article proceeds in four parts. First, it will briefly review the various critiques of Locke's labor theory of value, focusing mostly on Hettinger's well-known argument against a Lockean justification for intellectual property rights, but also on equally influential and more general critiques of Locke's labor theory of property by Nozick, Cohen and others. Second, it will explicate Locke's labor theory of value through a careful textual analysis of the actual argument he presents in the *Two Treatises of Government*. Since the *Two Treatises* is only a work in political theory, it is necessary to further discuss his natural law ethical theory, which defines and informs the basic normative concepts, such as value, that he employs in his arguments in the property theory he presents in the *Second Treatise*. Accordingly, this part will incorporate his arguments about the meaning of labor and value from other works, such as *An*

*Essay Concerning Human Understanding*. Third, once Locke’s labor theory of value has been properly described, it is possible to discuss his approval of property rights in inventions and books; in fact, Locke explicitly endorses copyright in an essay he wrote in 1695. Lastly, the article will conclude by discussing Marx’s labor theory of value, identifying the ways in which it is substantively different from Locke’s superficially similar-sounding labor theory of value, but identify how superficial aspects of Locke’s arguments have been used improperly to equivocate between Locke and Marx.

## II. THE CRITICS OF LOCKE’S LABOR THEORY OF VALUE IN INTELLECTUAL PROPERTY THEORY AND BEYOND

There is widespread misunderstanding today about Locke’s property theory, which is something I have had to address in my own scholarship on how natural rights philosophy influenced the historical development of Anglo-American patent law.<sup>11</sup> In a previously published essay, I explained how Robert Nozick, Jeremy Waldron and other philosophers have misinterpreted Locke’s “mixing labor” argument,<sup>12</sup> but I have not yet addressed their misunderstanding of Locke’s labor theory of value. Although I have addressed how *legal scholars* have misunderstood Locke’s labor theory of value as a normative argument for a property right in economic value,<sup>13</sup> the shibboleth of economic value within critiques of Locke’s labor theory of value by *philosophers* needs to be addressed on its own terms.

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<sup>11</sup> Mossoff, “The Use and Abuse of Intellectual Property at the Birth of the Administrative State,” 2001-2050; Adam Mossoff, “Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent ‘Privilege’ in its Historical Context,” *Cornell Law Review* 92 (2007): 953-1012; Adam Mossoff, “Patents as Constitutional Private Property: The Historical Protection of Patents under the Takings Clause,” *Boston University Law Review* 87, no. 3 (2007): 689-724; Adam Mossoff, “Rethinking the Development of Patents: An Intellectual History,” *Hastings Law Journal* 52, no. 6 (2001): 1255-1322.

<sup>12</sup> Adam Mossoff, “Locke’s Labor Lost,” *The University of Chicago Law School Roundtable* 9, no. 1 (2002): 155-64.

<sup>13</sup> Mossoff, “The Use and Abuse of Intellectual Property at the Birth of the Administrative State,” 2001-2050.

With respect to Locke’s labor theory of value, prominent contemporary philosophers have assumed that “labor” means only physical exertion, that “value” means only socially-defined economic value, and that the fulcrum in Locke’s normative argument is that physical exertion inputs and economic outputs are necessarily measurable in quantifiable proportions. The critiques of his labor theory of value proceed on these often unstated assumptions, and thus it is necessary to review the arguments to reveal how philosophers are equivocating conceptually between Locke and Marx. Accordingly, this part will first discuss Hettinger’s analysis of Locke’s labor theory of value, as this represents the most extensive critique by a contemporary philosopher of a Lockean theory of intellectual property rights. It will then discuss some of the more prominent critiques of Locke’s labor theory of value by other philosophers, such as Nozick and Cohen, who are writing outside the context of intellectual property theory, but whose arguments support or are identical to the conclusions reached by Hettinger.

In *Justifying Intellectual Property*, Hettinger maintains that “justifying intellectual property rights is a formidable task,” and that attempts to do so on the basis of the “[n]atural rights to the fruits of one’s labor are not by themselves sufficient.” Although a Lockean theory of intellectual property rights captures a “power intuition,” it has two “significant shortcomings” that are revealed under closer analytical scrutiny.<sup>14</sup> First, it cannot separate out the proportional contributions of intellectual labor by past and present creators in the market value of an invention or book, and, second, it ignores the necessary social context that defines economic value as such. In sum, Hettinger argues that Locke’s labor theory of value fails to justify a property right to the economic value in an invention or book given the inherent social nature of the creative process

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<sup>14</sup> Hettinger, “Justifying Intellectual Property,” 36, 51.

on the front end and the inherent social nature of economic value on the back end of a theory of intellectual property rights.

Although Hettinger believes that there is some valence in the labor theory of value in situations in which someone makes improvements to fallow land or to other unimproved objects, the same cannot be said of intellectual creations. Contrary to a laborer's improvement of completely barren wasteland into a bountiful farm, Hettinger observes that

Invention, writing, and thought in general do not operate in a vacuum: intellectual creation is not creation *ex nihilo*. Given this vital dependence of a person's thoughts on the ideas of those who came before her, intellectual products are fundamentally social products. Thus even if one assumes that the value of these products is entirely the result of human labor, this value is not entirely attributable to *any particular laborer* (or small group of laborers).<sup>15</sup>

Hettinger's basic point here is not new; as Isaac Newton poignantly observed, "If I have seen further it is only by standing on the shoulders of giants."

But Hettinger is not making merely a descriptive observation about sequential and complementary innovation; rather, this observation leads him to conclude that, according to the labor theory of value, there is no morally justified property claim to the total "market value" in an invention or book. This economic value arises from untold contributions of many intellectual laborers in the distant past and in the present, and according to Hettinger, the labor theory of value demands that this "*market value* should be shared by all those whose ideas contributed to the origin of the product."<sup>16</sup> The absurdity of this idea, or at least that it is untenable if not an

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<sup>15</sup> Hettinger, "Justifying Intellectual Property," 38.

<sup>16</sup> Hettinger, "Justifying Intellectual Property," 38 (emphasis added).

impossible task, is left unstated. His ultimate conclusion, though, is clear: the labor theory of value does not morally justify a creator's intellectual property rights.

In addition to the problem in identifying the proportional contributions to the total economic value of a new invention or book, Hettinger also argues that Locke's labor theory of value fails to account for the fact that "[m]arket value is a socially created phenomenon." It is an economic truism that market value—price—is determined by the aggregate supply of and demand for a product, which is itself defined by such variables as the existence of market substitutes, the "opportunity costs" incurred by firms and consumers, the transaction costs in selling and purchasing goods, the economies of scale achieved by firms, etc. These are all factors that are exogenous to the specific efforts by the inventor or author in creating intellectual property, which thus explains why the "market value of the same fruits of labor will differ greatly with variations in these social factors." In sum, there is no correlation between the proportional contribution of an inventor or author in one's efforts in creating a new product of intellectual property and the market price for that product. Hettinger bluntly concludes: "The notion that a laborer is naturally entitled as a matter of right to receive the market value of her product is a myth."<sup>17</sup>

The careful reader will note a subtle conceptual shift in Hettinger's analysis of how Locke's labor theory of value fails to justify intellectual property rights. With no explanation, Hettinger replaces Locke's normative concept of "value" with the economic concept of "market value." Moreover, Hettinger assumes that Locke's labor theory of value justifies a property right in this "market value" given a quantifiable ratio of measurable physical labor to economic value. He does not explain why he thinks Locke's concept of value refers solely to economic value or

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<sup>17</sup> Hettinger, "Justifying Intellectual Property," 38-39.

why his labor theory of value requires a proportional relationship between physical labor inputs and dollar outputs. Hettinger simply assumes that this is what Locke means by “labor” and “value”—an assumption that drives his critique of how the labor theory of value fails to justify intellectual property rights.

It is neither surprising nor inexplicable why Hettinger makes these assumptions about Locke’s labor theory of value, because he explicitly bases his argument on Nozick’s famous criticism of Locke’s labor theory of property in *Anarchy, State and Utopia*.<sup>18</sup> There, in a brief passage, Nozick advances a broadside against Locke’s property theory. In addition to his criticism of Locke’s “mixing labor” argument, in which he construes “labor” in a literal sense of referring only to physical actions,<sup>19</sup> Nozick also rejects Locke’s labor theory of value on the exact same grounds asserted by Hettinger. In a single, brief paragraph, Nozick rejects Locke’s labor theory of value wholesale by pointing out that it no more justifies an entitlement to “the whole object rather than just to the *added value* one’s labor has produced.” Nozick simply assumes that a labor theory of value mandates that there is an identifiable, proportional relationship between physical labor inputs and value outputs, and Hettinger adopts this assumption without question.

Moreover, Nozick thinks that identifying or measuring a proportional relationship between one’s contribution of physical labor and the value produced thereby is impossible, although he does not explain why he thinks so. He merely jumps to his conclusion that “No workable or coherent value-added property scheme has yet been devised. At least, no labor

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<sup>18</sup> Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, Inc., 1974): 175.

<sup>19</sup> I have criticized this egregious strawman attack on Locke’s “mixing labor” argument in Mossoff, “Locke’s Labor Lost.”

theory of value has been worked out since the demise of “the theory of Henry George.”<sup>20</sup>

Nozick’s reference to Henry George is telling. George was a nineteenth-century economist who is viewed today as a fellow traveler of Marx because he argued that the labor theory of economic value proves that land could not be the subject of private property.<sup>21</sup> By conflating Locke with George, Nozick reveals that he makes the same assumption as does Hettinger about Locke’s concept of value: value means economic value. As with his criticism of Locke’s concept of labor, Nozick does not explain his equivocation between Locke and Marx.<sup>22</sup>

Not all philosophers assume that Locke employs a concept of *economic value* in his labor theory of value; in fact, G.A. Cohen recognizes that Locke and Marx are talking about two different concepts of value in their respective labor theories of value.<sup>23</sup> But Cohen still agrees with Nozick and Hettinger that *labor*—the other central concept in Locke’s labor theory of value—refers only to physical actions. For instance, he expresses agreement with Marx’s criticism of Locke’s labor theory of value because comprised only “concrete labour,” such as the “labour considered in its concrete form of ploughing, sowing and so forth.” Moreover, for this “concrete labour” to justify a property right to the value it produces, according to Cohen, it must

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<sup>20</sup> Nozick, *Anarchy, State and Utopia*, 175.

<sup>21</sup> See Henry George, *Progress and Poverty* (New York: D. Appleton & Co., 1886). The book was first published in 1879.

