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## Jefferson's Taper

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# JEFFERSON'S TAPER

Jeremy N. Sheff\*

## ABSTRACT

*This Article reports a new discovery concerning the intellectual genealogy of one of American intellectual property law's most important texts. The text is Thomas Jefferson's often-cited letter to Isaac McPherson regarding the absence of a natural right of property in inventions, metaphorically illustrated by a "taper" that spreads light from one person to another without diminishing the light at its source. I demonstrate that Thomas Jefferson likely copied this Parable of the Taper from a nearly identical passage in Cicero's De Officiis, and I show how this borrowing situates Jefferson's thoughts on intellectual property firmly within a natural law theory that others have cited as inconsistent with Jefferson's views. I further demonstrate how that natural law theory rests on a pre-Enlightenment Classical Tradition of distributive justice in which distribution of resources is a matter of private judgment guided by a principle of proportionality to the merit of the recipient—a view that is at odds with the post-Enlightenment Modern Tradition of distributive justice as a collective social obligation that proceeds from an initial assumption of human political equality. Jefferson's lifetime correlates with the historical pivot from the Classical to the Modern Tradition, but modern readings of the Parable of the Taper, being grounded in the Modern Tradition, ignore this historical context. Such readings cast Jefferson as a proto-utilitarian at odds with his Lockean contemporaries, who supposedly recognized property as a natural right. I argue that, to the contrary, Jefferson's Taper should be read in light of the Classical Tradition from which he borrowed and the Baconian scientific model he admired, such that it not only fits comfortably within a natural law framework, but also points the way toward a novel natural law-based argument that inventors and other knowledge creators actually have moral duties to share their knowledge with their fellow human beings.*

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*“For upon every invention of value, we erect a statue to the inventor, and give him a liberal and honourable reward.”<sup>1</sup>*

—Francis Bacon

## I. INTRODUCTION

**B**Y virtue of his position as the first Secretary of State of the United States, Thomas Jefferson was intimately involved in the establishment of the federal patent system. Under the Patent Act of 1790,<sup>2</sup> Jefferson was responsible for receiving patent applications and was one of the three men (with the Secretary of War and the Attorney General) comprising the “Patent Board” that determined whether a new invention was worthy of a patent. Due to the combination of these responsibilities with his keen interest in the technological arts, Jefferson has been called the Patent Board’s “moving spirit” and the American patent system’s “first administrator.”<sup>3</sup>

Two decades later, Jefferson (now a private citizen) received a letter from a Baltimore millstone maker named Isaac McPherson about a pend-

1. 3 FRANCIS BACON, *New Atlantis*, in THE WORKS OF FRANCIS BACON 235, 258 (1730) [hereinafter BACON, *New Atlantis*]. The cited editions of Bacon’s works are those attested in Thomas Jefferson’s library, with spellings modernized and typefaces standardized. See 5 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON 166–68 (E. Millicent Sowerby ed., 1959) [hereinafter 5 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON].

2. Act of April 10, 1790, ch. 7, § 1, 1 Stat. 109, 109–10 (repealed 1793).

3. P.J. Federico, *Operation of the Patent Act of 1790*, 18 J. PAT. OFF. SOC’Y 237, 238 (1936) [hereinafter Federico, *Operation of the Patent Act of 1790*].

ing lawsuit over infringement of a flour mill patent.<sup>4</sup> Jefferson's letter responding to McPherson has since become part of the fundamental lore of American intellectual property (IP) law—the statutory patent and copyright privileges afforded by federal law to inventors and authors, respectively. After expressing his (generally critical) opinions of the strength of the patent in suit, Jefferson suddenly waxed philosophical on the nature of patent rights:

It has been pretended by some, (and in England especially,) that inventors have a natural and exclusive right to their inventions, and not merely for their own lives, but inheritable to their heirs. But while it is a moot question whether the origin of any kind of property is derived from nature at all, it would be singular to admit a natural and even an hereditary right to inventors. It is agreed by those who have seriously considered the subject, that no individual has, of natural right, a separate property in an acre of land, for instance. By an universal law, indeed, whatever, whether fixed or movable, belongs to all men equally and in common, is the property for the moment of him who occupies it, but when he relinquishes the occupation, the property goes with it. Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody. . . .

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4. For a brief history of the Evans flour mill patent and Jefferson's role in it, see Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC'Y U.S.A. 19, 58–65 (2001). For a more thorough history, see generally P.J. Federico, *The Patent Trials of Oliver Evans—Part I*, 27 J. PAT. OFF. SOC'Y 586 (1945); P.J. Federico, *The Patent Trials of Oliver Evans—Part II*, 27 J. PAT. OFF. SOC'Y 657 (1945).

Considering the exclusive right to invention as given not of natural right, but for the benefit of society, I know well the difficulty of drawing a line between the things which are worth to the public the embarrassment of an exclusive patent, and those which are not.<sup>5</sup>

Jefferson's Taper, which spreads light to others without diminishing the light at its source, has been hailed as a "prophetic vision" of knowledge transmission,<sup>6</sup> and invoked as an early metaphor for the economic concepts of non-excludability and non-rivalrousness that lie at the heart of the public-goods model of utilitarian IP theory. A "public good," as famously defined by the twentieth-century economists Richard Musgrave and Paul Samuelson,<sup>7</sup> is the type of good to which all members of society have equal access (non-excludability) and the consumption of which by any one person does not diminish the quantity available to others (non-rivalrousness). National defense is the paradigm example. As economists have observed, public goods are particularly susceptible to market failures resulting from free riding: because all members of society enjoy the benefits of the good regardless of whether they contribute to its production, rational welfare-maximizers will decline to make such contributions unless compelled to do so. The designation of such goods as "public goods" recognizes that the free riding problem counsels for public provision of the goods and compulsory taxation to support their production.<sup>8</sup>

The utilitarian theory of IP categorizes information as this type of public good. The theory begins with the observation that new knowledge—whether a novel invention or an original work of creative expression—is usually costly to create but cheap to copy. In the absence of legal intervention, any knowledge creator who publicized their creation would instantly make it freely available to the entire world. Any attempt to commercialize that knowledge would be quickly undermined by free-riding competitors, who could simply copy the creator's disclosed knowledge without having to worry about recouping the costs of developing the knowledge in the first place. Faced with the prospect of guaranteed losses in the face of such free-riding competition, the rational wealth-maximizer would *never* choose to expend effort or resources to create new knowl-

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5. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON 326, 333–35 (Andrew A. Lipscomb ed., 1903) [hereinafter Letter from Jefferson to McPherson].

6. ABBY SMITH RUMSEY, WHEN WE ARE NO MORE: HOW DIGITAL MEMORY IS SHAPING OUR FUTURE ch. 5 (2016).

7. See generally Maxime Desmarais-Tremblay, *Musgrave, Samuelson, and the Crystalization of the Standard Rationale for Public Goods*, 49 HIST. POL. ECON. 59 (2017).

8. On the economics of public goods, and the role of the criteria of non-excludability and non-rivalrousness, see generally Agnar Sandmo, *Public Goods*, in THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS (John Eatwell, Murray Milgate & Peter Newman eds., 1st ed. 1987), reprinted in THE NEW PALGRAVE DICTIONARY OF ECONOMICS 1, 8 (Palgrave Macmillan ed. 2016); RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS chs. 6–8 (1986).

edge, and society would go wanting for new works of intellectual labor—or so the model tells us.<sup>9</sup>

The solution that utilitarian IP theory offers to this market failure is the *Incentive Thesis*: the proposition that IP rights—the legal power to exclude competitors for a limited time—allow knowledge creators to charge supracompetitive prices during the term of their rights, thereby providing such knowledge creators an opportunity to recoup their investment and thus an incentive to create and disclose new knowledge.<sup>10</sup> The policymaker's job, in this view, is simply to tailor the incentive scheme—the scope and term of the IP right—to provide the necessary incentive to knowledge creators at minimum cost to the public.<sup>11</sup> This incentive rationale is supposedly encoded in our constitutional text, which confers on Congress the power to give authors and inventors limited-term exclusive rights to their creations “[t]o promote the Progress of Science and useful Arts.”<sup>12</sup>

Jefferson's Parable of the Taper, which frames patent legislation as “an encouragement to men to pursue ideas which may produce utility,”<sup>13</sup> is today widely understood to endorse the incentive thesis and, with it, a utilitarian theory of IP law. The Supreme Court endorsed this reading of Jefferson's Taper in the seminal patent law case of *Graham v. John Deere*:

[Jefferson] rejected a natural-rights theory in intellectual property rights and clearly recognized the social and economic rationale of the patent system. The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge. The grant of an exclusive right to an invention was the creation of society—at odds with the inherent free nature of disclosed ideas—and was not to be freely given. Only inventions and discoveries which furthered human knowledge, and were new and useful, justified the special inducement of a limited private monopoly.<sup>14</sup>

This reading of Jefferson's Taper has attained the status of conventional wisdom in IP circles. It has resurfaced over the decades since *Graham* was decided in Supreme Court opinions, and particularly the opinions of Justice Breyer.<sup>15</sup> And it is a commonplace among IP commentators. As

9. For applications of this theoretical framework to patents and copyrights, see, respectively, SUZANNE SCOTCHMER, *INNOVATION AND INCENTIVES* ch. 2 (2004), and William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

10. Jonathan M. Barnett, *Do Patents Matter? Empirical Evidence on the Incentive Thesis*, in *HANDBOOK ON LAW, INNOVATION AND GROWTH* 178, 178 (Robert E. Litan ed., 2011).

11. See Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSP. 57, 58 (2005) (“The tension between incentives and access . . . preoccupies the conventional economic analysis of intellectual property.”).

12. U.S. CONST. art. I, § 8, cl. 8.

13. Letter from Jefferson to McPherson, *supra* note 5, at 334.

14. *Graham v. John Deere Co.*, 383 U.S. 1, 8–9, 8 n.2 (1966).

15. See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146–51 (1989); *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) (“The subject-matter provisions

today's foremost IP scholar (and avowed utilitarian) Mark Lemley put it in one of the most widely cited articles ever written on IP:

Thomas Jefferson was of the view that “inventions . . . cannot, in nature, be a subject of property;” for him, the question was whether the benefit of encouraging innovation was “worth to the public the embarrassment of an exclusive patent.” On this long-standing view, free competition is the norm. Intellectual property rights are an exception to that norm, and they are granted only when—and only to the extent that—they are necessary to encourage invention. . . .

. . . .  
 . . . We are better off with [this] traditional utilitarian explanation for intellectual property . . . .<sup>16</sup>

Even scholars who do not endorse utilitarian IP theory accept this characterization of Jefferson's Taper: they concede that the parable “forcefully advanced the utilitarian and economic justification of the patent system.”<sup>17</sup> These scholars tend to look instead to deontological or natural law theories for an alternative. By far the most influential such theory is the Lockean account, under which certain conditions of appropriation give rise to a pre-political property right. In this view, the state's proper role is simply to implement these natural moral rights as positive legal privileges.<sup>18</sup> John Locke famously identified property with the moral claims of labor, on the theory that all would “unquestionabl[y]” agree to allow individuals to assert property rights over resources they had labored to put to productive use, “at least where there is enough, and as good, left in common for others.”<sup>19</sup> Lockean theorists have extended Locke's logic from physical resources to intangible ones, identifying the natural rights of authors and inventors with the labor of the mind.<sup>20</sup> But

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of the patent law have been cast in broad terms to fulfill the constitutional and statutory goal of promoting ‘the Progress of Science and the useful Arts’ with all that means for the social and economic benefits envisioned by Jefferson.”); *see also* *Golan v. Holder*, 565 U.S. 302, 348–49 (2012) (Breyer, J., dissenting) (“This utilitarian view of copyrights and patents, embraced by Jefferson and Madison, stands in contrast to the ‘natural rights’ view underlying much of continental European copyright law . . . .”); *Bd. of Trs. of the Leland Stan. Junior Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 796 (2011) (Breyer, J., dissenting); *Bilski v. Kappos*, 561 U.S. 593, 658 (2010) (Breyer, J., concurring).

16. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1031–32 (2005). A recent survey concludes this article is the most widely cited IP article published since 2005. Ted Sichelman, *Most-Cited IP Law Articles Published in the Last 10 Years*, WRITTEN DESCRIPTION (Mar. 23, 2016), <https://writtendescription.blogspot.com/2016/03/most-cited-ip-law-articles-published-in.html> [<https://perma.cc/K33P-7U7F>].

17. Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 962 (2007) [hereinafter Mossoff, *Who Cares What Thomas Jefferson Thought About Patents?*].

18. *See generally, e.g.*, Adam Mossoff, *Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory*, 29 SOC. PHIL. & POL'Y 283 (2012) [hereinafter Mossoff, *Saving Locke from Marx*]; Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).

19. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ch. V, § 27 (C.B. McPherson ed., Hackett Pub. Co. 1980) (1689).

20. *See generally, e.g.*, Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609 (1993); Mossoff, *Who Cares What Thomas Jefferson Thought*

in the United States for most of the past century, the Lockean account of IP rights has always had to combat not only the Constitution's text but also the dominance of the utilitarian theory that traces its pedigree to the founder of the American patent system. After all, Jefferson's famous letter seems to place his authority squarely against a natural-law account of IP rights, and to endorse a utilitarian account.

My central claim in this Article is that this conventional reading of Jefferson's Taper is wrong. The claim draws support from an important new discovery I report herein: The Parable of the Taper was *not* Jefferson's invention. Like any good innovator, Jefferson copied the core of his idea from an earlier source, modifying it just enough to suit his purposes. Jefferson's hitherto unacknowledged source was Marcus Tullius Cicero—specifically, Cicero's *De Officiis* (*On Duties*).<sup>21</sup> In an early section of *De Officiis*, Cicero quotes a three-line passage from a lost play by the poet Quintus Ennius to make precisely the same argument—in precisely the same way—as Jefferson's argument about resources that naturally belong to all in common:

[W]e find the common property of all men in things of the sort defined by Ennius; and though restricted by him to one instance, the principle may be applied very generally:

“Who kindly sets a wand’rer on his way  
Does e’en as if he lit another’s lamp by his:  
No less shines his, when he his friend’s hath lit.”<sup>22</sup>

In paraphrasing Cicero (albeit without attribution), Jefferson was invoking a deep philosophical tradition that stretches from Aristotle through Cicero and Seneca to Thomas Aquinas and Hugo Grotius—a tradition that maintained its hold on Western philosophy at least up to the Enlightenment. Tracing the genealogy of Jefferson's Taper reveals an intellectual architecture undergirding the parable: a theory of distributive justice grounded in what I will refer to as the Classical Tradition. And importantly, the concept of natural law, far from being antithetical to the Classical Tradition, was its source and its justification for thousands of years—right up to Jefferson's lifetime. Casting Jefferson's views on IP as proto-utilitarian and anti-natural-law thus gets those views precisely backward. I will offer herein a new reading of Jefferson's Taper, which reflects not only its natural-law antecedents but also its roots in the Classical Tradition. I will, in short, argue that the unappreciated moral of Jef-

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*About Patents?*, *supra* note 17; Gordon, *supra* note 18; Mala Chatterjee, *Lockean Copy-right versus Lockean Property*, 12 J. LEG. ANALYSIS 136 (2020). For a more skeptical view of the Lockean justification for IP rights, see generally Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 138 (Stephen R. Munzer ed., 2001).

21. See generally MARCUS TULLIUS CICERO, *DE OFFICIIS* (Walter Miller trans., MacMillan Co. 1913) [hereinafter *OFF.*]. Citations to *De Officiis* are by book and paragraph number, with page numbers and English quotations from the Loeb Classical Library translation by Walter Miller, unless otherwise noted.

22. *Id.* bk. I, ¶ 51, at 55.



person's parable is that knowledge is a resource that its possessors have a *natural duty to share*.

This correction in our reading of Jefferson's Taper is not merely of academic interest. It is key to evaluating the most prominent trend in knowledge-governance law over the past half century. This period has witnessed the steady erosion of what Robert Merton famously identified as the norm of scientific "communism," which has been a tenet of Western science since the seventeenth-century founding of the Royal Society by admirers of Francis Bacon's philosophy. This norm holds that "[t]he substantive findings of science are a product of social collaboration and are assigned to the community" such that "[t]he scientist's claim to 'his' intellectual 'property' is limited to that of recognition and esteem."<sup>23</sup> Since the late twentieth century, this norm has all but disappeared, as knowledge production has come increasingly under the ascendant logic of the market by means of IP law.<sup>24</sup> This trend is reflected in the increasing scope and lengthening terms of IP rights,<sup>25</sup> the globalization of IP law through the TRIPS regime (even to the point of privatizing the ancient knowledge of traditional societies),<sup>26</sup> the weakening of defenses available to researchers and educators in increasingly protracted IP litigation,<sup>27</sup> and the privatization of publicly funded research through the Bayh-Dole Act.<sup>28</sup> These legal innovations have both defenders and critics, but neither utilitarianism nor Lockean theory—our only theoretical frameworks for dealing with knowledge-governance policy—shed significant light on them. That is because the question whether knowledge should be freely available or privately controlled is, at its core, a question of distributive justice that these theories largely ignore.

Utilitarianism by definition treats distribution as a second-order con-

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23. Robert K. Merton, *The Normative Structure of Science*, in *THE SOCIOLOGY OF SCIENCE: THEORETICAL AND EMPIRICAL INVESTIGATIONS* 267, 273 (Norman W. Storer ed., 1973). For the Baconian origins of scientific communism, particularly in the organization of the Royal Society, see ROBERT K. MERTON, *SCIENCE, TECHNOLOGY & SOCIETY IN SEVENTEENTH CENTURY ENGLAND* 115 (1970); *THE RECORD OF THE ROYAL SOCIETY OF LONDON* 1–3 (3d ed. 1912) (describing the Royal Society as "one of the earliest practical fruits of the philosophical labours of Francis Bacon").

24. See generally Peter Lee, *Patents and the University*, 63 *DUKE L.J.* 1 (2013); Robert P. Merges, *Property Rights Theory and the Commons: The Case of Scientific Research*, in 13 *SCIENTIFIC INNOVATION, PHILOSOPHY, AND PUBLIC POLICY* 145 (Ellen Frankel Paul et al. eds., 1996).

25. See Andrew Beckerman-Rodau, *The Problem with Intellectual Property Rights: Subject Matter Expansion*, 13 *YALE J.L. & TECH.* 35, 53–67 (2011).

26. See generally SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* (2003); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 *CALIF. L. REV.* 1331 (2004).

27. See, e.g., *Madey v. Duke Univ.*, 307 F.3d 1351, 1360–63 (Fed. Cir. 2002) (effectively eliminating the "experimental use" exception to patent infringement); see also *Cambridge Univ. Press v. Albert*, 906 F.3d 1290, 1293 (11th Cir. 2018) (remanding for the second time a decade-long litigation between academic publishers and a university library over the scope of the fair use defense to copyright infringement). See generally Katherine J. Strandburg, *What Does the Public Get?: Experimental Use and the Patent Bargain*, 2004 *WIS. L. REV.* 81 (2004) (critiquing the narrowing of such research-protective doctrines).

28. 35 U.S.C. §§ 200–212 (providing a pathway for patenting inventions developed with federal research funding); see also Lee, *supra* note 24, at 64–65.

cern (if that).<sup>29</sup> Lockean labor-desert theory is similarly cagey about the problem of distribution among competing claimants, because the “enough and as good” proviso against which Locke’s system of property rights unfolds assumes an absence of the scarcity that generates such competition. But property rights are just one piece of a larger normative puzzle—namely, the question of how the world’s resources ought to be allocated among individuals with competing and incompatible claims to them—and Locke’s solution was only one solution (albeit a highly influential one) to emerge during a transitional period during which the Classical Tradition was being critically reevaluated. During this period, a new conception of distributive justice, founded on a normative commitment to the political equality of human beings—which I will refer to as the Modern Tradition—was beginning to take shape. The Modern Tradition recognizes a right of *all* human beings to claim some share of the resources needful to a life well lived.

In this Article, I hope to introduce IP scholars, lawyers, and policymakers to a long-ignored literature that directly addresses our most current concerns. The Modern Tradition, encapsulated in the philosophy of John Rawls, explicitly underlies many contemporary critiques of expanding IP rights. I believe that the Classical Tradition—particularly its proposition that resource allocation ought to be a function of individual merit—*implicitly* underlies many contemporary defenses of those rights. Yet because of the relative ignorance of the Classical Tradition in the IP commentariat, such arguments are instead often grounded in either utilitarian or Lockean reasoning that, while comfortably familiar, ultimately misses the point. As the Parable of the Taper demonstrates, questions about distributive justice have been part of American IP law since the Founding. We have simply forgotten how to talk about them.

A corrected understanding of Jefferson’s Taper—as a late expression of the Classical Tradition that surprisingly aligns with the IP-skepticism of many commentators working in the Modern Tradition today—opens the way toward more fruitful and honest debates about the laws that govern the distribution of knowledge. This is not to say we ought to defer to Jefferson as an authority when formulating our present-day IP policy. We should not relinquish such important responsibilities to long-dead men of privilege, and especially not to men like Jefferson, whose soaring rhetoric on rights, liberty, and equality stands in stark contrast to his lifelong

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29. See JOHN RAWLS, A THEORY OF JUSTICE 67 (rev. ed. 1999) (“A classical utilitarian . . . is indifferent as to how a constant sum of benefits is distributed. He appeals to equality only to break ties.”); AMARTYA SEN, ON ECONOMIC INEQUALITY 6 (1973) (“Much of modern welfare economics is concerned with precisely that set of questions which avoid judgements on income distribution altogether.”); HENRY SIDGWICK, THE METHODS OF ETHICS 416–17 (7th ed. 1907) (“Now the Utilitarian formula seems to supply no answer to this question: at least we have to supplement the principle of seeking the greatest happiness on the whole by some principle of Just or Right distribution of this happiness.”).

abuse of the human beings he claimed as chattel slaves.<sup>30</sup> Rather, I will argue that reading Jefferson's Taper as part of a broader philosophical tradition gives us a window into a larger universe of normative theory than our current one, which has proven inadequate to engage the pressing policy question of justly distributing knowledge through law.

## II. JEFFERSON'S UNACKNOWLEDGED DEBT TO CICERO

The core of Jefferson's parable is the equation of an idea with a flame: "He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me."<sup>31</sup> Jefferson's observation of the nature of candlelight was lifted, almost word for word, from Book I, Section 51 of Cicero's *De Officiis*. Prior to this key passage, Cicero had been musing on the duty of beneficence and its relationship to the duty of justice.<sup>32</sup> This is a complex relationship in Cicero's philosophy—a point which we will turn to below. But key to our present purposes is how Cicero illustrates his point: with a three-line quotation from a lost play of the poet Quintus Ennius. The entire surrounding passage is worth quoting at length:

This, then, is the most comprehensive bond that unites together men as men and all to all; and under it the common right to all things that nature has produced for the common use of man is to be maintained, with the understanding that, while everything assigned as private property by the statutes and by civil law shall be so held as prescribed by those same laws, everything else shall be regarded in the light indicated by the Greek proverb: "Amongst friends all things in common." Furthermore, we find the common property of all men in things of the sort defined by Ennius; and though restricted by him to one instance, the principle may be applied very generally:

"Who kindly sets a wand'rer on his way  
Does e'en as if he lit another's lamp by his:  
No less shines his, when he his friend's hath lit."

In this example he effectively teaches us all to bestow even upon a stranger what it costs us nothing to give. On this principle we have the following maxims: "Deny no one the water that flows by;" "Let anyone who will take fire from our fire;" "Honest counsel give to one who is in doubt;" for such acts are useful to the recipient and cause the giver no loss. We should, therefore, adopt these principles and always be contributing something to the common weal. But since the resources of individuals are limited and the number of the needy is infinite, this spirit of universal liberality must be regulated accord-

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30. ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY 106 (1997) ("[E]veryone knows that even as he wrote passionately about the rights of human beings and, on occasion, the evils of slavery, Jefferson owned slaves."). See generally Paul Finkelman, *Jefferson and Slavery: "Treason Against the Hopes of the World"*, in JEFFERSONIAN LEGACIES 181 (Peter S. Onuf ed., 1993).