<sup>22</sup> If there was any doubt about this assumption, Nozick later confirms it when he refers to “the crumbling of the labor theory of value” in his discussion of the failure of Marxist labor-exploitation economics. Nozick, *Anarchy, State and Utopia*, 253-60.

<sup>23</sup> Cohen writes that the Marxist labor theory of value is a theory about economic value—what Marx and economists call “exchange-value”—but not so for Locke’s labor theory of value, which claims only that “labour is responsible for virtually all of the use-value.” See G.A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge: Cambridge University Press, 1995): 178. He further explains:

Locke’s premiss is often described as a rough statement of what, since Marx, has been known as the labour theory of value. That is misleading, since the value which Locke says is (nearly all) due to labour is not the value Marx says labour created. Locke’s topic is use-value, not exchange-value.

Cohen, *Self-Ownership, Freedom and Equality*, 178. For Marx’s discussion of the distinction between use-value and exchange-value, see Karl Marx, *Das Kapital*, vol. 1, in Robert C. Tucker, ed., *The Marx-Engels Reader*, 2d ed. (New York: W.W. Norton & Co., 1978): 302-29.

be capable of quantifiable measurement relative to the total value produced. Of course, like Nozick, Cohen thinks this proposition is nonsensical: “In short, Locke goes from (i) facts about marginal contributions, to (ii) claims about comparative physical contributions, to (iii) conclusions about rewards.” Given the logical infirmities in an argument that results in moral claims to *total* products based only on *relative* physical contributions, Cohen thus concludes that Locke’s version of the labor theory of value is “indefensible” and “meaningless.”<sup>24</sup>

Jeremy Waldron agrees with Cohen that Locke’s labor theory of value is concerned with “use-value,” not the “exchange-value” of market prices,<sup>25</sup> and he also seems to agree with Cohen that the problem with Locke’s labor theory of value is with his concept of *labor*. Following in the footsteps of Nozick and Cohen, he implicitly frames Locke’s concept of labor as solely a physical process. Thus, for instance, he contends that Locke’s labor theory of value is “most plausible in the case of [improved] land” and with “manufactured artifacts,” but he believes that it is “implausible in regard to food and other items that have been merely gathered from their natural state.”<sup>26</sup> The implicit premise is that the relative contribution of physical labor to the use value in the final product is much greater for a manufactured article than for pre-existing goods, and thus the moral claim to ownership in the former has greater force. Furthermore, his assumption that Lockean labor must refer only to physical actions is brought to the foreground in his statement that “Locke attempts to show that it is labour which is responsible for the wealth and prosperity of modern societies, and that explains why it is legitimate to take labour as a basis for property entitlements. But we know that if, indeed, it is labour which creates modern

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<sup>24</sup> Cohen, *Self-Ownership, Freedom and Equality*, 182-88.

<sup>25</sup> Jeremy Waldon, *The Right to Private Property* (Oxford: Clarendon Press, 1988): 192.

<sup>26</sup> Waldron, *The Right to Private Property*, 193.

prosperity, it is the unpleasant and alienated drudgery of the proletariat, not the autonomous and self-possessed activity of Lockean farmers.”<sup>27</sup>

Interestingly, Waldron does not say whether he thinks *ideas* are goods that are either manufactured or merely gathered through physical drudgery. Nonetheless, a substantial contingent of legal scholars and philosophers would have no truck with this distinction because they have long argued that patents and copyrights are appropriated by intellectual property owners from a pre-existing intellectual or cultural commons.<sup>28</sup> Moreover, in his writings on intellectual property rights, Waldron accepts as given (for the purpose of criticism) the dominant theory today that intellectual property rights, such as copyrights, are justified given their *economic value* and overall contribution to social welfare.<sup>29</sup>

These criticisms of Locke’s labor theory of value seem to have traction—and one so obvious to Nozick that he does not even feel it necessary to explain it—but only because they make fundamental assumptions about what Locke means by *labor* and *value*. The conventional wisdom among philosophers is that Locke’s labor theory of value justifies property rights in economic values based on proportional contributions of physical labor in the creation of these economic values. Even when philosophers recognize that Locke does not define value solely in terms of economic value, such as Cohen and Waldron, they still assume that labor means some

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<sup>27</sup> Waldron, *The Right to Private Property*, 321.

<sup>28</sup> See, for example, James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press, 2008). Boyle’s reference to the mind as a “commons” is deliberate; for, as Locke argues, in the beginning “God . . . hath given the World to Men in common . . . and no body has originally a private Dominion exclusive of the rest of Mankind.” (II.26) Justin Hughes similarly writes, “It requires some leap of faith to say that ideas come from a ‘common’ in the Lockean sense of the word. Yet it does not take an unrehabilitated Platonist to think that the ‘field of ideas’ bears a great similarity to a common.” Justin Hughes, “The Philosophy of Intellectual Property,” *Georgetown Law Journal* 77 (1988): 315. Among philosophers, see, for example, Herman T. Tavani, “Locke, Intellectual Property Rights, and the Information Commons,” *Ethics and Information Technology* 7, no. 2 (2005): 87-97.

<sup>29</sup> Jeremy Waldron, “From Authors to Copiers: Individual Rights and Social Values in Intellectual Property,” *Chicago-Kent Law Review* 68 (1992): 841-87.

form of quantifiable physical effort that should be directly correlated with the resulting value in a produced object. Absent some kind of proof of this direct correlation—and the category mistake in shifting between proportional physical effort and total value in a completed object is palpable—Locke’s labor theory of value collapses into a nonsequitor. This perhaps explains why it has been given such short shrift by contemporary philosophers across the ideological spectrum—from libertarians (Nozick) to socialists (Cohen).

Nonetheless, these philosophical critiques now constitute the baseline assumptions within contemporary intellectual property theory, particularly among many legal scholars in the “law and economics” movement. In *The Economic Structure of Intellectual Property Law* (2003), for instance, William Landes and Richard Posner merely assert as a foundational truism that “making intellectual property excludable creates value.”<sup>30</sup> Of course, as leaders of the law and economics movement, they mean *economic value* when they speak of value, and they do not feel it necessary to even consider the proposition that value is created, not by the legal definition of property rights under the law, but by the labor of a creator. If pressed, they would not need to point any further than to Nozick or Hettinger to confirm that value—economic value—is a socially created phenomenon and that Locke’s labor theory of value makes a nonsensical claim to a quantifiable correlation between proportional physical labor and total economic value.

Beyond the economic theory of intellectual property rights, legal scholars generally assume that Locke’s property theory rests on a basic claim about a relationship between *physical labor* and the *value* in a work of intellectual property. This is best evidenced by the reaction of legal scholars to the 1990 Supreme Court decision in *Feist Publications v. Rural Telephone Services*. In this copyright case, the Supreme Court overruled the “sweat of the brow” doctrine,

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<sup>30</sup> William Landes and Richard Posner, *The Economic Structure of Intellectual Property Law* (Cambridge: Harvard Univ. Press, 2003): 379.

which represented the theory in copyright law that legal protection of a copyright work is justified by the physical effort involved in creating the work.<sup>31</sup> Following this decision, scores of intellectual property scholars have asserted that “the Supreme Court in *Feist Publications* clearly and unequivocally disposed of the pure labor theory as justification for copyright.”<sup>32</sup> In sum, they have assumed—just as Nozick, Hettinger, Cohen and Waldron—that rejecting a theory of property rights that justifies protection of valuable creative works given the *physical labor* employed to produce these works is tantamount to rejecting Locke’s labor theory of property.

But *Feist* is even more significant, because it also exposes the conceptual blinders that have been created by the equivocation today between Marx and Locke. Although intellectual property scholars widely believe that *Feist* represents an unequivocal rejection of Locke’s labor theory of property in copyright law, they have all failed to read the *Feist* Court’s explicit approval of the nineteenth-century justification for copyright as securing the “fruits of intellectual labor.”<sup>33</sup> Of course, it is just as widely accepted that the ubiquitous references within Anglo-American property law to “securing the fruits of one’s labors” is an explicit invocation of Lockean property theory, particularly of the labor theory of value that functions as a central premise within Locke’s justification for property rights.

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<sup>31</sup> 499 U.S. 340, 352-54 (1991).

<sup>32</sup> Kenneth L. Port, “The ‘Unnatural Expansion of Trademark Rights: Is a Federal Dilution Statute Necessary?,” *Seton Hall Legislative Journal* 18 (1994): 485. For other references to *Feist* as representing a rejection of Locke’s labor theory or to the “sweat of brow” doctrine as representing (Lockean) labor theory, see John William Nelson, “The Virtual Property Problem: What Property Rights in Virtual Resources Might Look Like, How They Might Work, and Why They Are a Bad Idea,” *McGeorge Law Review* 41 (2010): 292; Robert Brauneis, “The Transformation of Originality in the Progressive-Era Debate Over Copyright in News,” *Cardozo Arts & Entertainment Law Journal* 27 (2009): 328-29; Shubha Ghosh, “Copyright as Privatization: The Case of Model Codes,” *Tulane Law Review* 78 (2004): 722-23; Wendy J. Gordon, “A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property,” *Yale Law Journal* 102 (1993): 1540, footnote 37. For an example of a legal scholar claiming that focusing on intellectual labor and creativity allegedly *conflicts* with the historical uses of labor theory in copyright, see Jane Ginsburg, “Creation and Commercial Value: Copyright Protection of Works of Information,” *Columbia Law Review* 90 (1990): 1875-81.

<sup>33</sup> *Feist Publications*, 499 U.S. at 346 (quoting *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879)).

How could intellectual property scholars miss such an overt invocation of Locke’s labor theory of value in the very decision in which they claim the Supreme Court rejects Locke’s labor theory of value? The obvious answer is that they failed to see this because they have misconstrued Locke’s labor theory of value, relying on the conventional wisdom among philosophers that Locke’s concept of labor refers only to *physical* labor, that his concept of value refers only to *economic* value, and that he is asserting that a proportional contribution of physical labor in the creation of a creative work justifies claiming a property right in the total value therein. In other words, what Nozick, Cohen, Hettinger and Waldron all ascribe to Locke is exactly the “sweat of the brow” doctrine rejected by the *Feist* Court. It is time to set the record straight and establish the proper textual and philosophical context that gives meaning to Locke’s labor theory of value. This context was well understood by early American jurists, which is why they believed that intellectual property rights secure the “fruits of intellectual labor.” In fact, as I have explained elsewhere, such natural rights justifications for intellectual property rights are ubiquitous in patent law cases and commentaries in the early American Republic.<sup>34</sup> The next part will proceed to make clear why this is so.

### III. LOCKE’S PROPERTY THEORY: THE NATURAL LAW OF LIFE, PRODUCTION AND VALUE

Since many legal scholars and philosophers spend so much of their time discussing the two provisos in Locke’s property theory—the waste proviso and the “enough and as good” proviso—it is easy to forget that these are merely corollaries of his two primary arguments for the right to property. The first premise is the “mixing labor” argument and the second is his labor theory of value. Waldron believes that one can and should separate the mixing labor argument

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<sup>34</sup> See Adam Mossoff, “Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent ‘Privilege’ in Historical Context,” *Cornell Law Review* 92 (2007): 953-1012.

from the labor theory of value,<sup>35</sup> but Locke would reject this attempt at analytically dicing up his property theory. As his property theory unfolds in Chapter Five of the *Second Treatise*, it is clear that he thinks these two premises are necessary and sufficient in explaining “how Men might come to have a *property* in several parts of that which God gave to Mankind in common.” (*TT* II.25)

Given the interrelated nature of Locke’s two central premises in his property theory—his “mixing labor” argument and his labor theory of value—it is necessary to discuss in some detail both of the premises constituting his property theory. Specifically, it is necessary to identify the *textual* and *philosophical* context in which Locke claims that “mixing labor” creates value in things that one can claim as one’s property. By rediscovering this all-important context in defining the basic terms in Locke’s property theory, such as labor and value, this exposes the misrepresentations and anachronisms in the widespread critiques, particularly of his labor theory of value. To wit, it belies the conventional wisdom today that Locke and Marx are of one mind when it comes to the labor theory of value. Moreover, this is essential to understand why Locke believes his property theory justifies intellectual property rights in inventions and writings.

#### A. “MIXING LABOR” AS PRODUCTIVE LABOR

The first premise in Locke’s property theory is his widely known and equally widely misunderstood “mixing labor” argument. As I and others have explained, “mixing labor” is Locke’s metaphor for the *productive activities* that man must engage in so that he can create the objects necessary for maintaining his life—transforming wheat into bread, animals into livestock

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<sup>35</sup> Waldron believes that the “mixing labor” argument is nonsensical and thus he thinks the labor theory of value should be conceptually separated from it. See Waldron, *The Right to Private Property*, 193. As I noted earlier, this is based on Waldron’s misunderstanding of the “mixing labor” argument, see Mossoff, “Locke’s Labor Lost.”

and steaks, and timber and rocks into houses.<sup>36</sup> Thus, I will call it the *productive labor* argument to avoid the misinterpretations of the “mixing labor” metaphor.

First, as a matter of textual analysis, Locke is absolutely clear in the *Second Treatise* that he defines his poetic phrase of “mixing labor” as referring to productive activities. His many examples of “mixing labor” that he employs throughout Chapter Five are all examples of production, such as husbandry, preparation of food, manufacture of clothes, and the creation of other basic commodities, including even wine. All of these examples illustrate his argument that “subduing or cultivating the Earth, and having Dominion, we see are joined together. The one gave Title to the other.” (*TT* II.35) In addition to his consistent references to productive activities, such as cultivation, as examples of “mixing labor,” Locke also repeatedly uses “industry” as a synonym for “labor” (see, for example, *TT* II.31, II.34, II.36, II.37, II.38, II.42, II.43, II.45, II.46). And beyond the book covers of the *Second Treatise*, Locke continues to refer to productive activities by the term, “labor”; this is perhaps best evidenced by his aptly titled essay, *Labour*.<sup>37</sup> Labor means production—the creation of valuable things for use by men—and mixing labor is merely his poetic metaphor in making this basic point. Thus, he writes, “God gave the World . . . to the use of the Industrious and Rational, (and *Labour* was to be *his Title* to it;) not to the Fancy or Covetousness of the Quarrelsome and Contentious.” (*TT* II.34)

But this textual identification does not explain *why* Locke believes that production is a moral activity that justifies the laborer claiming a property right in his created works. We should

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<sup>36</sup> Mossoff, “Locke’s Labor Lost,” 159-61. The same arguments are made by Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* 151 (Oxford: Clarendon Press, 1991); A. John Simmons, “Maker’s Rights,” *Journal of Ethics* 2, no. 3 (1998): 210; Daniel Russell, “Locke on Land and Labor,” *Philosophical Studies* 117 (2004): 318.

<sup>37</sup> See Mark Goldie, ed., *John Locke: Political Essays* (Cambridge: Cambridge University Press, 1997): 326-28. Here, for instance, Locke writes that “if the labour of the world were rightly directed and distributed there would be more knowledge, peace, health and plenty in it than now there is. And mankind be much more happy than now it is.” *Ibid.*, 328.

first be clear as to what Locke is not saying in his productive labor argument, as confusions abound in philosophical and legal literature. First, it is not because Locke merely asserts as an axiom that man owns his self. The idea that self-ownership is the axiomatic foundation of Locke's justification for property rights, adopted by Nozick and many others who have misunderstood both the productive labor argument and the labor theory of value, results from reading the *Second Treatise* as a political treatise without reference to the ethical concepts and principles that inform Locke's arguments therein.<sup>38</sup> For Locke, the reason why "every Man has a Property in his own Person" (*TT* II.27) is because, as he explains in the *First Treatise* and in *An Essay Concerning Human Understanding*, man is a rational animal who chooses to direct his actions in order with the natural law obligation to preserve his life (more on this below).<sup>39</sup>

Second, it is not because human labor merely replicates God's workmanship in making the universe (including humanity itself), as argued by Tully and other philosophers.<sup>40</sup> God does reign supreme in Locke's ethical and political philosophy, which is why the "workmanship model" has *prima facie* appeal as an explanatory theory, but God's role is not merely to serve as a role model whose actions man must imitate as a categorical imperative. Rather, God is important in Locke's ethical theory because he is the ultimate source of both the divine law and man's rational nature—the latter serving as the basis of the natural law (*ECHU* II.28.6-8).

Natural law and divine law, according to Locke, are complementary sources of moral obligation,

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<sup>38</sup> See, for example, Nozick, *Anarchy, State and Utopia*, 174-178; J.W. Harris, "Who Owns My Body?," *Oxford Journal of Legal Studies* 16, no. 1 (1996): 68-69. Tibor R. Machan, "Self-Ownership and the Lockean Proviso," *Philosophy and the Social Sciences* 39, no. 1 (2009): 93-98. While criticizing Nozick's use of the idea of self-ownership, which Nozick claims to take from Locke, Cohen maintains that "those who stand to the left of Nozick . . . might relax their opposition to the idea of self-ownership . . ." Cohen, *Self-Ownership, Freedom and Equality*, 71.

<sup>39</sup> See James Tully, *A Discourse on Property: John Locke and his Adversaries* (Cambridge: Cambridge University Press, 1980): 62-63, 105-117.

<sup>40</sup> John Simmons rightly criticizes the "workmanship model," first developed by Tully in *A Discourse on Property*, as lacking support in either the text or the analytical content of Locke's property theory. See Simmons, "Maker's Rights," 197-218.

and each instructs man in his basic moral duty: “Every one . . . is *bound to preserve himself* and not to quit his Station willfully.” (*TT* II.6) In the *First Treatise*, Locke writes that

God having made Man, and planted in him, as in all other Animals, a strong desire of Self-preservation, . . . and Being having been Planted in him, as a Principle of Action by God himself, Reason, *which was the Voice of God in him*, could not but teach him and assure him, that pursuing that natural Inclination he had to preserve his Being, he followed the Will of his Maker, and therefore had a right to make use of those Creatures, which by his Reason or Senses he could discover would be serviceable thereunto.

(*TT* I.86)<sup>41</sup>

In his property theory, Locke applies this basic moral duty—the preservation of life—to both explain and justify why productive labor is both the descriptive source and moral justification for property rights. In fact, Locke could not be clearer about this moral standard: the first sentence in Chapter Five (“Of Property”) informs readers that “natural *Reason* . . . tells us, that Men, being once born, have a right to their Preservation,” which Locke also points out is equally confirmed by “*Revelation*.” (*TT* II.25) In sum, the divine law and the natural law both direct man to preserve himself, and thus he has the right to take the actions necessary to preserve himself, such as laboring to create the products necessary to maintain his life. “God and his Reason commanded him to subdue the Earth, *i.e.*, improve it for the benefit of Life, and therein lay out something upon it that was his own, his labour.” (*TT* II.32)<sup>42</sup>

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<sup>41</sup> Earlier in the *First Treatise*, Locke writes that it is “the Priviledge of Man alone to act more contrary to Nature than the Wild and Untamed part of the Creation . . . and seem to forget that general Rule which Nature teaches all things of self Preservation, and the Preservation of their Young.” (*TT* I.56; see also I.92) In the *Second Treatise*, Locke’s repeatedly refers to self-preservation as the primary moral duty, see, for example, *TT* II.6, II.19, II.35 and II.129, which should always be understood as a duty within his natural law ethical theory.

<sup>42</sup> These two sources of obligation—God (divine law) and Reason (human nature and natural law)—are ubiquitous in Locke’s productive labor argument in his property theory. In Section 35, for example, Locke writes that “The Law Man was under, was rather for *appropriating*. God commanded, and his Wants forced him to *labour*. . . . And hence subduing or cultivating the Earth, and having Dominion, we see are joyned together. The one gave

Ultimately, this is Locke’s solution to the problem in the consent-based property theories of Hugo Grotius and Samuel Pufendorf. (*TT* II.25) It is not consent that justifies property, it is self-preservation, and productive labor is the means by which man sustains his life. An individual thus has “a Property in all that he could affect with his Labour: all that his *Industry could extend to, to alter* from the State Nature had put it in, was his.” (*TT* II.46; emphasis added) But the productive labor argument does more than merely serve as an end-run around the problems faced by consent-based property theories; rather, Locke derives it directly from his natural law ethical theory, which establishes as its foundational principle that self-preservation is man’s primary moral duty. Accordingly, the actions that serve this moral duty, such as producing the values required for the life of a rational animal, are morally justified. In sum, since man must preserve his life, he has a moral right to produce the values that fulfill this moral obligation, such as creating food, clothing, ships, factories, and all of the other examples of productive labor that Locke uses to illustrate this point. Thus, Locke glorifies the “Industrious and Rational” as a moral ideal (*TT* II.34), and this logically brings him to the second premise in his property theory—the labor theory of value.