31. Letter from Jefferson to McPherson, *supra* note 5, at 334.

32. OFF., *supra* note 21, bk. I, ¶ 50, at 53–55.

ing to that test of Ennius—"No less shines his"—in order that we may continue to have the means for being generous to our friends.<sup>33</sup>

Apart from replacing a lamp (Latin: *lumen*) with a taper, Jefferson has clearly adopted Cicero's metaphor as his own, just as Cicero had adopted Ennius's.

The unattributed reference to Cicero in Jefferson's correspondence is unsurprising; the Roman statesman was something of a role model for the third President:

Jefferson first encountered Cicero as a schoolboy learning Latin, and continued to read his letters and discourses as long as he lived. He admired him as a patriot, valued his opinions as a moral philosopher, and there is little doubt that he looked upon Cicero's life, with his love of study and aristocratic country life, as a model for his own.<sup>34</sup>

We know that Jefferson was particularly familiar with *De Officiis* because he had a copy in his personal library (both in Latin and in English translation),<sup>35</sup> and he recommended it to others at least twice—in the latter instance, within a year of his letter to McPherson, he recommended it to those studying for a career in law and public life.<sup>36</sup> He apparently returned to the work frequently enough to become an expert on it: a letter of April 1818 remarks that he had found defects in a recent edition.<sup>37</sup> Jefferson claimed in other correspondence that his political philosophy was influenced by Cicero's<sup>38</sup> (of which *De Officiis* is the crowning example),<sup>39</sup> and in his exchanges with John Adams during the months preceding Jefferson's letter to McPherson, Adams commends Jefferson to review his Cicero on two separate occasions.<sup>40</sup>

Moreover, Jefferson's familiarity with—and unattributed reference to—*De Officiis* is to be expected: it was perhaps the most widely read secular book in the political classes of the Western world, "central . . . to

33. *Id.* bk. I, ¶¶ 51–52, at 55–57.

34. JEFFERSON'S LITERARY COMMONPLACE BOOK 159 (Douglas L. Wilson ed., 1989).

35. 2 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON 35, 35 (E. Millicent Sowerby ed., 1953) [hereinafter 2 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON].

36. Letter from Thomas Jefferson to John Minor (Aug. 30, 1814), enclosing Letter from Thomas Jefferson to Bernard Moore (ca. 1773), in 11 THE WORKS OF THOMAS JEFFERSON 420, 420–22 n.1 (Paul Leicester Ford ed., 1905); Letter from Thomas Jefferson to Robert Skipwith (Aug. 3, 1771), in 1 THE PAPERS OF THOMAS JEFFERSON: 1760–1776, at 76, 80 (Julian P. Boyd ed., 1950).

37. Letter from Thomas Jefferson to Wells and Lilly (Apr. 1, 1818), in THOMAS JEFFERSON CORRESPONDENCE: PRINTED FROM THE ORIGINALS IN THE COLLECTIONS OF WILLIAM K. BIXBY 238, 238 (Worthington Chauncey Ford ed., 1916).

38. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), in 17 THE WRITINGS OF THOMAS JEFFERSON 117, 118–19 (Andrew A. Lipscomb ed., 1905) ("This was the object of the Declaration of Independence. . . . All its authority rests . . . on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc.").

39. See A.A. LONG, *Cicero's Politics in De Officiis*, in FROM EPICURUS TO EPICETUS: STUDIES IN HELLENISTIC AND ROMAN PHILOSOPHY 307, 333 (2006) ("The *De officiis*, not the *De re publica*, is Cicero's Republic.").

40. Letter from John Adams to Thomas Jefferson (July 9, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 5, at 304; Letter from John Adams to Thomas Jefferson (July 16, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 5, at 317.

the education of both philosophers and statesmen for many centuries.”<sup>41</sup> Cicero’s last work of philosophy was, “[f]rom the twelfth century onward[,] . . . part of the bloodstream of Western culture.”<sup>42</sup> Over 700 manuscripts of the work survive,<sup>43</sup> and it was among the first printed books in Europe, appearing no later than 1465—indeed, the world’s first set of movable type for the Greek alphabet seems to have been cast specifically so that *De Officiis* could be printed.<sup>44</sup> The book’s popularity reached a “high-water mark” in the eighteenth century,<sup>45</sup> just as the American founding generation was turning to Rome as a model and as a cautionary example for their new continental republic.<sup>46</sup> Around this time, quoting Cicero without attribution was not unheard of because “to mention the source would be to insult the learning of the audience.”<sup>47</sup>

There are other possible sources for Jefferson’s Taper, but they are less convincing. In *De Iure Belli ac Pacis*, Grotius’ discussion of the natural law of property includes the following passage:

The next [right] is that of innocent Profit; when I only seek my own Advantage, without damaging any Body else. Why should we not, says Cicero, when we can do it without any Detriment to ourselves, let others share in those Things that may be beneficial to them who receive them, and no Inconvenience to us who give them. Seneca therefore denies that it is any Favour, properly so called, to permit a Man to light a Fire by ours.<sup>48</sup>

Grotius’ reference to Seneca paraphrases a passage in Book IV of *De Beneficiis*. The relevant passage (in the earliest available English translation) reads:

A benefit is a profitable work, but every profitable work is not a benefit. For some things are of so small moment, that they deserve not the name of a benefit. . . . [W]hoever accounted it a benefit, to have given a shive of bread, or a piece of bare money, or to have permitted a neighbour to enter and kindle fire in his house? . . . [F]or

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41. Martha C. Nussbaum, *Duties of Justice, Duties of Material Aid: Cicero’s Problematic Legacy*, 8 J. POL. PHIL. 176, 179 (2000).

42. ANDREW R. DYCK, A COMMENTARY ON CICERO, *De Officiis* 43 (1996).

43. Michael Winterbottom, *The Transmission of Cicero’s De Officiis*, 43 CLASSICAL Q. 215, 215 (1993).

44. E. GORDON DUFF, EARLY PRINTED BOOKS 31, 47–49 (1893) (noting that *De Officiis* was the first printed book in Europe to include Greek text).

45. DYCK, *supra* note 42, at 46.

46. See generally CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT (1994).

47. Nussbaum, *supra* note 41, at 179. Nussbaum is referring here specifically to Adam Smith’s lengthy unattributed quotations of *De Officiis* in his *Theory of Moral Sentiments*. Smith was particularly wont to quote Cicero at length without attribution. See GLORIA VIVENZA, ADAM SMITH AND THE CLASSICS: THE CLASSICAL HERITAGE IN ADAM SMITH’S THOUGHT 1–4 (2001).

48. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE bk. II, ch. ii, ¶ XI, at 438 (Richard Tuck ed. 2005) [hereinafter GROTIUS, THE RIGHTS OF WAR AND PEACE] (footnotes omitted).

we bestow them not as upon worthy men, but carelessly as small things, and we give it not unto the man, but unto humanity.<sup>49</sup>

As Secretary of State, Jefferson had relied on *De Iure Belli ac Pacis* as an authority on international law (but not on natural law or the institution of property),<sup>50</sup> and he owned two copies of the work—one in Latin and the other in French translation.<sup>51</sup> He owned a copy of the above-quoted translation of Seneca as well.<sup>52</sup> But we can be fairly confident that Jefferson had Cicero, rather than these other authors, in mind when formulating the Parable of the Taper. First, Grotius does not appear in Jefferson's writings other than in connection with discussions of international treaties,<sup>53</sup> whereas (as noted above) Cicero is a source Jefferson refers to frequently and with far greater esteem. Moreover, the key passage from Grotius refers back to Seneca for the metaphor of the flame and to Cicero for its justification. Seneca, meanwhile, uses the example of fire not to show how a gift can leave the giver undiminished (Jefferson's point), but rather to show that some donations are so trivial as to be unworthy of the name "benefit." Finally, Jefferson seemed to hold Cicero in (at least marginally) higher esteem than Seneca in the matter of ethics.<sup>54</sup>

One other potential precursor of Jefferson's Taper is Grotius' *Mare Liberum*, in which Grotius quotes the same passage from Ennius as does Cicero—albeit with attribution to both—to argue that the non-rivalrous quality of the sea makes it naturally common property.<sup>55</sup> Indeed, Ariel Katz has recently noted the similarity of Grotius' arguments about the sea to Jefferson's arguments about ideas—though without noting their common source in *De Officiis*.<sup>56</sup> But Jefferson did not own a copy of *Mare Liberum*.<sup>57</sup> Nor is there evidence that he was otherwise familiar with it: Jefferson's own handwritten notes for his opinion on the French Treaties copy out a short excerpt from *De Iure Belli ac Pacis* but make no

49. LUCIUS ANNAEUS SENECA, ON BENEFITS bk. IV, ¶ xxix, at 162–63 (Thomas Lodge trans., 1614).

50. Thomas Jefferson, Opinion on French Treaties (Apr. 28, 1793), in 7 THE WORKS OF THOMAS JEFFERSON 283, 292–95 (Paul Leicester Ford ed., 1904).

51. 2 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON, *supra* note 35, at 67–68.

52. *Id.* at 39.

53. In addition to his memorandum on the survival of the Treaty with France after that country's Revolution, Jefferson cited the same trinity of Grotius, Pufendorf, and Vattel in connection with negotiations with Spain over the southern boundary of the State of Georgia. Thomas Jefferson, Report on Negotiation with Spain (Mar. 18, 1792), in 6 THE WORKS OF THOMAS JEFFERSON 414, 418 (Paul Leicester Ford ed., 1904). Grotius does not appear in the recommended reading list enclosed in Jefferson's letter to John Minor, though Vattel does. Letter from Jefferson to Minor, *supra* note 36, at 422.

54. Jefferson's reading list places *De Officiis* before Seneca's philosophical works under the heading "Ethics. & Natl Religion," and he instructs his correspondent that "the books are to be read in the order in which they are named." Letter from Jefferson to Minor, *supra* note 36, at 422–26 n.1.

55. HUGO GROTIUS, THE FREEDOM OF THE SEAS 38–39 (James Brown Scott ed., Ralph Van Deman Magoffin trans., 1916).

56. See generally Ariel Katz, *Data Libera? Canada's Data Strategy and the Law of the Sea*, CENTRE FOR INT'L GOVERNANCE INNOVATION (May 1, 2018), <https://www.cigionline.org/articles/data-libera-canadas-data-strategy-and-law-sea> [<https://perma.cc/X3YL-CCQ3>].

57. 5 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON, *supra* note 1, at 310.

reference at all to *Mare Liberum*,<sup>58</sup> nor does any such reference appear elsewhere in his voluminous writings. It appears that the similarity between Jefferson and Grotius is an example of what patent scholars refer to as “parallel innovation” or what copyright scholars refer to as “independent creation”: both appear to have built on an existing stock of knowledge (an intellectual tradition that dates back to classical antiquity), and attempted to apply it to the practical controversies of their own times. In doing so, they appear to have independently arrived at the same insight in two separate spheres. Given Cicero’s immense influence on Western political and legal thought, this is perhaps not as surprising as it might otherwise seem.

In sum, it seems highly likely that Jefferson was cribbing from Cicero in his famous Parable of the Taper. In an earlier age, Jefferson’s allusion would likely have been obvious to any educated reader, given the ubiquity of *De Officiis*. Indeed, it would have lent Cicero’s considerable authority to Jefferson’s argument. But perhaps owing to the decline of classical education in the United States since the nineteenth century,<sup>59</sup> the genealogy of Jefferson’s Taper has gone essentially unnoticed in the academic literature since the parable was “discovered” by the Supreme Court in 1966.<sup>60</sup> Despite widespread discussion of Jefferson’s Taper in scholarly and teaching texts,<sup>61</sup> I am aware of only two scholars who have even noticed a similarity between Jefferson’s parable and Cicero’s work, and that only in passing.<sup>62</sup> The IP community has simply overlooked this

58. Thomas Jefferson, Grotius, et al Political Writings, in French and Latin (Apr. 18, 1793), THOMAS JEFFERSON PAPERS LIB. CONGRESS, [www.loc.gov/item/mtjbib007326/](http://www.loc.gov/item/mtjbib007326/) [<https://perma.cc/3VJF-NZDS>].