### *B. THE LABOR THEORY OF VALUE: PRODUCING VALUES FOR HUMAN FLOURISHING*

Once we have established the moral import and function of productive labor within Locke’s property theory, we can now profitably discuss his second argument for property rights: the labor theory of value. Productive labor, according to Locke, is a moral activity because it creates the goods that sustain human life, and thus, by definition, productive labor must be a *value-creating activity*. As Stephen Buckle writes, “labour is the improving, value-adding

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Title to the other. So that god, by commanding to subdue, gave Authority so far to *appropriate*. And the Condition of Human Life, which requires Labour and Materials to work on, necessarily introduces *private Possessions*.” (*TT* II.35)

activity required by the duty to preserve oneself and others.”<sup>43</sup> Although Locke does not always explicitly define his terms, he does not hide the ball concerning the meaning of value: “the intrinsic value of things . . . depends only on their usefulness to the Life of Man.” (*TT* II.37) In sum, the moral standard that justifies productive labor is also what justifies the labor theory of value—productive labor is a moral activity because it sustains human life and the goods that result from productive labor are a value because they sustain human life.

In what *sense* of value are the goods created through productive labor? If one hews closely to Locke’s text and always remembers the overarching framework of his natural law ethical theory, it is evident that he has a thicker concept of value than merely money (or some social variant thereof). As always, we begin with his actual text and then we will situate this text within the context of his broader philosophical framework.

Locke first introduces the labor theory of value in § 36, a pivotal paragraph in Chapter Five of the *Second Treatise*, because it summarizes the preceding discussion of productive labor and it introduces the ensuing analysis of the labor theory of value. At a minimum, § 36 is a reminder that, in Locke’s mind, the productive labor argument and the labor theory of value are necessarily linked together in his justification for property rights—contra Waldron’s assertion that it is necessary to separate these two arguments. Here, Locke restates the main thrust of his productive labor argument that “the measure of Property, Nature has well set, by the extent of *Mens Labour, and the Conveniency of Life*.” He then asserts for the first time his labor theory of value by inferring a corollary from his definition of labor as production: “*Ground* is of so little value, *without labour*.” He thus transitions from productive labor argument to his labor theory of

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<sup>43</sup> Buckle, *Natural Law and the Theory of Property*, 151.

value by first asserting the *conclusion* of the labor theory of value; for the rest of the chapter, Locke fills out the details of his labor theory of value to prove his bald-faced assertion in § 36.

Before addressing the substance of his labor theory of value, it is important to recognize that Locke sometimes illustrates how values are created through productive labor by using money or by making quantitative comparisons value from productive labor and from other materials (see, for example, *TT* II.37 and II.43). These examples are entirely consistent with his natural law concept of value—something that serves the self-preservation of man as a rational animal—but they have nonetheless given superficial plausibility to the conventional wisdom today that Locke is Marx. But this confusion is easily dispelled when one focuses on the substance of his argument for the labor theory of value, as apart from out-of-context examples. For instance, Locke begins his argument for the labor theory of value in § 37 by first distinguishing between (1) the consent-based value in “*a little piece of yellow Metal*” (money) and (2) the “intrinsic value” that necessarily serves “the Life of Man.” Of course, his labor theory of value explains how men claim property rights in the latter, not the former, and it is this context that must be remembered when interpreting his examples of value-creating, productive labor that use monetary values or quantified proportions of relative contributions of value.

This also reconfirms the importance of construing his labor theory of property within the context of his prior argument for the moral justification for property rights arising from productive labor. The reason Locke distinguishes between money and “intrinsic value” is precisely because he has already explained why man must produce the goods necessary to support his life—this is a morally justified activity given that it serves the duty of self-preservation—and thus man has a moral claim to these produced values.<sup>44</sup> (*TT* I.92) Although

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<sup>44</sup> This explains the spoilage and “enough and as good” provisos, which delimit in the state of nature the scope of the initial acquisition of a property right through productive labor. (*TT* II.27 and II.31) Unlike the labor

money can serve this function, which is one reason why Locke uses it approvingly in his examples, the act of producing values to sustain one's life is more fundamental than market exchanges in complex commercial societies. The underlying normative claim is self-preservation of man as a rational animal—and the right to create, use and dispose of those things that serve this fundamental moral duty is the focus of Locke's argument for the labor theory of value. Hopefully, by Chapter Five, the reader has not forgotten Locke's injunction at the start of the *Second Treatise* that "To understanding Political Power right," we must "derive it from its Original." (II.4)

### 1. LOCKE'S MORAL IDEAL OF HUMAN FLOURISHING

What does Locke mean by the duty of self-preservation? More precisely, what is the nature of the values that man has a right to produce and to use in order to meet this fundamental moral obligation? The key is to recognize that Locke does not refer merely to "life" when he discusses the moral justification both for productive labor and to the property right to the values created thereby. Throughout the *Second Treatise*, Locke consistently explains that value-creating, productive labor serves "Life, and convenience" or the "Conveniences of Life" (II.26, II.34, II.37, II.36, II.48).

The "conveniences of life" is Locke's term for the flourishing life of a rational animal that is preserved through productive labor. The duty of self-preservation is not a duty to maintain only one's life as a brute, physical animal, and thus productive labor is not the purely *physical effort* employed by lower animals in sustainin their lives. Working within the classical natural law tradition, Locke recognizes that man is a *rational* animal. In fact, Locke begins *An Essay*

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theory of value, the nature and function of these two provisos are heavily debated in the literature today. This debate is beyond the scope of this article, which focuses solely on the labor theory of value. Yet it is important to acknowledge these two additional premises within Locke's property theory, and it is my belief that they are consistent with the construction here of both productive labor and the labor theory of value, although this argument must be presented in another article.

*Concerning Human Understanding* with this poignant observation: “Since it is the *Understanding* that sets Man above the rest of sensible Beings, . . . it is certainly a Subject, even for its Nobleness, worth our *Labour* to enquire into.” (*ECHU* 1.1.1; “labor” emphasis added) It is unsurprising here that Locke recognizes that the intellectual exercise of man’s rational faculty in understanding his nature and the world at large is an act of “labour,” i.e., it produces the requisite values necessary for sustaining the conveniences of life. In this case, it is the “Information of Vertue” (*ECHU* I.1.5; see also I.3.6) that is required for man to live a life in accord with his nature as a rational animal—a flourishing human life.

Locke’s oeuvre—the works in which he develops the larger philosophical framework that he presupposes in the political tract of the *Two Treatises*—reveals his commitment to a thick notion of human flourishing as a moral ideal. Locke vividly demonstrates this in his early work as a professor of moral philosophy at Christ Church, Oxford,<sup>45</sup> as well as in his more mature philosophical work completed later in his life. In his treatise on education, for instance, he reconfirms his knowledge of and commitment to ideals of natural law ethical theory. Thus, for

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<sup>45</sup> See John Locke, *Questions Concerning the Law of Nature*, trans. and ed. Robert Horwitz, Jenny Straus Clay & Diskin Clay (Ithaca: Cornell University Press, 1990). This posthumously published monograph comprises Locke’s lecture notes as a professor of moral philosophy, and it is rife with citations, quotations and paraphrases of classical sources. Although there are differences here from Locke’s more mature thought, the similarities are evident:

the law of nature is knowable by the light of nature. Since, in truth, the light of nature is the sole thing that directs us as we are about to enter the path of this life and that guides us . . . it is fitting, not only to use this light as do animals for the necessities of life and to employ it to direct our steps, but to investigate also by a deeper inquiry what this light is and [to discover] its nature and its principle. Now inasmuch as this light of nature is not tradition (as has been shown elsewhere), nor any inner principle of action inscribed in our minds by nature, there remains nothing that can be called the light of nature except reason and sense.

Ibid. 153. The essays by the translators and editors in this edition also do much to establish the classical influences, both explicit and implicit, in this work. For an excellent analysis of how Locke and the other modern natural rights philosophers were generally influenced by classical virtue ethics theory, see Eric R. Claeys, “Virtue and Rights in American Property Law,” *Cornell Law Review* 94, no. 4 (2009): 889-934. The natural rights philosophers generally embraced the classical philosophical ideal of the good as human flourishing. See Adam Mossoff, “What is Property? Putting the Pieces Back Together,” *Arizona Law Review* 45, no. 2 (2003): 371, footnote 166.

instance, in his recommendation of study on moral and political philosophy, he identifies works by Hugo Grotius and Samuel Pufendorf as necessary for a student to be “instructed in the natural rights of men, and the original and foundations of society.” Yet he maintains that Grotius and Pufendorf should be read only after the student “has pretty well digested Tully’s *Offices*,” referring to Cicero’s monograph on ethical theory, *de Officiis (On Duties)*. (STCE 185-186)<sup>46</sup> As Locke explains in the introduction to his treatise on education, dedicating a child’s education to the moral ideal of human flourishing is essential in creating a “sound mind in a sound body,” which “is a short but full description of a happy state in the world.” (STCE 1)

Although Locke does not explicitly cite to or quote from Cicero or other classical philosophers in the *Second Treatise*, revealing that he intended this work for popular as well as scholarly consumption, his argument for property is rife with evidence of his intellectual debt to natural law ethical theory. To take but one example: In *de Officiis*, Cicero explains that “it is clear that without the labour of men’s hands we could not in any way have acquired the fruits and benefits that are culled from inanimate objects,”<sup>47</sup> and Cicero makes clear that labor is not just physical effort, as he defines this concept in terms of “the application of craft and manipulative skills” and “human organization.”<sup>48</sup> In other words, “labor,” according to Cicero, refers to value-creating, productive labor. And this is a moral activity precisely because it serves a flourishing human life:

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<sup>46</sup> Although Cicero self-identified as a skeptic, *de Officiis* is based explicitly on the moral teachings of stoicism. See Miriam Griffin, “Introduction,” *On Duties* (Cambridge: Cambridge University Press, 1991): xix-xx. In Locke’s shorter and lesser known essay, *Some Thoughts Concerning Reading and Study for a Gentleman*, he again identifies only two books in his discussion of the “study of morality”: the New Testament and Cicero’s *de Officiis*. See Mark Goldie, ed., *John Locke: Political Essays* (Cambridge: Cambridge University Press, 1997): 351.

<sup>47</sup> Cicero, *On Duties*, 67.

<sup>48</sup> Cicero, *On Duties*, 67.