59. See CHRISTOPHER J. LUCAS, AMERICAN HIGHER EDUCATION: A HISTORY 139–219 (1994).

60. *Graham v. John Deere Co.*, 383 U.S. 1, 8 & n.2 (1966); Mossoff, *Who Cares What Thomas Jefferson Thought About Patents?*, *supra* note 17, at 954 (“In 1966, the Supreme Court discovered that Thomas Jefferson was the founder of American patent law.”). The Court discovered Jefferson’s Taper through the work of Pat Federico—a physics major whose extensive education does not appear to have included the classics. See generally Giles S. Rich, *P. J. (Pat) Federico and His Works*, 64 J. PAT. OFF. SOC’Y 3 (1982). Federico reproduced Jefferson’s letter in the *Journal of the Patent Office Society*, in a work that was cited by the Court in *Graham*. Compare Federico, *Operation of the Patent Act of 1790*, *supra* note 3, at 241–42, with *Graham*, 383 U.S. at 7 (quoting Federico, *Operation of the Patent Act of 1790*, *supra* note 3, at 238).

61. See, e.g., JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 20 (2008); PETER S. MENELL, MARK A. LEMLEY, & ROBERT P. MERGES, 1 INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 209 n.2 (2017); Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 998–99, 1026–34 (2006) [hereinafter Hughes, *Copyright and Incomplete Historiographies*]. Jefferson’s letter to McPherson was publicly available no later than 1854, when it was published in the H.A. Washington compilation of his papers. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 6 THE WRITINGS OF THOMAS JEFFERSON 175 (H.A. Washington ed., 1854).

62. The first reference comes in a footnote that cites the McPherson letter and otherwise reads, in its entirety: “The metaphor of the taper is a classic example from the poet Ennius which was also used by Cicero, Seneca, and Grotius.” HENRY C. MITCHELL, THE INTELLECTUAL COMMONS: TOWARD AN ECOLOGY OF INTELLECTUAL PROPERTY 16, 23 n.8 (2005). Mitchell’s observation does not inform the rest of his project, but his footnote was also quoted in passing in a student law review note. Joseph Kamien, Note, *The Natural*

important connection of one of our founding texts to a wider intellectual tradition.<sup>63</sup>

### III. *DE OFFICIIS*, DISTRIBUTIVE JUSTICE, AND NATURAL LAW

Cicero's invocation of Ennius is tied to his particular vision of the relative authority of the state and individuals in managing resources—a vision tied to a classical conception of natural law. That vision, though framed in terms of justice and virtue, is one that might strike modern sensibilities as callous—or even venal. But because it was foundational for much of Western philosophy up to Jefferson's day, understanding Cicero's vision of nature and virtue—and the theories of property and distributive justice that vision implies—is key to understanding the theoretical underpinnings of Jefferson's Taper.

#### A. CICERO'S FINAL COUNSEL

Marcus Tullius Cicero was a *homo novus*—a man with no senators or consuls in his ancestry—who parlayed a successful legal practice into a political career that reached its apex in his election to the consulship in 63 B.C.E. As consul, he successfully foiled the Catilinarian Conspiracy and was rewarded with the honorific “father of his country” (*pater patriae*), as well as the gratitude and loyalty of Rome's propertied classes. But Cicero's excesses in suppressing the conspiracy (he had ordered Roman citizens executed without trial) provided the tribune Publius Clodius Pulcher of the populist *populares* faction with a pretext to exile him and confiscate his property. A year later, Cicero's exile was lifted and his property restored at the instigation of Pompey Magnus, and for some years he continued to navigate the political eddies of the First Triumvirate as the acknowledged leader of the aristocratic *optimates* faction of the Roman Senate.<sup>64</sup>

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*Flow of Ideas: Why the Fifth Amendment Takings Clause and an Obscure Water-Rights Decision Might Thwart Attempts at Streamlining the Patent Queue*, 20 WM. & MARY BILL RTS. J. 1373, 1394 n.190 (2012). The second reference is in an unpublished doctoral dissertation from the Harvard philosophy department, which notes that Jefferson's metaphor is a “more familiar” version of Cicero's illustration, which the author compares with the Lockean thesis that appropriation from the commons is permissible where it harms nobody. Michael E. Kenneally, *Intellectual Property Rights and Institutions: A Pluralist Account* (May 5, 2014) (unpublished Ph.D. dissertation, Harvard University) (on file with Harvard's DASH repository), <https://ssrn.com/abstract=2310986> [<https://perma.cc/7Z4P-PPMK>].

63. The failure to credit Jefferson's Taper to Cicero's example is particularly striking in the work of Adam Mossoff, who has criticized modern patent scholars' reliance on Jefferson as insufficiently attentive to the influence of the natural law tradition on patent law (citing, among other natural law philosophers, Cicero). See Mossoff, *Who Cares What Thomas Jefferson Thought About Patents?*, *supra* note 17, at 980. Indeed, Mossoff's other work even cites *De Officiis* (by way of Pufendorf and Locke), but conspicuously omits to note the passage from Ennius or Cicero's gloss on it. See Mossoff, *Saving Locke from Marx*, *supra* note 18, at 300–01; Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 412 n.166 (2003).

64. For a detailed biography of Cicero's political career, of which this paragraph is a summary, see generally DAVID STOCKTON, *CICERO: A POLITICAL BIOGRAPHY* (1971).



Soon after defeating Pompey in Rome's Great Civil War, Julius Caesar was assassinated on the Ides of March in 44 B.C.E. (without Cicero's participation, to his regret),<sup>65</sup> and Cicero suddenly found himself once again among the most powerful and respected politicians in the Republic.<sup>66</sup> Over the ensuing months, as Cicero and Mark Antony jostled for power (and for the favor of Caesar's heir, Octavian), Cicero was distracted by a personal crisis: he received word that his only surviving child and namesake, Marcus Tullius Cicero Minor (then a twenty-one-year-old philosophy student in Athens), was falling into dissolution.<sup>67</sup> Cicero set sail for Athens in August of 44 B.C.E. in the hopes of setting his son aright, but he never arrived; he was called back to Rome soon after embarking to attend to the political struggle with Antony.<sup>68</sup> With that struggle still simmering, Cicero retreated into the Italian countryside in September of 44 B.C.E. and from there produced two primary pieces of writing: a condemnation of Antony in the *Second Philippic*, and fatherly advice to his faltering heir in *De Officiis (On Duties)*, completed in late October or early November of 44 B.C.E.<sup>69</sup> Within a year of completing this work, Cicero was proscribed and assassinated,<sup>70</sup> his severed head and hands gleefully displayed on the Rostra of the Forum by Antony.<sup>71</sup> *De Officiis* represents a final, urgent transmission from father to son of both advice and patrimony.<sup>72</sup>

## B. JUSTICE, PROPERTY, AND THE STATE

Cicero's invocation of Ennius goes to the core of his particular way of thinking about the interaction between the duties of justice, the distribution of wealth and material goods, and the role of the state. Cicero's philosophy is deeply informed by his experience of the political turmoil of the late Republic—a period in which public power was accumulated by a

65. See CICERO, AD FAMILIARES X.28, reprinted in Letter from Marcus Tullius Cicero to Trebonius (c. 44 B.C.E.), in CICERO'S LIFE AND LETTERS: THE LETTERS OF MARCUS TULLIUS CICERO TO SEVERAL OF HIS FRIENDS 563 (William Melmoth trans., 1875).

66. See 7 PLUTARCH'S LIVES § 45, at 199 (E. Capps et al. eds., Bernadotte Perrin trans., 1919) ("Cicero's power in the city reached its greatest height at this time . . .").

67. DYCK, *supra* note 42, at 12–13.

68. See CICERO, AD ATTICUM XVI.7, reprinted in Letter from Marcus Tullius Cicero to Titus Pomponius Atticus ltr. VII (c. 44 B.C.E.), in CICERO'S LIFE AND LETTERS: THE LETTERS OF MARCUS TULLIUS CICERO TO TITUS POMPONIUS ATTICUS 821 (William Heberden trans., 1875).

69. DYCK, *supra* note 42, at 1–2.

70. APPIAN, ROMAN HISTORY: THE CIVIL WARS bk. IV, ¶ 19, at 173 (Jeffrey Henderson ed., Horace White trans., 1913); 7 PLUTARCH'S LIVES, *supra* note 66, §§ 48–49, at 207–08; 2 SENECA THE ELDER: DECLAMATIONS ¶ 17, at 579 (Jeffrey Henderson ed., M. Winterbottom trans., 1974).

71. 5 CASSIUS DIO, ROMAN HISTORY bk. XLVII, ¶ 8, at 131 (Jeffrey Henderson ed., Earnest Cary trans., 1917).

72. OFF., *supra* note 21, bk. I, ¶¶ 77–78, at 79 (recounting Cicero's victory over the Catilinarian conspiracy, and adding, "[w]hat triumph can be compared with that? For I may boast to you, my son Marcus; for to you belong the inheritance of that glory of mine and the duty of imitating my deeds"); *id.* bk. III, ¶ 21, at 403 ("Herewith, my son Marcus, you have a present from your father—a generous one, in my humble opinion; but its value will depend upon the spirit in which you receive it.").

steadily decreasing number of increasingly wealthy men and deployed in service of their private ambitions. A key move in these consolidations of power—first by Sulla after his victory over Marius, then by Caesar during the First Triumvirate—was the redistribution of land from political adversaries to the victor's veterans and partisans.<sup>73</sup> Cicero had felt the effects of such measures firsthand earlier in life: his dispossession at the hands of Clodius Pulcher, though ultimately reversed, clearly left Cicero angry and embittered.<sup>74</sup>

This bitterness leaps off the pages of *De Officiis*, written during another period of reversal and precarity for Cicero, and it can be detected at the core of Cicero's conception of justice (Latin: *iustitia*): "The first office of justice is to keep one man from doing harm to another, unless provoked by wrong; and the next is to lead men to use common possessions for the common interests, private property for their own."<sup>75</sup> Cicero's notion of justice is, on its face, deeply conservative. It is fundamentally tied to the preservation of the status quo, and in particular to securing the material resources of those who currently control them—particularly against claims by the broader community. This concern over preserving status quo allocations of resources is also at the core of Cicero's notion of civil society and its emergence from the state of nature: "[E]ven though nature guides men to gather together, it was the hope of guarding their things [Latin: *rerum suarum*] that led them to seek the protection of cities [Latin: *urbium*]."<sup>76</sup>

Given this view of the purpose of political communities, it is perhaps unsurprising that for Cicero, redistribution is the gravest sin on the part of a government official. He repeatedly castigates both Sulla<sup>77</sup> and Caesar<sup>78</sup> for it. "The man in an administrative office," he instructs his son, "must make it his first care that every one shall have what is his [Latin: *suum quisque*] and that private citizens suffer no invasion of their goods by act of the state."<sup>79</sup> Compulsory redistributive measures, he argues,

undermin[e] the foundations of the commonwealth: first of all, they are destroying harmony, which cannot exist when money is taken away from one party and bestowed upon another; and second, they do away with equity, which is utterly subverted, if the rights of property are not respected. For, as I said above, it is the peculiar function of the state [Latin: *civitatis*] and the city [Latin: *urbis*] to guarantee to

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73. 3 APPIAN, ROMAN HISTORY: THE CIVIL WARS bk. I, ¶ 11, at 23–25, bk. II, ¶ 2, at 233–35 (Jeffrey Henderson ed., Horace White trans., 1913); 3 CASSIUS DIO, ROMAN HISTORY bk. XXXVIII, ¶¶ 1–7, at 197–99 (Jeffrey Henderson ed., Earnest Cary trans., 1914); 4 CASSIUS DIO, ROMAN HISTORY bk. XLIII, ¶ 47, at 295 (Jeffrey Henderson ed., Earnest Cary trans., 1916).

74. See STOCKTON, *supra* note 64, at 212 ("The compensation voted him for the damage to his property [during his exile] he had thought less than generous.").