Why do I need to enumerate the multitude of arts without which there could be no life at all? What assistance would be given to the sick, what delights would there be for the healthy, what sustenance or comfort, if there were not so many arts to minister to us? It is because of these that the civilized life of men differs so greatly from the sustenance and the comforts that animals have.<sup>49</sup>

This is essential to Cicero's thesis that "nothing more pernicious can be introduced into human life" than "separating virtue from expediency."<sup>50</sup> In strikingly similar terms, Locke concludes his argument for the right to property in the *Second Treatise* by observing that his property theory shows how "Right and conveniency went together." (*TT* II.51)

As made clear by Locke's commitment to natural law ethical theory, a proper life is one lived in accord with man's nature—a rational animal capable of understanding and guiding his actions by the moral law, both divine and natural. As I noted in the previous section, Locke argues in the *First Treatise* for psychological egoism: all men have "a strong desire for Self-preservation" that is achieved through the proper use of the "Senses and Reason" that are given to him by God. (*TT* I.86) In the *Essay*, Locke affirms that "all Men's desires tend to Happiness," and here he employs a metaphor of bees and beetles to distinguish between two types of happiness pursued by two different types of men (revealing that his preference for the literary device of metaphors goes beyond the "mixing labor" metaphor in the *Second Treatise*).<sup>51</sup> The bees, according to Locke, pursue higher values ("Flowers, and their sweetness"), but beetles

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<sup>49</sup> Cicero, *On Duties*, 68.

<sup>50</sup> Pufendorf approvingly quotes this line from Cicero in *On the Law of Nature and Nations*. See Samuel Pufendorf, *De Jure Naturae et Gentium*, C.H. Oldfather and W.A. Oldfather, trans. (Oxford: Clarendon Press, 1934): 195. As I noted, Locke recommends Pufendorf's treatise as necessary for a proper education in political theory.

<sup>51</sup> Thank you to Eric Claeys for bringing this metaphor in the *Essay* to my attention. Locke's use of metaphors in the *Second Treatise* is not unusual, as he uses many metaphors throughout his philosophical writings. See Tom West, "The Ground of Locke's Law of Nature," *Social Philosophy & Policy*, vol. 29, no. 2 (2012): p. \_\_\_.

pursue only crude and limited physical values (“Viands; which having enjoyed for a season, they should cease to be, and exist no more”). (*ECHN* II.21.55) Although Locke does not explicitly draw out his moral evaluation, the nature of the comparison makes it clear as to which of the two animals represent the pursuit of values through productive labor. In their pursuit of the higher-value of sweetness, the bees seek true happiness—a flourishing life.

Accordingly, Locke criticizes the “Philosophers of old” who attempted to reduce value to a single source, whether “Riches, or bodily Delights, or Virtue, or Contemplation.” Such reductionism is absurd, according to Locke, as they “might have as reasonably disputed, whether the best Relish were to be found in Apples, Plumbs, or Nuts; and have divided themselves into Sects upon it.” (*ECHU* II.21.55) To cross the metaphors between the *Essay* and the *Second Treatise*, the bees seek the happiness in accord with a flourishing human life through “mixing their labor” and creating all of the sweet values that comprise the “conveniences of life.”

That Locke believes that the self-preservation pursued by rational men is that of a flourishing life served by the many physical and intellectual values that are produced through value-creating labor is not merely something that must be inferred from mixing his poetic metaphors of bees and labor. In the *Essay*, he writes that “the highest perfection of intellectual nature, lies in a careful and constant pursuit of true and solid happiness” (*ECHU* II.21.51), and to prevent people from concluding that happiness comprises purely intellectual contemplation, Locke explains in the *Two Treatises* that man is “an intellectual Creature” and thus he is “capable of *Dominion*.” (*TT* I.30)<sup>52</sup> Man’s intellectual nature—his rational faculty—is the

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<sup>52</sup> The full sentence in the *First Treatise* is: “God makes [man] *in his own Image after his own Likeness*, makes him an intellectual Creature, and so capable of *Dominion*.” This is important, because it also shows again how the “workmanship model” misconstrues the role of God in Locke’s argument for property. Locke thinks that God is essential for property, not as a role model by which man mimics his own actions, but because God made man a rational animal capable of learning both the divine law and the natural law, and which oblige him respectively to engage in value-creating, productive labor to sustain a flourishing human life.

ultimate source of labor that produces both intellectual values, such as the principles of virtue, and physical values, such as clothing, shelter and food. In sum, Locke’s property theory, especially his labor theory of value, must be construed within the context of his natural law ethical theory. It is only within this intellectual context that one can recognize the two premises of Locke’s argument that value-creating, productive labor is the fountainhead of property because it is only such labor that serves the happiness of a flourishing human life.

Toward the end of Chapter Five of the *Second Treatise*, Locke summarizes his argument for property

that though the things of Nature are given in common, yet Man (by being Master of himself, and *Proprietor of his own Person*, and the Actions or *Labour* of it) had still in himself *the great Foundation of Property*; and that which made up the great part of what he applied to the Support or Comfort of his being, when Invention and Arts had improved the conveniences of Life, was perfectly his own, and did not belong in common to others. (*TT* II.44)

This single sentence captures the entire context of Locke’s moral argument for property rights—both in tangible goods and in inventions and books. Since man is a rational animal he is “Proprietor of his own Person,” and this is why he has “in himself the great Foundation of Property,” because it is his rational mind that guides his productive labor. This productive “labour” is a moral activity because it is what secures his “support or comfort of his being,” and this does not mean just support of his physical or animal nature; rather, it is support of “the conveniences of life”—the flourishing life of a rational being. Thus, value-creating, productive labor is a moral activity that creates in the laborer a moral claim to the products of his labor—such things are “his own,” meaning he has a right to the use, enjoyment and disposal of them.

Moreover, that labor includes “invention and arts,” which “improved the conveniences of life,” reveals Locke’s moral approval of inventive activity and property rights therein. I’ll say more on this shortly, but first we must directly confront the conventional wisdom that Locke defines value in terms of physical labor, money, or both.

## 2. VALUE AND MONEY IN LOCKE’S LABOR THEORY OF VALUE

Contrary to the claims of Nozick, Cohen, Hettinger and others, when Locke writes that “’tis *Labour* indeed that *puts the difference of value* on everything,” (*TT* II.40) he is not referring to money or to the products of merely physical effort. Textually and substantively, Locke’s argument for the labor theory of value is clear that the values created through productive labor comprise all things that serve a flourishing human life, intellectual as well as physical. In a letter Locke wrote in 1698, for instance, to his friend, William Molyneux:

If I could think that discourses and arguments to the understanding were like the several sorts of cates [i.e., food] to different palates and stomachs, some nauseous and destructive to one, which are pleasant and restorative to another; I should no more think of books and study, and should think my time better employ’d at push-pin than in reading or writing. But I am convinc’d of the contrary: I know there is truth opposite to falsehood, that it may be found if people will, and is worth the seeking, and is not only the most valuable, but the pleasantest thing in the world.<sup>53</sup>

Locke believes that truth is “valuable” and “the pleasantest thing in the world” because, like Cicero and other ancient natural law philosophers, he believes that one cannot separate virtue from expediency. (*TT* II.51) Thus, truth is as necessary for the productive labor in the intellectual realm as the Earth is as necessary for productive labor in the physical realm; it is the

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<sup>53</sup> E.S. de Beer, ed., *The Correspondence of John Locke*, vol. 6 (Oxford: Clarendon Press, 1976), 294-95.

combination of the intellectual and the physical that makes possible a flourishing life. (*ECHU* 1.1.1; 2.21.51) As applied in his property theory, his labor theory of value further recognizes that if individuals are to have such a life, then they must engage in value-creating, productive labor to create these values in both the intellectual and physical spheres of human life.

One does not need to read Locke’s personal letters or the *Essay* to understand that he does not define value solely in terms of economic value, because he explicitly makes this point within the bounds of the *Second Treatise*. In Chapter Five, Locke explains that money is not necessarily a moral value, because it “has its *value* only from the consent of Man.” (*TT* II.50) In other words, it is neither man’s nature nor the nature of values that man must produce in order to live a flourishing life that makes money valuable; economic value is based entirely in social agreement, i.e., consent among participants in the marketplace. This is a particularly striking passage given that Locke’s labor-based property theory responds to the failings in the consent-based theories of property of Grotius and Pufendorf. For Locke, then, to claim that economic value is based in consent means that it is fundamentally distinct from the labor and values that comprise the foundation of his property theory, including his labor theory of value.

But economic value is not necessarily arbitrary nor does it necessarily contradict Locke’s labor-based property theory; quite the contrary, economic value can be a proper value that is justified by his natural law principles and his property theory so long as “Labour yet makes, in great part, *the measure*” of this economic value. (*TT* II.50) The symmetry of this proposition with his earlier statement that productive labor is the *measure* of property is not accidental. (*TT* II.36) Given the core argument of Locke’s property theory—it is value-creating, productive labor that creates property—the development of money has moral import if and only if it serves as a storehouse of these produced values. Accordingly, Locke acknowledges that money is invented

solely to serve as a medium of exchange for produced goods, and that the consent to this development is morally justified only insofar as it is consistent with the principles that validate the property arising from value-creating, productive labor. To extend Locke's point about the role of human decision-making in the state of nature: "though this be a *State of Liberty*, yet it is *not a State of License*." (*TT* II.6)

The moral status of economic value—money—within Locke's ethical and political theory is that it is a *derivative* concept of a broader normative concept of value that is both logically and temporally antecedent to economic value. Textually, this is evident from the non-economic uses of "value" that one finds throughout Locke's oeuvre (see, for example, *ECHU* II.21.46 and *ECHU* II.28.14), which reveals that this concept has a moral sense for Locke that is not restricted solely to quantities of money. Moreover, it is evident in the analytical structure of Locke's justification for money as the natural consequence of value-creating, productive labor. Locke writes that the "different degrees in Industry were apt to give Men Possessions in different Proportions, so this *Invention of Money* gave them the opportunity to continue and enlarge them." (*TT* II.48) Money, according to Locke, develops from and refers to the values created, used and possessed by men after engage in different degrees of value-creating, productive labor ("Industry"). If it were otherwise, then such a statement would be nonsensical. How else could money "continue and enlarge" the "Possessions" previously produced through "Industry"? Locke is clear that it is these possessions—the products of value-creating, productive labor—that men "agreed, that a little piece of yellow Metal" would represent in their commercial transactions. (*TT* II.37) To wit, value-creating, productive labor is the progenitor of economic value if only because there cannot be consent to the use of money without goods being created in the first place. Since the concept of value encompasses economic value, just as the human good

encompasses all values that serve the “conveniences of life,” Locke argues that the moral justification for men to consent to the use of money is rooted in the same value-creating, productive labor that produces all values in a flourishing human life.