75. OFF., *supra* note 21, bk. I, ¶ 20, at 23.

76. See *id.* bk. II, ¶ 73, at 248 (my translation).

77. *Id.* bk. I, ¶ 43, at 47, bk. II, ¶ 27, at 195–97.

78. *Id.* bk. I, ¶ 26, at 27, bk. I, ¶ 43, at 47, bk. II, ¶ 54, at 225.

79. *Id.* bk. II, ¶ 73, at 249 (my translation).

every man the free and undisturbed control of his own particular property.<sup>80</sup>

Cicero's opposition to redistribution as unjust is not—like more modern conceptions of natural rights in property—tied to any reasoned argument that the status quo distribution of material goods is in any way justified. Indeed, it never seems to occur to Cicero that private dominion over the things of the world *requires* any justification, and he flatly concedes that no such justification can be found in natural law. Rather, distributions simply are what they are as a matter of *social convention*—but however they came to be that way, they must be defended as a matter of justice:

There is, however, no such thing as private ownership established by nature, but property becomes private either through long occupancy (as in the case of those who long ago settled in unoccupied territory) or through conquest (as in the case of those who took it in war) or by due process of law, bargain, or purchase, or by allotment. . . . Therefore, inasmuch as in each case some of those things which by nature had been common property became the property of individuals, *each one should retain possession of that which has fallen to his lot*; and if anyone appropriates to himself anything beyond that, he will be violating the laws of human society.<sup>81</sup>

Unlike later philosophers, Cicero is supremely unconcerned with the justice of private property's original acquisition, which is emphatically *not* a question of natural law. Occupancy of vacant land is on equal footing with conquest through war; bargain and sale are on equal footing with allocation by lot. Mode of acquisition is utterly irrelevant to Cicero's conception of property or its justification; all that matters is that a thing is owned *now*.

This view of property as inherently civil and conventional contrasts sharply with the Lockean framework, but it is entirely consistent with Jefferson's skepticism of natural rights in property. Just as Jefferson argued that "[s]table ownership is the gift of social law,"<sup>82</sup> Cicero thought property arose only in political communities.<sup>83</sup> Indeed, as Neal Wood argued in his comprehensive review of Cicero's social and political philosophy, for Cicero the defense of property is the *raison d'être* of the state.<sup>84</sup> This is not to say that either Jefferson or Cicero rejects the possibility of a natural law in the relationships among persons and things. It is, rather, to say that such a natural law, if it exists, differs meaningfully from the

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80. *Id.* bk. II, ¶ 78, at 255.

81. *Id.* bk. I, ¶ 21, at 23 (emphasis added).

82. Letter from Jefferson to McPherson, *supra* note 5, at 333.

83. *See* OFF., *supra* note 21, bk. II, ¶ 73, at 249.

84. NEAL WOOD, CICERO'S SOCIAL AND POLITICAL THOUGHT 128–32 (1991). For a less jaundiced evaluation of Cicero's political philosophy (with a critique of Wood's thesis), see J. Jackson Barlow, *Cicero on Property and the State*, in CICERO'S PRACTICAL PHILOSOPHY 212, 229–30 (Walter Nicgorski ed., 2012).

Lockean pre-political natural right of property—that it is something other than a “property right” as we conceive of it.<sup>85</sup>

To note that Cicero saw no foundation for private property rights in the law of nature is therefore not to say that Cicero believes his conception of justice—as *preservation* of status quo distributions—to be a matter of social convention or civil law, rather than a matter of natural law—quite the opposite. The closest thing to an argument Cicero offers against redistribution is that the dispossessed will take it hard and will therefore resent the newly enriched (more, one must assume, than the currently poor could possibly resent the currently rich for the legal enforcement of unequal distributions of wealth). This argument, such as it is, provides an instrumental reason to uphold status quo distributions as a matter of natural law: avoiding such resentments—which are natural human responses to material loss at the hands of fellow human beings—preserves peace in the communities into which humans are naturally drawn:

[F]or a man to take something from his neighbour and to profit by his neighbour's loss is more contrary to nature than is death or poverty or pain or anything else that can affect either our person or our property. For, in the first place, injustice is fatal to social life and fellowship between man and man. For if we are so disposed that each, to gain some personal profit, will defraud or injure his neighbour, then those bonds of human society, which are most in accord with nature's laws, must of necessity be broken.<sup>86</sup>

For Cicero, a state-ordered redistribution of resources is nothing more than a public gloss on an underlying private crime against nature: the crime of theft. This crime makes impossible the civic and social relations between thief and victim that would otherwise be their natural tendency toward one another and is therefore contrary to natural law.

Such antipathy to disturbing status quo distributions of resources might (uncharitably) be attributed to vulgar self-interest, given Cicero's status as a man of considerable—but recently acquired, previously dispossessed, and still precarious—property.<sup>87</sup> As psychology, the argument from resentment might be worthy of empirical investigation.<sup>88</sup> But as moral philosophy, in the absence of such empirical validation, Cicero's justice is an *ipse dixit*. And his argument that his conception of justice is a requirement of natural law because human beings are *naturally* drawn to form

85. Indeed, among scholars of natural law there is debate as to whether the ancient Romans had any concept of a “right” at all. Compare RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* 5–13 (1979) (arguing that the Romans lacked a concept of subjective right), with Charles Donahue Jr., *Ius in the Subjective Sense in Roman Law: Reflections on Villey and Tierney*, in A ENNIO CORTESE 506 (Domenico Maffei et al. eds., 2001) (arguing that Roman legal sources, and particularly the law of servitudes in the Digest, evince a modern conception of rights).

86. OFF., *supra* note 21, bk. III, ¶ 21, at 289.

87. Much of Cicero's wealth came to him by marriage and thus could be lost by divorce, and his marriages proved not to be durable. See generally SUSAN TREGGIARI, *TERENTIA, TULLIA AND PUBLILIA: THE WOMEN OF CICERO'S FAMILY* (2007).

88. See generally, e.g., Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991).

property-defending *civil societies* renders the distinction between natural and civil law unclear at best. As we will see in the next part of this Article, a considerable amount of property theory can be understood as an effort to save Cicero's conservative notion of distributive justice by back-filling the justificatory chasms that he opened up in *De Officiis*.

### C. BENEFICENCE: CUI BONO?

Cicero's association of the duties of justice and the *raison d'être* of the state with status quo distributions of material goods has a complex relationship with another concept he associates with—but distinguishes from—justice: the virtue of beneficence (Latin: *beneficentia*). Beneficence, “which may also be called kindness [Latin: *benignitas*] or generosity [Latin: *liberalitas*]” is, Cicero claims, “close akin to justice.”<sup>89</sup> He groups justice and beneficence together as two divisions of the single principle “by which society [Latin: *societas*] and what we may call its ‘common bonds’ [Latin: *communitas*] are maintained.”<sup>90</sup>

Justice, in Cicero's view, is other-regarding: it requires us to secure others against injuries or dispossessions we might cause (or fail to prevent, despite our power to do so) because such dispossessions strain social and civic bonds.<sup>91</sup> Beneficence, in contrast, is a virtue that we practice both for our own moral self-improvement and for the strengthening of our bonds with fellow human beings.<sup>92</sup> It is in this sense a mirror image of justice: if refraining from *involuntary* redistribution of property *avoids* social discord, engaging in *voluntary* transfers of property might well *enhance* social cohesion. Civil society thus becomes a complex transactional economy of obligation and gratitude among individuals acting according to their nature, without any mediation of the state. The units of account in this moral economy are individual acts of beneficence: “we ought to follow Nature as our guide, to contribute to the general good by an interchange of acts of kindness, by giving and receiving, and thus by our skill, our industry, and our talents to cement human society more closely together, man to man.”<sup>93</sup>

Beneficence should not be unlimited, however, as Cicero warns his (reportedly profligate) son:

[T]hose who wish to be more open-handed than their circumstances permit are guilty of two faults: first, they do wrong to their next of kin; for they transfer to strangers property which would more justly be placed at their service or bequeathed to them. And second, such generosity too often engenders a passion for plundering and misappropriating property, in order to supply the means for making large gifts.<sup>94</sup>

89. OFF., *supra* note 21, bk. I, ¶ 20, at 21–23.

90. *Id.*

91. *Id.* bk. I, ¶¶ 21–23, at 23–25.

92. *Id.*

93. *Id.* bk. I, ¶ 22, at 23–25.

94. *Id.* bk. I, ¶ 44, at 49.

It is against this background that Cicero invokes Ennius, and the reason is now clear. Sharing that which “costs us nothing to give” is a desirable way to practice beneficence because, costing nothing, it risks neither of the supposed faults of excessive liberality—leaving fewer resources to one’s kin and creating conditions in which redistribution might seem tempting. A prophylactic concern for justice—understood as preservation of status quo distributions of material wealth—is a *limit* on beneficence:

We must, therefore, take care to indulge only in such liberality as will help our friends and hurt no one. The conveyance of property by Lucius Sulla and Gaius Caesar from its rightful owners to the hands of strangers should, for that reason, not be regarded as generosity; for nothing is generous, if it is not at the same time just.<sup>95</sup>

For the same reason (and one other, discussed below), Cicero counsels his (again, reportedly profligate) son that donations of personal service (such as representation in legal matters) are “nobler and more dignified”<sup>96</sup> than donations of money, which must be carefully conserved. “Liberality is . . . forestalled by liberality: for the more people one has helped with gifts of money, the fewer one can help.”<sup>97</sup> Indeed, for Cicero this is the point of invoking Ennius: “this spirit of universal liberality must be regulated *according to that test of Ennius—’No less shines his’*—in order that we may continue to have the means for being generous to our friends.”<sup>98</sup>

The need to retain sufficient means to be “generous to our friends” foreshadows Cicero’s views of gratuitous transfers that *do* cost us something, and provides the other reason why donations of services are to be preferred to donations of wealth. Cicero’s main argument in favor of acts of beneficence is that they are *useful to the donor* because they obligate others to the donor both economically and politically:

I set it down as the peculiar function of virtue to win the hearts of men *and to attach them to one’s own service*. . . . in order that we may through their co-operation have our natural wants supplied in full and overflowing measure, that we may ward off any impending trouble, avenge ourselves upon those who have attempted to injure us, and visit them with such retribution as justice and humanity will permit.”<sup>99</sup>

Cicero’s *beneficentia* is here revealed to be a mobster’s generosity.<sup>100</sup> The

95. *Id.* bk. I, ¶ 43, at 47–49; see also SAMUEL FLEISCHACKER, A SHORT HISTORY OF DISTRIBUTIVE JUSTICE 21 (2004) (“Cicero himself makes clear, however, that . . . justice *constrains* beneficence. . . . [A]nd his point here is precisely to rule *out* any kind of beneficence that would violate property rights.”).

96. *OFF.*, *supra* note 21, bk. II, ¶ 52, at 223.

97. *Id.* bk. II, ¶¶ 52–53, at 223.

98. *Id.* bk. I, ¶ 52, at 57 (emphasis added).

99. *Id.* bk. II, ¶¶ 17–18, at 185–87 (emphasis added). Cicero’s discussion makes clear he is referring here to all the virtues, not merely the virtue of beneficence.

100. MARIO PUZO, THE GODFATHER 28 (New American Library 2005) (“[Y]ou shall have your justice. Some day, and that day may never come, I will call upon you to do me a service in return. Until that day, consider this justice a gift . . .”).

transactional moral economy of beneficence—of reciprocated favors, generosity and gratitude, debt and restitution—is a game by which men of property obligate others and thereby gain power. This game manifested itself most overtly in the relations of *patronus* and *cliens*, and the associated webs of patronage and loyalty that organized socioeconomic relations and electoral politics in the Roman Republic.<sup>101</sup>

Such a cynical (to modern eyes) view of virtue helps explain why most of Cicero's discussion of beneficence appears in Book II of *De Officiis*, on utility, rather than in Book I, on morality. It offers one reason (though, admittedly, not the only reason) why Cicero is able to maintain, in Book III of *De Officiis*, that there cannot truly be a conflict between the moral and the useful: because acting contrary to his vision of morality gives one an inexpedient reputation for untrustworthiness.<sup>102</sup> And it affords the second reason why personal service is to be preferred to donations of money: such service is especially useful in advancing the political status of the donor.<sup>103</sup> Both the preference for donations of personal service and the invocation of Ennius reflect a “buy low, sell high” strategy. If one must be generous in order to obligate others to one's service, it is better to do so at the lowest possible cost.

The same self-interested approach to beneficence explains Cicero's view that generosity should be parceled out according to careful consideration of a number of contextual factors:

[I]n acts of kindness we should weigh with discrimination the worthiness of the object of our benevolence; we should take into consideration his moral character, his attitude toward us, the intimacy of his relations to us, and our common social ties, as well as the services he has hitherto rendered in our interest.<sup>104</sup>

Cicero's beneficence appears to diminish (though not disappear) with social distance: our family and household are to be preferred to our neighbors, who are to be preferred to our ethnic group, who are to be preferred to foreigners.<sup>105</sup> Conversely, beneficence increases with a history of exchanges: those who have demonstrated their generosity to us in

101. On the patron-client relationship in the late Republic, see P.A. BRUNT, *THE FALL OF THE ROMAN REPUBLIC AND RELATED ESSAYS* 351–442 (1988); ALEXANDER YAKOBSON, *ELECTIONS AND ELECTIONEERING IN ROME: A STUDY IN THE POLITICAL SYSTEM OF THE LATE REPUBLIC* 65–123 (1999). On the connection between these relationships and Cicero's thought, see WOOD, *supra* note 84, ch. 10.

102. OFF., *supra* note 21, bk. III, ¶ 57, at 327 (“Is it not inexpedient to subject oneself to all these terms of reproach and many more besides?”). Cicero also adopts the circular argument of the Stoics: that because a good man loves virtue, he would find it inexpedient to behave immorally. *Id.* bk. III, ¶¶ 13–16, at 281–83.

103. *Id.* bk. II, ¶ 65, at 239 (“To protect a man in his legal rights[, to assist him with counsel,] and to serve as many as possible with that sort of knowledge tends greatly to increase one's influence and popularity.”).

104. *Id.* bk. I, ¶ 45, at 49.

105. See *id.* bk. I, ¶¶ 50–57, at 53–61, bk. III, ¶ 28, at 295; see also Nussbaum, *supra* note 41, at 185–87 (critically examining Cicero's cosmopolitanism with respect to material aid); cf. Richard Rorty, *Justice as a Larger Loyalty*, 4 *ETHICAL PERSP.* 139, 139–40 (1997).

the past have a first claim on our aid.<sup>106</sup> But most important in the selection of a recipient of beneficence is the recipient's moral desert, or "worthiness."<sup>107</sup> "[T]he more a man is endowed with these finer virtues—temperance, self-control, and that very justice about which so much has already been said—the more he deserves to be favoured."<sup>108</sup> This concern over merit and desert is a key feature of the appropriate allocation of beneficence, and thus of material aid: "[I]n order to become good calculators of duty, [we must be] able by adding and subtracting to strike a balance correctly and find out just how much is due [Latin: *debeo*] to each individual."<sup>109</sup>

Calculating each person's due is a matter of merit and reciprocal social obligation; it is emphatically *not* a matter of material need. Indeed, acts that we would today recognize as charitable play only a minor role in Cicero's beneficence. While he concedes that relieving the poor is a worthwhile "service to the state"<sup>110</sup> and that, "other things being equal," it is better to give aid to those with greater need than to those from whom we might expect greater reward,<sup>111</sup> material need remains secondary to merit in allocating beneficence. "It will be the duty of charity [Latin: *benignitas*] to incline more to the unfortunate," Cicero says, "*unless, perchance, they deserve their misfortune.*"<sup>112</sup>

Even here, the transactional nature of Cicero's beneficence creeps in. Preference for the poor is advisable not because alleviating need is virtuous but because the rich are less likely than the poor to demonstrate gratitude. Generosity is quite literally an investment (Latin: *collocari*)—from which one ought to expect a return—and the ungrateful rich are, in Cicero's view, simply a poor investment:

[T]hey who consider themselves wealthy, honoured, the favourites of fortune, do not wish even to be put under obligations by our kind services. Why, they actually think that they have conferred a favour by accepting one, however great; and they even suspect that a claim is thereby set up against them or that something is expected in return. Nay more, it is bitter as death to them to have accepted a patron or to be called clients. Your man of slender means, on the other hand, feels that whatever is done for him is done out of regard for himself and not for his outward circumstances. Hence he strives to show himself grateful not only to the one who has obliged him in the past but also to those from whom he expects similar favours in the future—and he needs the help of many; and his own service, if he happens to render any in return, he does not exaggerate, but he actually depreciates it. . . . I think, therefore, that kindness to the good is

106. OFF., *supra* note 21, bk. 1, ¶¶ 47–48, at 51–53.

107. *Id.* bk. I, ¶ 45, at 49.

108. *Id.* bk. I, ¶ 46, at 51.

109. *Id.* bk. I, ¶ 59, at 63.

110. *Id.* bk. II, ¶ 63, at 235–37.

111. *Id.* bk. I, ¶ 49, at 53.

112. *Id.* bk. II, ¶ 62, at 235 (emphasis added).



a better investment [Latin: *collocari*] than kindness to the favourites of fortune.<sup>113</sup>

#### D. SUMMARY: CICERO LIGHTS THE TAPER

In sum, Cicero's view of our duties regarding property and distribution rests on three pillars: (1) preservation of status quo distributions of material goods against involuntary dispossession by public or private action (the strict duty of *iustitia*); (2) creation of a socially cohesive web of favors and obligations through voluntary acts of personal generosity (the pragmatic virtue of *beneficentia*); and (3) discrimination in the allocation of beneficence according to merit or desert in the recipient (the measure of *debitio*).

Against Cicero's three principles, Ennius's *lumen* is a residuum, or a special case. The privately held resources that are appropriately treated as common property are treated as such because they can generate gratitude and its concomitant social bonds at no cost. Sharing such resources supports Cicero's second pillar without destabilizing the first. Our close reading of *De Officiis* thus provides us with our first and most important insight into Jefferson's Taper: Jefferson appears to consider ideas to be within this special category of resources. Such a categorization circumvents the need to consider Cicero's third principle—the notion of worthiness, merit, or “due” (*debitio*)—in weighing the just distribution of knowledge, precisely because indiscriminate sharing has no effect on our “means for being generous to our friends.”<sup>114</sup>

Jefferson's characterization of ideas has been controversial among those who profess a natural-law justification for their IP policy preferences.<sup>115</sup> But as we will see, Cicero's views are *foundational* to the natural law tradition, while Locke's valorization of labor can comfortably be read as a gloss on Cicero's third pillar: an identification of labor with merit. And importantly, Cicero's view of merit—a view he shares with other founders of the natural law tradition—is that it is socially contingent: different societies may evaluate it according to different criteria. This is a view strikingly similar to another position taken by Jefferson in his letter to McPherson: that governments might choose to award IP rights (or not to do so) “according to the will and convenience of the society, without claim or complaint from anybody.”<sup>116</sup>

These connections between Jefferson and Cicero are tantalizing, but incomplete. A fuller consideration of the full sweep of the natural law tradition before Locke will help illuminate the move Jefferson is making with the Parable of the Taper and its relation to a particular conception of natural justice.

113. *Id.* bk. II, ¶¶ 69–71, at 243, 245.

114. *Id.* at bk. I, ¶ 52, at 57.

115. See *supra* notes 17–20 and accompanying text.

116. Letter from Jefferson to McPherson, *supra* note 5, at 334.

#### IV. FROM MODERN TO CLASSICAL: A NATURAL LAW THEORY OF DISTRIBUTIVE JUSTICE

Julia Annas observes that “although [Cicero] is very sure that people have just entitlements to what is theirs, he has no criterion for deciding whether an entitlement is just.”<sup>117</sup> This position is, in the view of modern scholars, “deeply problematic,”<sup>118</sup> even “pernicious,”<sup>119</sup> insofar as Cicero’s defense of status quo distributions of material resources is “utterly unjustified”<sup>120</sup> and yet so central to Western philosophy. Martha Nussbaum has been especially critical of Cicero on this point, even while noting with approval that his sense of duty seems to be remarkably cosmopolitan for the ancient world.<sup>121</sup> “[A]ny . . . thinker who starts off from Cicero,” she writes, “is bound to notice the thinness and arbitrariness of his account of [property] rights.”<sup>122</sup>

Cicero clearly thinks that a taking of private property is a serious injustice, analogous to an assault. But nothing in [his discussion of property] explains why he should think this, or why he should think that there is any close relation between existing distributions and the property rights that justice would assign.<sup>123</sup>

This lacuna opens Cicero to the charge of hypocrisy and “partisan politicking,” particularly given his claimed allegiance to Stoic principles:

His Stoic forebears, as he well knows, thought all property should be held in common; he himself has staked his entire career on an opposition to any redistributive takings. So it’s no accident that he skates rather rapidly over the whole issue of how property rights come into being . . . .<sup>124</sup>

Nussbaum is right to point out that Cicero assumes, rather than argues for, status quo distributions of material resources. But Cicero’s assumption—his Stoic forebears notwithstanding—is hardly surprising in historical context. Nussbaum is critiquing Cicero from the perspective of what I have referred to as the Modern Tradition of distributive justice, under which access to resources can be a matter of individuals’ rights-based claims, and resource inequalities among human beings accordingly require some justification. Indeed, Nussbaum’s Capabilities Approach rivals Rawls’s *Theory of Justice* as the most fully developed expression of

117. Julia Annas, *Cicero on Stoic Moral Philosophy and Private Property*, in *PHILOSOPHIA TOGATA: ESSAYS ON PHILOSOPHY AND ROMAN SOCIETY* 151, 170 (Miriam Griffin & Jonathan Barnes eds., 1989).

118. CHRISTOPHER PIERSON, *JUST PROPERTY: A HISTORY IN THE LATIN WEST, VOLUME ONE: WEALTH, VIRTUE, AND THE LAW* 49 (2013).

119. Nussbaum, *supra* note 41, at 180.

120. *Id.* at 187.

121. *See generally id.*; *see also* MARTHA C. NUSSBAUM, *THE COSMOPOLITAN TRADITION: A NOBLE BUT FLAWED IDEAL*, 54–63 (2019) [hereinafter NUSSBAUM, *THE COSMOPOLITAN TRADITION*] (reviewing critiques of Cicero’s views on the system of duties regarding material resources).

122. NUSSBAUM, *THE COSMOPOLITAN TRADITION*, *supra* note 121, at 55.

123. *Id.*

124. *Id.* at 56.

that tradition. And while Nussbaum may be right to critique Cicero in this way based on our current philosophical understandings, both the possibility of rights-based claims to material resources and the concomitant presumption that material inequalities require justification are—as applied to Cicero—anachronisms.<sup>125</sup> In the first instance, as noted above, it is not at all clear that the Romans of Cicero’s day, or indeed any Western societies up to the Middle Ages, had any concept of “rights” in the modern sense of individually held claims that both other individuals and political institutions have a duty to respect and enforce.<sup>126</sup> And in the second instance, the idea that material inequality *in itself* requires justification is of recent vintage. It is a byproduct of the intellectual, political, and socioeconomic upheavals of the Enlightenment and the Age of Revolutions in the seventeenth and eighteenth centuries—episodes in which Jefferson played some part. The democratic ferment of this era broadly coincided with the socioeconomic shocks of technology-driven industrialization and mercantilist colonialism, which shattered (for some fortunate segments of the population) the Malthusian trap of material scarcity that had snared the human race for its entire history.<sup>127</sup> Combined, these dynamics situated a deeply radical and still-unfulfilled principle at the heart of Western political philosophy: the proposition “that all men are created equal.”<sup>128</sup>

Today we may chafe at the gender exclusion encoded into Jefferson’s declaration of equality or dismiss it as hypocritical in light of Jefferson’s enslavement of other human beings. But even as expressed, this supposedly “self-evident” truth would have seemed absurd or even repugnant to the ancients, and indeed to most philosophers before the Enlightenment, at least with respect to practical and political questions such as distribution of resources. To them, the most fundamental concern of distributive justice was to *identify inequalities* among human beings and shape one’s behavior accordingly. This difference is key to unpacking the distinctions

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125. This is not to say that Nussbaum is being in any way unfair to Cicero—quite the contrary, insofar as her latest work seeks to elaborate on some of Cicero’s more defensible insights in a way that is congenial to her Capabilities Approach. NUSSBAUM, *THE COSMOPOLITAN TRADITION*, *supra* note 121, at 252 (“Obviously enough, a tradition is a good guide to philosophers of today only if we are alert to its weaknesses and deficiencies. We learn by grappling with it and finding it wanting, as well as by appreciating the insights it continues to offer.”). It is only to say that the background commitments and assumptions underlying modern and ancient moral philosophy—particularly regarding the distribution of resources—differ substantially, and each should be understood on its own terms even where we find those commitments and assumptions to be flawed.