Admittedly, Locke uses quantitative ratios and monetary sums in his favored farming examples of how “’tis *Labour* indeed that *puts the difference of value* on everything” (*TT* II.40). In discussing farming and its resulting products, he initially posits that labor accounts for 90% of the value in improved land and its products, but he quickly increases the labor-created value in a farm to 99%. (*TT* II.37) A few sections later, he repeats the claim that productive labor is responsible for between 90% and 99% of the value in improved land and its products (*TT* II.40), and in his final reference to his beloved farming example, he claims that productive labor is responsible for 99.9% of the value of improved land and its products. (*TT* II.43) In his final farming example, he even frames the 99.9% marginal contribution of value-creating, productive labor in monetary terms. (*TT* II.43)

What to make of these references to quantitative proportions of value and to money in Locke’s explication of his labor theory of value? First and foremost, there is nothing in the text of the farming examples that indicates that he intends the proportional contributions of value to be construed literally; that is, it is arguable that his references to the numeric ratios of value contributions, even in terms of economic value, reflects his literary preference for metaphors, such as his “mixing labor” and bees and beetles metaphors. These are expressions that Locke employs with artistic license to emphasize the substantial degree to which productive labor is the source of values in a flourishing human life.

Furthermore, at this late juncture in Chapter Five, it makes some sense for Locke to speak in terms of money in his examples because it is in these sections that Locke transitions to his

final analysis of the consent-based institutions of civil society and money. (*TT* II.45-50) As he writes in the penultimate section of Chapter Five: “But since Gold and Silver, being of little useful to the Life of Man in proportion to Food, Rayment, and Carriage, has its *value* only from the consent of Men, whereof Labour yet makes, in great part, *the measure*, it is plain.” (*TT* II.50) The labor theory of value, based in non-consensual productive labor (*TT* II.28-29), precedes and informs Locke’s discussion of the “Invention of Money,” as it arises through “mutual consent” (*TT* II.47-48) or “tacit and voluntary consent” (*TT* II.50).

Interestingly, when contemporary philosophers have reframed and criticized Locke’s labor theory of value, they have all missed the fact that Locke never says that the respective value contributions between pre-existing materials and productive labor is a quantifiable economic relationship that can or should be measured in justifying property rights. In fact, in the first two farming examples that Locke’s uses in his discussion of the labor theory of value, he expressly states that he is making only loose assessments; i.e., he explains that he must “speak much within compass” (*TT* II.37) and that “we will rightly estimate” (*TT* II.40) the values arising from productive labor. Making an estimate is hardly something a philosopher would do if he intends to claim that there is a necessarily quantifiable relationship between productive labor and value, and that identifying this proportional relationship is the analytical fulcrum for his normative justification for property rights in such values. In sum, the farming examples do not support the claim that Locke defines his concept of labor in solely *physical* terms or that he defines his concept of value in solely *economic* terms.

Similarly, Locke’s contemporary critics have all missed the logical structure of his argument for the labor theory of value and its final conclusions—the development of money, civil institutions and advanced commercial transactions. But Locke’s acknowledgment that

money is a derivative concept of value that arises logically and temporally from value-creating, productive labor that serves a flourishing human life is hardly a concession to the allegation that his labor theory of value justifies only economic values. It is true that he concludes his genetic argument for property rights in the values produced through productive labor—the values that serve a flourishing human life—with a discussion of money and a commercial economy, but this does not justify the interpretative claim that he defines the antecedent concept of value solely in terms of the consequent of economic value. Locke argues for a temporal and logical hypothetical proposition,  $P$  (value)  $\rightarrow$   $Q$  (economic value), and Nozick, Hettinger, and other contemporary philosophers have thus concluded that Locke asserts an identity proposition,  $P = Q$ . This is a nonsequitor and, when used to criticize his labor theory of value, it is a strawman attack as well.

Lastly, Locke's loose references to quantitative, monetary ratios in his farming examples must be metaphorical if we are to interpret him as being consistent in using the same concept of value in both his ethical theory and in his political theory—values are those things that serve a flourishing human life. Otherwise, Locke would be explicitly embracing a flagrant contradiction between his ethical theory and political theory, because he stridently rejects as absurd the reductionist theories of value by “ancient Philosophers” and yet he would be committing the exact same reductionism if he was Marx—arguing for a labor theory of economic value. In response to this contradiction imposed on him by his contemporary critics, Locke might write today: “Hence it was, I think, that the [Philosophers of new] did in vain enquire, whether *Summun bonum* consisted in Riches” in my theory of how property rights arise from value-creating, productive labor. (*ECHU* II.21.55) Since this problem arises only from the *interpretation* of Locke's labor theory of value by contemporary philosophers and scholars who have paid no heed to the principle of interpretative charity, it has been necessary to reconsider

Locke’s labor theory of value within its proper framework of his natural law ethical theory. Now that we have done this, we can profitably assess why Locke approves of intellectual property rights as rightly securing what early American judges often referred to as “the fruits of intellectual labor.”

#### IV. LOCKE’S JUSTIFICATION FOR INTELLECTUAL PROPERTY RIGHTS

In considering what Locke would think of intellectual property rights, it bears observing that one must be careful to avoid anachronisms in construing what a philosopher in the seventeenth and early eighteenth centuries might think about legal concepts like patents and copyrights. Patents, copyrights and the other legal concepts within the category of *intellectual property rights* began to take shape in the eighteenth century and did not really come to full fruition until the nineteenth century,<sup>54</sup> just as with other legal concepts that we now take for granted, such as contracts and corporations. In fact, the first time an American judge uses the phrase, “intellectual property,” is in a patent decision in 1845.<sup>55</sup> The early American court cases and commentaries reveal that judges and scholars explicitly invoked Lockean property theory to justify their creation and protection of property rights in inventions (patents) and creative works (copyrights),<sup>56</sup> but this does little to establish whether Locke himself would approve of such property rights.

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<sup>54</sup> See generally Mossoff, “Rethinking the Development of Patents,” 1255-1322; Stuart Banner, *American Property: A History of How, Why, and What We Own* (Cambridge: Harvard University Press, 2011): 23-44.

<sup>55</sup> See *Davoll v. Brown*, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845) (No. 3,662).

<sup>56</sup> In *Davoll v. Brown*, Circuit Justice Levi Woodbury explicitly invokes Locke’s value-creating, productive labor justification for property rights in inventions, writing that “we protect intellectual property, the labors of the mind, productions and interests as much a man’s own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears.” *Davoll*, 7 F. Cas. at 199. Moreover, Chancellor James Kent, a famous antebellum jurist and legal scholar, classified both copyrights and patents in his 1826 treatise, *Commentaries on American Law*, in a section entitled, “Original Acquisition by Intellectual Labor.” There, he argued for the Lockean principle that “It is just that [authors and inventors] should enjoy the pecuniary profits resulting from mental as well as bodily labor.” James Kent, *Commentaries on American Law*, vol. 2 (Little, Brown & Co., 12th edition, 1873): 474. For further discussion of the ubiquitous Lockean justifications for intellectual property rights, especially patents, in the early American Republic, see Mossoff, “The Use and Abuse of IP at the Birth of the Administrative State,” 2022-2024;

But we do not need to merely infer from Locke’s property theory that he would approve of intellectual property rights, because he recognizes their moral validity as property rights. In fact, he states such approval explicitly about copyright, and he also expressly praises the value-creating, productive labor in *inventive activity* within his exegesis of this property theory in the *Second Treatise*. Each of these points will be addressed in turn, but it is important to reassert the normative framework of the ethical theory at work in his property theory—value-creating, productive labor is a moral activity because it is the means by which man meets his fundamental moral obligation to live a flourishing life. This is what gives Locke’s particular arguments about property rights in literary works and inventions their normative import.

As before, it is best to begin with the text, as Locke’s express endorsement of an author’s property right in a literary work is the easiest way to disabuse the conventional wisdom among many law professors today that intellectual property rights contradict Locke’s property theory.<sup>57</sup> In 1695, Locke pens an essay that criticizes a proposed law in Parliament that would extend the monopoly originally granted to the Stationers’ Company by the Licensing Act of 1662 as the sole printer of literary works in the English Realm.<sup>58</sup> By his law, Locke argues, “the Company of Stationers have a monopoly of all the classic authors and scholars,” such as Cicero, whose works figure prominently in his argument that there is no “reason in nature why I might not print them as well as the Company of Stationers if I thought fit.” (Of course, as I discussed earlier in Part Three, it is hardly surprising that Locke would be so interested in the dissemination of Cicero’s

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Mossoff, “Who Cares What Thomas Jefferson Thought About Patents?,” 990-998; Mossoff, “Patents as Constitutional Private Property,” 705-707 & 718-719.

<sup>57</sup> I discuss this conventional wisdom in Mossoff, “The Use and Abuse of IP at the Birth of the Administrative State,” 2047.

<sup>58</sup> This 1695 memorandum was recently brought to light by Justin Hughes, “Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson,” *Southern California Law Review*, vol. 79 (2006): 1012. In his earlier work, though, Hughes embraces the conventional wisdom that Locke’s labor theory of value refers to only physical labor and “social value” (i.e., money). See Hughes, “The Philosophy of Intellectual Property,” 299-310.

works given his own admiration for the ethical theory of this Roman philosopher.) Locke laments that “By this Act scholars are subjected to the power of these dull wretches who do not so much as understand Latin,” and that ultimately, this printing monopoly “is very unreasonable and injurious to learning.” Thus, he concludes that “’tis very absurd and ridiculous that anyone now living should pretend to have a property in or a power to dispose of the property of any copies or writings of authors who lived before printing was known or used in Europe.”<sup>59</sup>

Moreover, the printing monopoly in literary works runs counter to what contemporaneous “authors” can rightly claim as “their property,” which should be secured to them, their heirs or assignees for their lifetimes plus “50 or 70 years.” And just to be clear that Locke believes that it is authors who have a property right in their literary works, not printers, he proposes an amendment to the 1695 bill in which the precatory clause states “To secure the author’s property in his copy, or to his whom he has transferred it, . . .”<sup>60</sup> In sum, Locke believes firmly in an “author’s property in his copy”—what we now call *copyright*.