126. *See supra* note 85 and accompanying text.

127. *See generally* GREGORY CLARK, *A FAREWELL TO ALMS: A BRIEF ECONOMIC HISTORY OF THE WORLD* (2007). Thus Hume could write in *An Enquiry Concerning the Principles of Morals* that “nature is so liberal to mankind, that, were all her presents equally divided among the species, and improved by art and industry, every individual would enjoy all the necessaries, and even most of the comforts of life,” concluding that material inequality is justified only because the alternative is impracticable. DAVID HUME, *ENQUIRIES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS* 193–94 (L. A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1902).

128. *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

between the Classical Tradition and the Modern Tradition, and thereby tracing the natural-law argument of Jefferson's Taper.

#### A. THE MODERN TRADITION: TAKING EQUALITY SERIOUSLY

The Modern Tradition of distributive justice that emerged from the Enlightenment era is the source of our modern notion of "social justice,"<sup>129</sup> which is itself the culmination of two-and-a-half centuries of working through the implications of the political equality of human beings. It is a tradition in which individuals have a claim to certain goods simply by virtue of being human, and in which political institutions have a responsibility to vindicate such claims in the face of excessive material inequalities on the ground—by compulsory redistribution if necessary. But this conception of justice did not emerge fully formed from the democratic revolutions of the late eighteenth century. Samuel Fleischacker, in his brief but powerful history of the philosophical concept of distributive justice,<sup>130</sup> traces its stirrings in the philosophy of eighteenth-century thinkers such as Rousseau, Smith, and Kant, and finds its first political expression in the ill-fated career of the French revolutionary François-Noël "Gracchus" Babeuf.<sup>131</sup> The history of Western political movements and political philosophy since the Enlightenment is in no small part a history of conflict over the principle of equality and its implications: a "politicization of poverty" in which a diverse array of advocates for the poor press states to recognize a justice-based claim of their poorer citizens to resources (with the example of the French Revolution as an implied threat), while reactionaries (such as Malthus, Burke, Spencer, Rand, and Nozick) argue that such a claim would be immoral, impracticable, or counterproductive.<sup>132</sup> By the late twentieth century, the various threads of political and moral philosophy built on the commitment to equality had become mutually reinforcing and ripe for synthesis as a fully-fleshed-out theory of distributive justice. Fleischacker summarizes this theory—what I refer to here as the Modern Tradition—as including the propositions that "[s]ome share of material goods is part of every individual's due, part of the rights and protections that everyone deserves" and that "[t]he state, and not merely private individuals or organizations, ought to be guaranteeing the distribution."<sup>133</sup>

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129. The canonical articulation of the domain of social justice in the modern sense comes from Rawls:

A set of principles is required for choosing among the various social arrangements which determine [the] division of advantages and for underwriting an agreement on the proper distributive shares. These principles are the principles of social justice: they provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation.

RAWLS, *supra* note 29, at 4.

130. See generally FLEISCHACKER, *supra* note 95.

131. See *id.* ch. 2, 53–80.

132. See *id.* ch. 3, 80–125.

133. *Id.* at 7.

The fullest systematic expression of the Modern Tradition is found in John Rawls' *A Theory of Justice*, and its implications are further developed in the works of Amartya Sen and Martha Nussbaum on human capabilities.<sup>134</sup> These three philosophers arrive at closely related theories of distributive justice from different methodological paths, one from each of the three great schools of Western moral philosophy: Consequentialism (Sen),<sup>135</sup> Deontology (Rawls),<sup>136</sup> and Virtue Ethics (Nussbaum).<sup>137</sup> In *A Theory of Justice*, the Modern Tradition finds its capsule summary in the form of Rawls's Difference Principle: "Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, . . . and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."<sup>138</sup> For Sen, inequality of resources is a second-order problem because the primary end of human life is to develop our *capabilities* and *functionings*—whereas resources are merely means to that end.<sup>139</sup> But again, Sen defends equality (of capabilities) as an end to be pursued by societies with a claim to justice—though he is deliberately vague as to how particular societies ought to engage in such pursuit.<sup>140</sup> Martha Nussbaum has most fully developed the capabilities approach into a fairly concrete program of social justice to be implemented as a matter of public policy and potentially enforceable by law, making explicit the Modern Tradition's derivation of enforceable claims to resources from the principle of human equality.<sup>141</sup> What these modern theorists of social justice have in common is the idea that the commitment to human equality has implications for the guidance of our actions

134. See generally RAWLS, *supra* note 29; MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH (2011) [hereinafter NUSSBAUM, CREATING CAPABILITIES]; AMARTYA SEN, THE IDEA OF JUSTICE (2009) [hereinafter SEN, THE IDEA OF JUSTICE].

135. See Amartya Sen, *Capability and Well-Being*, in THE QUALITY OF LIFE 30, 33 (Martha C. Nussbaum & Amartya Sen eds., 1993) [hereinafter Sen, *Capability and Well-Being*].

136. See generally JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly ed., 2001).

137. See generally Martha Nussbaum, *Nature, Function, and Capability: Aristotle on Political Distribution*, in OXFORD STUDIES IN ANCIENT PHILOSOPHY: SUPPLEMENTARY VOLUME 145 (Julia Annas & Robert H. Grimm eds., 1988) [hereinafter Nussbaum, *Nature, Function, and Capability*]. Nussbaum's reliance on Aristotle invokes his perfectionism regarding the good human life, rather than the (comparatively thinner) account of distributive justice examined below.

138. RAWLS, *supra* note 29, at 266. Part (a) is further refined by Rawls' "lexical difference principle," which formalizes a concern for the less-well-off over the more-well-off throughout the social welfare distribution. *Id.* at 72.

139. See generally Amartya Sen, *Equality of What? (May 22, 1979)*, in 1 TANNER LECTURES ON HUMAN VALUES 195 (Sterling M. McMurrin ed., 1980); see also Sen, *Capability and Well-Being*, *supra* note 135, at 30–31.

140. See generally SEN, THE IDEA OF JUSTICE, *supra* note 134.

141. See generally, e.g., NUSSBAUM, CREATING CAPABILITIES, *supra* note 134, at 69–100; NUSSBAUM, THE COSMOPOLITAN TRADITION, *supra* note 121, at 244 ("One of the [Capabilities Approach's] most central contentions is that material entitlements—to education, to health care, to bodily integrity—are every bit as important for a life commensurate with human dignity as are the entitlements typically covered under the 'duties of justice': rights to freedom of speech, conscience, and association, as well as rights of political participation."); Nussbaum, *Nature, Function, and Capability*, *supra* note 137.

and the structure of our societies, particularly as regards the distribution of resources needful to a life well lived.

In IP policy and theory, the Modern Tradition of distributive justice finds expression in the form of a commitment to “access to knowledge.” Intangible goods that are subject to IP claims—such as educational materials, medical and communications technologies, and cultural products—are often crucial to a life well lived, and are thus things that all human beings have a claim to. Scholars working within the Modern Tradition are, accordingly, often critical of IP laws (or at least those currently prevailing), particularly insofar as those laws limit the ability of the poor and otherwise disadvantaged not only to access IP-covered goods that could ameliorate their condition but also to exploit their own knowledge for the benefit of themselves and their societies.<sup>142</sup> These critiques have coincided with some qualifications and limitations of IP rights in certain areas—such as the Doha Declaration concerning compulsory licensing and parallel importation of pharmaceuticals as a limit on patent rights,<sup>143</sup> or the Marrakesh Treaty expanding access to copyrighted works for the visually impaired.<sup>144</sup> More recently, these critiques have spurred renewed academic interest in alternatives to IP rights—such as prizes and direct government investment in knowledge production—that might provide comparable incentive effects without the price-rationing that generates inequalities of access under the IP system.<sup>145</sup>

To most of us, the moral imperatives of, for example, delivering available life-saving medicine to people who are suffering, or providing a quality education to disabled children, seems self-evident. It is a natural implication of our commitment to the equal worth of every human being. Steeped as we are in the Modern Tradition of distributive justice, it may be difficult for us to appreciate how innovative this view is in the intellectual history of the West. That every individual, whatever their station or condition, might have some claim on the resources conducive to a life well lived—let alone a claim that should be vindicated by the state—is a conclusion that requires as one of its premises the normative principle of human equality. Without that principle, modern notions of distributive justice are as arbitrary as Cicero's conception of justice seems to us. Conversely, viewed from the standards of his own day (and indeed of many centuries thereafter), Cicero's position is fully consistent with a much

142. See generally, e.g., Amy Kapczynski, *Access to Knowledge: A Conceptual Genealogy*, in *ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY* 17 (Gaëlle Krikorian & Amy Kapczynski eds., 2010); Peter Lee, *Toward a Distributive Agenda for U.S. Patent Law*, 55 *HOUS. L. REV.* 321 (2017); Symposium, *Intellectual Property and Social Justice*, 40 *U.C. DAVIS L. REV.* 559 (2007).

143. World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/2, 41 *ILM* 746 (2002).

144. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, 52 *I.L.M.* 1312.

145. See generally, e.g., Daniel J. Hemel & Lisa Larrimore Ouellette, *Beyond the Patents—Prizes Debate*, 92 *TEX. L. REV.* 303 (2013); Daniel J. Hemel & Lisa Larrimore Ouellette, *Innovation Policy Pluralism*, 128 *YALE L.J.* 544 (2019).

older tradition of distributive justice. That tradition—the Classical Tradition—saw *inequality* among persons as *natural* and potentially even *useful*.

## B. THE CLASSICAL TRADITION

The Classical Tradition's commitments regarding distribution of material resources include: (1) a default acceptance of the status quo allocation of resources; (2) a commitment to uphold the status quo by enforcing—via private or public coercion—claims to undo involuntary transfers (such as theft) as a matter of legal and natural right; (3) a principle that any prospective distribution or any reallocation away from the status quo ought to be in proportion to the merit of the recipients; and (4) a belief that transfers of resources, even according to merit, are strictly a matter of private ethics and judgment, and thus not subject to coercive enforcement by the state.

The first two points encapsulate the Classical Tradition's conception of rectificatory or commutative justice; the last two encapsulate its conception of distributive justice—though the two are obviously interrelated. Underlying these commitments is a classical conception of natural law: one premised on the belief that human beings are naturally unequal in virtue or merit, naturally inclined to their own self-preservation, and naturally inclined to pursue self-preservation by appropriating resources and cultivating social relationships (particularly by reciprocating the kindnesses or injuries visited upon them by one another). The Classical Tradition can thus be understood as an effort to rationally delineate the proper roles of the individual and the polity in allocating the resources needful to a life well lived, taking as given these features of human nature and the current state of the world.

Because the assessment of merit necessary to judgments regarding distribution is a practical exercise based on rich and varied circumstances, in the Classical Tradition, distributive justice is properly the province of individual virtue rather than public policy—subject to the soft pressure of context-sensitive norms rather than the strict and, as necessary, external compulsion of the law. Alternatively, it is the domain of what a Kantian would call wide and imperfect duties of Virtue, rather than narrow and perfect duties of Right.<sup>146</sup> The Classical Tradition thus implied no claims to redistribution that others were strictly *obligated* to respect, and the only duty it imposed on the state was to stay out of the way.<sup>147</sup> The Class-

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146. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 240, 390 (Mary Gregor trans., 1991). On the complex connections between Aristotelian virtue and Kantian imperfect duties, see generally NANCY SHERMAN, *MAKING A NECESSITY OF VIRTUE: ARISTOTLE AND KANT ON VIRTUE* (1997).