Substantively, Locke’s commitment to what was then a nascent concept of copyright makes sense, given that his property theory is grounded in his natural law ethical theory in which he recognizes that man is a rational animal for whom productive labor of both intellectual as well as physical values is the means by which man lives a flourishing life. In this respect, it is significant that he criticizes the Stationers Company’s printing monopoly as “injurious to learning,” a breach of a fundamental virtue, according to Locke. (*ECHU* 1.1.1) As he explains in his writings on education, the labor of learning produces the “Information of Vertue” (*ECHU*

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<sup>59</sup> Mark Goldie, ed., *John Locke: Political Essays* (Cambridge: Cambridge University Press, 1997): 330-338.

<sup>60</sup> Goldie, *John Locke: Political Essays*, 338.

1.1.5), which is fundamental to right action and to achieving the “conveniences of life”—a flourishing life.

Locke’s commitment to copyright thus reflects his belief that all manifestations of value-creating, productive labor, whether philosophical or physical, are rooted in man nature as a rational animal. In the *First Treatise*, for instance, he explains that it is man’s nature as “an intellectual Creature” that makes him “capable of *Dominion*.” (*TT* I.30). Previously, in Part Three, I highlighted this sentence to show that Locke understands that a flourishing human life consists of both intellectual and physical labor—the production of the intellectual and physical values that serve the “conveniences of life” through the uniquely human capacity for rationally guided action. Here, this sentence serves a different function, as it reveals that Locke grasps that it is man’s intellectual nature—his rational mind—that is the ultimate source of the labor that produces physical values, such as clothing, shelter and food. He does not explicitly explain this point, but the implication is that physical values are made possible only through the exercise of man’s rational mind in learning how to produce these goods. When a rational man engages in this value-producing labor, he creates property—*dominion* in the Latin of the Roman Law and of modern political philosophy.<sup>61</sup>

This foundational principle from his ethical theory explains why many of his examples of value-creating labor in the *Second Treatise* consist of the “Industry” of technological inventions, such as the bread that is made by the “Mill [and] Oven,” the “Plough” that tills the soil, “all the

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<sup>61</sup> There is an ambiguity in the Latin *dominion*, which also refers to political authority (see, for example, *TT* II.4, II.90 II.120), but Locke’s usage of this term in the context of discussing property rights is consistent with other modern natural law philosophers who also referred to property as *dominion*. (*TT* I.29, I.39, II.26, II.35) This explains William Blackstone’s reference to “the rights of dominion, or property,” in discussing the views of “writers on natural law.” It also explains his famous definition of “the right of property; or the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” William Blackstone, *Commentaries on the Laws of England*, vol. 2 (Chicago: The University of Chicago Press, 1979): 1-2.

Materials made use in the Ship,” etc. (*TT* II.43) And we must not forget the conceptual skills of artisans that made possible “the Labour of those who broke the Oxen, who digged and wrought the Iron and Stones, who felled and framed the Timber.” (*TT* II.43) This is what Locke means that “the ordinary Provisions of Life, through their several progresses, before they come to our use, . . . receive of their *value from Human Industry*.” (*TT* II.42) His examples of his labor theory of value reflect his moral approval and admiration for how technological inventions secure for man “the conveniences of life”—a flourishing human life. This shows the degree to which Locke’s farming examples, which are highlighted by legal scholars and philosophers to show that his property theory is allegedly restricted to only parcels of Earth or tangible chattels, have been widely misconstrued. His repeated references to farming as illustrations of value-creating, productive labor are replete with conspicuous references to the technological inventions that make farming an example of value-creating, productive labor.

Ultimately, this is why Locke approvingly includes “Inventions and arts” in his seminal summation of his theory of how value-creating, productive labor creates property rights—property rights that are morally justified because they serve the “conveniences of life.” (*TT* II.44) Although the legal concept of patents—property rights in inventions—did not exist yet in 1690,<sup>62</sup> there could hardly be a more explicit indication of his willingness to include what would later become patents within his property theory. If anything, Locke’s explicit approval of copyright—an author’s property right in copies of a literary work—reaffirms the validity of this inference, as copyright and patents are both intellectual property rights. And the ease by which early American judges and commentators embraced a Lockean justification for patents reveals

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<sup>62</sup> See Adam Mossoff, “Rethinking the Development of Patents,” 1255-1322.

the extent to which these intellectual property rights conformed to Locke’s justification for property rights as arising from the intellectually-based value creation in productive labor.

The natural law ethical theory that informs Locke’s argument for property rights explains why he thinks his property theory applies to inventions and books. In § 34 the *Second Treatise*, Locke explains that God gave the world “to the use of the Industrious and Rational” who obtain the “greatest Conveniences of Life they were capable to draw from it” by the “*Labour* [that] was to be *his Title* to it.” It is man’s rational nature as an “intellectual Creature” (*TT* I.30) that is the source of both the moral ideal—the virtues that guide one toward a flourishing life of happiness—and the means to that end—value-creating, productive labor. It is not wolves, lions, or other “dangerous and noxious Creatures” (*TT* II.16) who have invented the plough, the mill, and ships. Such inventions represent the achievements of the value-creating, productive labor that serves the flourishing life, and this is why Locke highlights them as exemplars of his property theory generally and of his labor theory of value specifically.

#### V. LOCKE’S LABOR LOST: WHY LOCKE BECAME MARX

Locke’s labor theory of value has suffered much at the hands of contemporary philosophers. In critiquing his property theory and its application to intellectual property rights, Hettinger, Nozick, Cohen and others have redefined Locke’s fundamental concept of labor in purely *physical* terms, they have redefined his concept of value in purely *economic* terms, or they have made such conceptual assumptions in imposing on Locke’s argument for the labor theory of value a methodology of quantifying physical inputs relative to economic value outputs. But as made clear in the previous parts, these are not Locke’s concepts of labor or value. His concept of labor refers to production, which has intellectual as well as physical characteristics, and his concept of value serves his moral ideal of human flourishing, which is a conception of the good

that is more robust than merely physical status or economic wealth. Even more importantly, he never says that property rights in the values created through productive value are justified by a measurable or quantifiable relationship between labor inputs and value outputs.

How has such a widespread misunderstanding of Locke's labor theory of value come to pass? There is probably no single answer to this question, and Locke would agree. To insist on a single answer would commit the same reductionist error of the "Philosophers of old" that Locke chastises in *An Essay Concerning Human Understanding*. (ECHU II.21.55) Just as there are myriad intellectual and physical values that serve a flourishing life, there are many reasons as to how a mistaken conventional wisdom comes about; they all have at least some explanatory force, and thus a single article cannot delve into all of them or fully engage with the historian as to which are the most fundamental or causal factors. In this concluding part, I will briefly identify one possible source for the misunderstanding of Locke's labor theory of value today, and I must leave it to philosophers and intellectual historians to explore more in depth the issues that I can only briefly touch on in this part.

Locke unfortunately has himself to blame for this misunderstanding. Admittedly, he disagrees with Marx's labor theory of economic value (what Marx and economists call "exchange-value"), as he does not think that the purpose of his labor theory of value is solely to explain how and why economic value arises in commodities in the marketplace. As the previous parts made clear, Locke does not define value solely in terms of economic value, and, even more important, he believes that the ethical concept of value is broader and more fundamental than the derivative concept of economic value. However, Locke endorses some ideas in his labor theory of value that are shared by Marx and thus there is an undeniable historical link between the two theories. Locke's arguments for the labor theory of value in the *Second Treatise*, or more

specifically, his use of the now-famous farming examples to illustrate the labor theory of value, made it plausible for follow-on philosophers to link Locke and Marx more closely than merely as a matter of family resemblance.

As a preliminary matter, it is unfortunate that Locke does not have an explicitly developed theory of value, or at least there is no standalone analysis of the normative concept of value in his extant writings. Thus philosophers and scholars have been forced to make inferences from what he does say about value throughout his philosophical writings generally, such as in his ethical theory presented in *An Essay Concerning Human Understanding* and in his property theory presented in the *Second Treatise*. When one considers the full context of these works, it is clear that Locke believes that a value is something that serves a flourishing human life—it is something that provides intellectual and material support for the life of a rational animal. Thus, for instance, his observation that when men quit “the Common Law of Reason,” they become “dangerous and noxious Creatures” (*TT* II.16), because they then take actions that threaten everything that makes a flourishing human life possible to other men who are living according to their rational nature and engaging in value-creating, productive labor.

But just as it is necessary to explain how Locke identifies the ultimate source of property in value-creating, productive labor, it is equally necessary to ask what is the ultimate source and meaning of Locke’s concept of value. He never explicitly identifies this beyond noting that value serves human life: “the intrinsick value of things, which depends only on their usefulness to the Life of Man.” (*TT* II.37) In his property theory, he argues that it is productive labor that leads to this value, and in his labor theory of value, he uses a recurring farming example to support his claim that “’tis *Labour* indeed that *puts the difference of value* on everything” (*TT* II.40). The farming examples are as ubiquitous in his property theory as they are important (*TT* II.36, II.37,

II.38, II.40, II.42, II.43, II.46, II.48), especially when it comes to his arguments for his labor theory of value. They are important because they reveal that Locke believes that there is some value in the raw materials of the world that *pre-exists* any value-creating, productive labor, and this becomes the conceptual linchpin for the equivocation between Locke and Marx.

The refrain in Locke’s farming examples is that there is *proportional* value contribution between productive labor and the pre-existing material of the land, ore or other natural products in the world. He claims that the relative contribution of productive labor to the total value in a finished thing of usefulness ranges between 90% to as much as 99.9%. (II.40) Locke thus assumes that there is some value, however negligible, that pre-exists the rational thought and action that produces a value—whether a farm, a mill, or a ship, to use his own examples from the *Second Treatise*. Locke’s concept of “intrinsic value” means that productive labor is not the *sole* source of creating value in the world. In fact, he readily acknowledges this point in one of his farming examples in his discussion of his labor theory of value: “the improvement of *labour* makes the far greater part of the *value*.” (TT II.43) Thus, Locke’s farming examples confirm that he does believe, as he states, that there is “natural, intrinsick Value” that exists separately from any productive labor by men. (TT II.43) Again, he intends his concept of value to be limited to neither physical conditions nor economic relationships—this “natural, intrinsick Value” is defined in terms of the happiness of a rational man seeking a flourishing human life. But, unfortunately, his argument does not equal his intention.<sup>63</sup>

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<sup>63</sup> Ayn Rand also identifies this as the concept of “intrinsic value,” using the same terminology that Locke uses in referring to his own concept of value (TT II.37, II.43), but she differentiates Locke’s concept of value from her “objective” concept of value, which she defines as “that which one acts to gain and/or keep.” See Ayn Rand, “The Objectivist Ethics,” *Virtue of Selfishness* (1964): 15. In other words, for Rand, values arise *solely* from the goal-directed actions that a living organism must engage in to preserve its life. There is no value until a living being takes the actions necessary to sustain itself, and then *one-hundred percent of the value* is directly attributable to the action of the living organism pursuing a specific purpose. See Tara Smith, “The Importance of the Subject to Objective Morality: Distinguishing Objective from Intrinsic Value,” *Social Philosophy & Policy* 25, no. 1 (2008) 126-148. For instance, many people believe that a parcel of fecund soil in the American Midwest is valuable and a

The concession to proportional contributions of value naturally led to the questions about the *source* of value, such as whether it is created by quantifiable physical labor, and the *meaning* of value, such as whether it is economic value (the pound and pence). At this level of conceptual analysis in meta-ethics, Locke simply asserts that value-creating, productive labor creates 90–99.9% of the total value in a final product that is “useful[] to the Life of Man” (*TT* II.37). Why this is so, and, even more important, how this justifies a moral claim—a right to property—to 100% of the final product is an argument Locke does not make.

Unsurprisingly, this represents the critique—the unanswered rhetorical questions, to be precise—raised by Hettinger, Nozick, Cohen and others. Apparently, when these philosophers thought about these questions, which were legitimate given the nature of Locke’s belief in pre-existing, intrinsic value in the world, Locke’s references to money in his labor theory of value pointed the way to an answer, at least this is what can be garnered from the nature of their brusque criticisms. That is, Hettinger and Nozick assume that Locke is speaking of economic value, which is measurable and quantifiable in terms of its inputs and outputs. Moreover, defining labor solely in terms of physical action, which is measurable and quantifiable, seemed like another plausible way to make sense of Locke’s argument for marginal contributions to the value of things used by men. This of course is the alternative interpretive move made by Cohen and others. In sum, to make sense of Locke’s labor theory of value, as it is presented only in the *Second Treatise*, contemporary philosophers filled in the conceptual gap—Locke’s ethical concept of value—and assumed that Locke defines labor in terms of physical actions, that he defines value in terms of economic value, or both.

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parcel of desert in the American Southwest is not, but this is only because they assume an unstated premise that the purpose for the use of the two parcels is farming. If one changes the purpose, such as building semi-conducting silicon chips for computers, then the sand in the desert is extremely valuable and the fecund soil is not. The value is defined by the specific goal and then created by the specific action undertaken by a living organism in pursuing this goal in sustaining its life, such as the flourishing life of rational individual.

In making these assumptions, this is why it seems like Marx is channeling Locke when Marx develops his own labor theory of economic value. In language that appears to mirror Locke's farming examples, Marx writes in *Das Kapital* "that labour is not the only source of material wealth, of use-values produced by labour. As William Petty puts it, labour is its father and the earth its mother."<sup>64</sup> Of course, the substantive content of their respective concepts of value are different—Locke is speaking about the myriad things that serve the flourishing life of a rational animal and Marx is speaking about measurable physical and economic data. Yet, they both agree that there are two independent *sources* of value—that value which exists in the world and that value which arises from productive labor.

One must be careful not to carry this point too far, though. Although Locke embraces the concept of intrinsic value, this does not mean that either his concept of value or its application in his labor theory of value is the same as Marx's. Locke and Marx may have shared the belief in pre-existing intrinsic values in the world to which there is added a contribution by productive labor, but unlike Locke, Marx believes that value means economic value or at least some other socially determined form of wealth. As Marx explains in *Das Kapital*: "Use-values become a reality only by use or consumption; they also constitute the substance of all wealth, whatever may be the social form of that wealth." Thus, Marx ultimately believes that "exchange-value is the only form in which the value of commodities can manifest itself or be expressed."<sup>65</sup> For Marx, identifying use-values in things is only a premise in explaining the complete meaning of such values in society: "An increase in the quantity of use-values is an increase of material wealth."<sup>66</sup> At the end of the day, for Marx, value means economic value—no more, no less.<sup>67</sup>

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<sup>64</sup> Marx, *Das Kapital*, vol. 1, 309.

<sup>65</sup> Marx, *Das Kapital*, vol. 1, 303-05.

<sup>66</sup> Marx, *Das Kapital*, vol. 1, 312.

Marx's labor theory of economic value reflects his underlying belief in the inherently social nature of ethical and political concepts. As Marx argues, "to stamp an object of utility as a value, is just as much a *social product* as language."<sup>68</sup> (This is why, Cohen argues, Marxists believe that the labor theory of value is essential to their critical political theory of the ideology of capitalist exploitation.<sup>69</sup>) Such a fundamental communitarianism in Marx's ethical theory stands in sharp contrast to ethical theory of Locke, which is individualistic insofar as it posits an individual's productive labor as the progenitor of the values that serve that individual's flourishing life. In this meta-ethical sense, Locke and Marx stand on opposite sides of a deep conceptual divide about the meaning of value, and thus their respective labor theories of value reflect this fact.

But even if one can successfully drive a conceptual wedge between Locke and Marx's labor theories of value, despite their mutual embrace of an intrinsicist concept of value, Locke's farming examples made it seem reasonable for follow-on commentators to conclude that he believes that there are specific proportional contributions of value, whether measurable in physical labor, economic value, or both. Locke admits that some "natural, intrinsic Value" exists in the world apart from productive labor (*TT* II.43), regardless of whether it is quantifiable or even measurable, and this has been the fulcrum by which philosophers today have equated Locke with Marx.

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<sup>67</sup> Ronald L. Meek, *Studies in the Labor Theory of Value*, 2d ed. (New York: Monthly Review Press, 1956): 157-200. David Ramsay Steele writes that "The Marxian labor theory of value (LTV) is intended to explain the determination of prices under commodity production (this is occasionally denied, but see Steele 1986). In Marxian terminology, there can be no 'value' in post-capitalist society." David Ramsay Steele, *From Marx to Mises: Post-Capitalist Society and the Challenge of Economic Calculation* (La Salle: Open Court Publishing Co., 1992): 127.

<sup>68</sup> Marx, *Das Kapital*, vol. 1, 303-05, 322 (emphasis added). Marx explicitly and repeatedly argues that value is purely relational or social. *Ibid.*, 315-17, 321-23, 328.

<sup>69</sup> Cohen, *Self-Ownership, Freedom and Equality*, 172-73.

The influence of this equivocation between Locke and Marx on contemporary intellectual property theory is beyond doubt. Today, legal scholars are wont to assert that “Intellectual property rights are justifiable only to the extent that that excludability does in fact create value.”<sup>70</sup> As two of the founders of the American “law and economics” movement proclaim: “making intellectual property excludable creates value.”<sup>71</sup> On their face, such pronouncements sound vaguely Lockean, as they imply that the justification for intellectual property right is the value creation that follows from their protection under the law—the legal definition and enforcement of these rights as “excludable” from others. But on closer inspection, this is deeply mistaken. The assumption in such statements is that value *follows* from the legal enforcement of exclusion; in other words, intellectual property rights cannot be commodified and valued on the market until the law secures them exclusively to their owners, who then can contract with them in commercial transactions once people are legally forbidden from copying the invention or book. Such an economic argument, though, turns Locke’s property theory on its head. For Locke, productive labor creates values that pre-exist civil society, civil government, or the market. According to Locke’s theory of natural property rights, the legal enforcement of exclusion in property and intellectual property rights *follows* from the creation of value.

In short, Locke is not Marx, despite the terminological similarity in their respective labor theories of value. It is time to rediscover the original meaning of Locke’s property theory, as presented in his own words and in the context of his own natural law ethical theory. As evidenced by his heavy debt to such classical natural law ethicists as Cicero, Locke argues that how value-creating, productive labor is morally justified insofar as it contributes to a flourishing

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<sup>70</sup> Mark Lemley, “Property, Intellectual Property, and Free Riding,” *Texas Law Review* 83 (2005): 1057. Lemley is describing the conventional wisdom here, as he disagrees with this statement, but only because he disputes the assumption that intellectual property rights are justifiable on economic value grounds.

<sup>71</sup> Landes and Posner, *The Economic Structure of Intellectual Property Law*, 379.

human life—serving all of the “conveniences of life.” This is why Locke believes that the products of such labor, whether in land, technological inventions or books, are the producer’s property, and thus deserving of protection under the law.

## VI. CONCLUSION

Locke’s labor theory of value is widely misunderstood today, and this is especially true in intellectual property theory, in which it is accused of being incoherent, weak, backwards in its logic or simply wrong. These attacks, however, are based on a deeply mistaken conceptual assumption that Locke defines labor solely as physical action, value solely as economic value, or that his labor theory of value utilizes a methodology of quantifying proportional contributions of physical labor inputs to economic value outputs. Although these critics claim to be targeting Locke, they are in fact thrashing Karl Marx and his labor theory of economic value, in which exchange-value does arise from proportional contributions of materials and physical actions. It is time to save Locke from Marx, identifying his labor theory of value on its own terms and in philosophical context, such that we can better understand how and why Locke applies it to intellectual property rights in inventions and books.

When Locke’s labor theory of value is understood within its proper context—it is an application in political theory of his natural law ethical principles—it is anything but incoherent or Marxist. Although Locke does not advance an explicit theory of value, his writings on this fundamental ethical concept throughout his mature philosophical works reveal that he defines it in terms of those things that serve a flourishing life of a rational individual. In the *Second Treatise*, written for consumption by public intellectuals and the like, he repeatedly refers to this moral standard by his ubiquitous turn of phrase, “conveniences of life.”

The products of value-creating, productive labor comprise both intellectual and physical values—and thus they represent the *dominion* that follows from man’s nature as an “intellectual creature.” This is why Locke recognizes the moral validity of an author’s property right in controlling copies of books. In his full-throated defense of property rights in the *Second Treatise*, he identifies “Inventions and Arts,” as exemplars of his theory of how property arises from the value-creating, productive labor of the “Rational and Industrious.” His approval of what we now call intellectual property rights is no more tenuous than it is oblique. It is for this reason that many early American judges and commentators found it natural to look to Locke’s natural rights philosophy for the moral justification in securing the rights of inventors, authors and other creators of intellectual property in the nineteenth century.