147. FLEISCHACKER, *supra* note 95, at 27 (“Not a single jurisprudential thinker before [Adam] Smith—not Aristotle, not Aquinas, not Grotius . . . —put the justification of property rights under the heading of distributive justice. Claims to property, like violations of property, were matters for commutative justice; no one was given a right to claim property by distributive justice.”).

ical Tradition is thus well-represented in *De Officiis*, but that work is only one link in a philosophical chain stretching over two millennia. And Jefferson, by invoking Cicero's illustration of this tradition in action, situated IP law within this interlocking set of normative commitments regarding the distribution of resources necessary to a life well lived—a tradition grounded in a particular conception of natural law. He was, in short, embracing rather than overthrowing the very justificatory framework espoused by his modern-day detractors in IP theory.

### 1. *The Ancients: Means and Merit*

We can trace the Classical Tradition back to Aristotle. In the *Nicomachean Ethics*, he provides the first extant definition of distributive justice in the Western canon. Distributive justice, for Aristotle, is that division of justice “which is manifested in distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution.”<sup>148</sup> He claims that such distributions

should be according to merit; for all men agree that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit, but democrats identify it with the status of freeman, supporters of oligarchy with wealth (or with noble birth), and supporters of aristocracy with excellence.<sup>149</sup>

Aristotle's definition and criteria of distributive justice are “formal rather than . . . substantial”<sup>150</sup>; he is mainly interested in distinguishing distributive justice from commutative justice—the latter having to do with the righting of wrongs. That distinction turns on the role of merit or desert in the divisions of justice: “We compensate even bad people who have been injured, paying attention only to the degree of harm done, but we distribute goods to people insofar as they deserve them.”<sup>151</sup>

We can see in Aristotle's distinction between commutative and distributive justice a mirror of Cicero's distinction between justice and beneficence. Just as Aristotle's commutative justice is concerned with restoring a baseline upset by an act of injury,<sup>152</sup> Cicero's *iustitia* consists in protection against disturbance of the status quo. And just as Aristotle ascribed merit a role in distributive justice but not commutative justice, Cicero's beneficence is subject to finely tuned determinations of merit, whereas his *iustitia* is absolute and unqualified.

The two thinkers' theories of property and their attitudes toward material inequality are similar as well. Aristotle's *Politics* even quotes the Greek aphorism with which Cicero sets the stage for Ennius—friends

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148. ARISTOTLE, *NICOMACHEAN ETHICS* 1130b, *reprinted in* 2 *THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION* 1729, 1784 (J. O. Urmson & W.D. Ross trans., Jonathan Barnes ed., 1984) [hereinafter *ARISTOTLE, NICOMACHEAN ETHICS*]. English translations of Aristotle are from this collection unless otherwise noted.

149. *Id.* 1131a, at 1785.

150. FLEISCHACKER, *supra* note 95, at 19.

151. *Id.* at 19–20.

152. ARISTOTLE, *NICOMACHEAN ETHICS* 1131b–1132b, *supra* note 148, at 1785–87.



“will have all things common.”<sup>153</sup> Aristotle invokes the aphorism in a discussion of whether material goods should be held in common or instead as private property—a question on which he departed from at least the early Greek Stoics, whom Cicero otherwise claimed to follow.<sup>154</sup> Aristotle and Cicero agreed on the answer to that question, favoring a system of private property under which men (always men, in the Classical Tradition) are voluntarily generous towards their fellows, and the state’s only role is to encourage—rather than compel—such voluntary generosity. “It is clearly better that property should be private, but the use of it common,” Aristotle says, “and the special business of the legislator is to create in men this benevolent disposition.”<sup>155</sup> Aristotle’s reasons for this position are twofold, and both reasons mirror Cicero’s pragmatic conservatism rather than any notion of pre-political rights.

First, just as Cicero claims that defense of status quo distributions of material goods is necessary to preserve civic harmony, Aristotle argues that private property avoids the jealousies and social strife that would result from equal stakes in a commons: “If [citizens] do not share equally in enjoyments and toils, those who labour much and get little will necessarily complain of those who labor little and receive or consume much.”<sup>156</sup> This argument is consistent with the principle of proportionality of material goods to merit under Aristotle’s conception of distributive justice, as well as with Cicero’s implied conclusion that the bitterness of the dispossessed rich under a redistributive scheme is a greater social ill than the discontentment of the presently (impliedly idle) poor under the unequal allocations of a private property system. Call this the *Instrumentalist Argument* for resource inequality.

Notably, the Instrumentalist Argument assumes the inescapable inequality of persons in a community according to some lexical ordering of merit (here, based on labor), and crafts distributive principles around—indeed, in proportion to—that inequality. In Aristotle’s moral and political framework, human beings are naturally unequal,<sup>157</sup> and it is both unjust and inexpedient to treat unequal things as if they were equal.<sup>158</sup>

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153. ARISTOTLE, POLITICS 1263a (B. Jowett trans.), reprinted in 2 THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION, *supra* note 148, at 1986, 2004 [hereinafter ARISTOTLE, POLITICS].

154. For a brief summary of the literature on the Greek Stoics’ complex and evolving views on property, see PIERSON, *supra* note 118, at 40–44.

155. ARISTOTLE, POLITICS 1263a, *supra* note 153, at 2004–05.

156. *Id.* at 2004.

157. See *id.* 1252a–b, at 1986–87 (distinguishing among men and women, rulers and slaves, Greeks and barbarians according to the way nature “makes each thing . . . for one and not for many uses”); *id.* 1254a, at 1990 (“For that some should rule and others be ruled is a thing not only necessary, but expedient; from the hour of their birth, some are marked out for subjection, others for rule.”); *id.* 1331b–1332a, at 2113 (“The happiness and well-being which all men manifestly desire, some have the power of attaining, but to others, from some accident or defect of nature, the attainment of them is not granted.”).

158. ARISTOTLE, NICOMACHEAN ETHICS 1131a, *supra* note 148, at 1785 (“but this is the origin of quarrels and complaints—when either equals have and are awarded unequal shares, or unequals equal shares”); ARISTOTLE, POLITICS 1280a, *supra* note 153, at 2031 (“[J]ustice is thought by [all men] to be, and is, equality—not, however, for all, but only for

Largely owing to Aristotle's influence, "[u]ntil the eighteenth century, it was assumed that human beings are unequal by nature—i.e., that there was a natural human hierarchy."<sup>159</sup> That hierarchy is the deep structure of the Classical Tradition, which distinguishes it from the Modern Tradition.

Aristotle's second justification of property supposes the institution to be not only a bulwark against social evil but also a source of individualized good. He argues that when transfers of material goods from rich to poor are voluntary, rather than a matter of state compulsion, there will be greater opportunity (at least for property owners) to experience the happiness of practicing virtue: "[T]here is the greatest pleasure in doing a kindness or service to friends or guests or companions, which can only be rendered when a man has private property."<sup>160</sup> The Aristotelean virtue of "liberality" [Greek: ἐλευθεριότης]<sup>161</sup> would be "annihilated" if the state tried to compel it: "No one, when men have all things in common, will any longer set an example of liberality or do any liberal action; for liberality consists in the use which is made of property."<sup>162</sup> Call this the *Virtue Argument* for material inequality. The Virtue Argument, to Aristotle, is the import of the aphorism "friends . . . will have all things common": things are "common" among friends not because either civil or natural law makes them so, but because virtuous friendship entails liberality toward one's friends.<sup>163</sup>

Thus, for Aristotle as for Cicero, defending rights in property despite its unequal distribution has the salutary effect of giving men of property opportunities to benefit *themselves*—for Aristotle through the perfection of virtue, and for Cicero through the cultivation of reciprocal obligations. And for Aristotle as for Cicero, such opportunities for acts of material generosity ought to be pursued by the well-off with a discriminating eye for the merit of their donees and with due care for the preservation of the donors' self-interest:

the liberal man will give for the sake of the noble, and rightly; for he will give to the right people, the right amounts, and at the right

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equals. And inequality is thought to be, and is, justice; neither is this for all, but only for unequals."); *id.* 1332b, at 2114 ("Equality consists in the same treatment of similar persons, and no government can stand which is not founded upon justice.").

159. Stefan Gosepath, *Equality*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 2.3 (Edward N. Zalta ed., Spring 2011 ed. 2011), <https://plato.stanford.edu/entries/equality/> [<https://perma.cc/9GS6-K2WG>].

160. ARISTOTLE, POLITICS 1263b, *supra* note 153, at 2005.

161. The translation of this term is complicated, and more closely related to freedom from undue concern over one's possessions than the "good-doing" implied by *beneficentia*. See MICHAEL PAKALUK, ARISTOTLE'S NICOMACHEAN ETHICS: AN INTRODUCTION 173 (2005).

162. ARISTOTLE, POLITICS 1263b, *supra* note 153, at 2005. For more on Aristotle's theory of property, see generally Robert Mayhew, *Aristotle on Property*, 46 REV. METAPHYSICS 803 (1993).

163. ARISTOTLE, POLITICS 1263a, *supra* note 153, at 2004.

time. . . . Nor will he neglect his own property, since he wishes by means of this to help others.<sup>164</sup>

Finally, Aristotle introduced another distinction that is important to Cicero and will be important to all others in the Classical Tradition: the distinction between natural—or universal—law, and civil—or positive—law:

[There are] two kinds of law . . . particular law [νόμος ἴδιος] and universal law [νόμος κοινός]. Particular law is that which each community lays down and applies to its own members: this law is partly written and partly unwritten. Universal law is the law of nature. For there really is, as everyone to some extent divines, a natural justice and injustice that is common to all, even to those who have no association or covenant with each other.<sup>165</sup>

Aristotle never tells us explicitly whether his principles of distributive justice ought to be associated with universal/natural law or particular/civil law, but his argument that different societies may judge “merit” differently for purposes of distributive justice strongly suggests the latter. Again, this is consistent with Cicero’s later-expressed view that property and the distribution of material goods are matters of civil—not natural—law.

The Aristotelean/Ciceronian view on the relationship between individual merit, the distribution of material resources, and the role of the state pervaded Western thought for centuries—millennia, really. It entered the legal tradition of Western Europe through the Emperor Justinian, who made it the cornerstone of all civil law. The very first sentence of the *Institutes* proclaims: “Justice is the constant and perpetual wish to render every one his due [Latin: *ius suum cuique*].”<sup>166</sup> In the medieval period “*ius suum*” became bound up with the justification of property through the debates of the Catholic Church’s scholastics. The foremost among these, Thomas Aquinas, is particularly associated with the concept of natural law, and blended the Classical Tradition with Christian theology.

## 2. *The Thomist Synthesis: Virtue and Grace*

Aquinas enters into his consideration of justice by citing—what else?—*De Officiis*.<sup>167</sup> But he ends up distinguishing himself from Cicero and

164. ARISTOTLE, NICOMACHEAN ETHICS 1120a–b, *supra* note 148, at 1768.

165. ARISTOTLE, RHETORIC 1373b (W. Rhys Roberts trans.), *reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION, *supra* note 148, at 2153, 2187; *see also* ARISTOTLE, NICOMACHEAN ETHICS 1134b–1135a, *supra* note 148, at 1789–92. For a fuller discussion of this distinction in the natural law tradition, and its interactions with more modern jurisprudential distinctions, see generally JOHN FINNIS, *The Truth in Legal Positivism*, in IV PHILOSOPHY OF LAW: COLLECTED ESSAYS 174 (2011); John M. Finnis, *Natural Law Theory: Its Past and Its Present*, 57 AM. J. JURIS. 81 (2012). For an assessment of the imprecision in the ancients’ concept of natural law, see Brian Bix, *Natural Law Theory*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 211, 212 (Dennis Patterson ed., 2d ed. 2010).

166. THE INSTITUTES OF JUSTINIAN 1.1.1 (Thomas Collett Sandards trans., 1917).

167. THOMAS AQUINAS, SUMMA THEOLOGICA pt. II-2, q. 61, art. 1 (Father of the English Dominican Province trans., Benziger Bros. ed. 1947).

resting instead on the authority of Aristotle: he accepts the division of justice into the commutative and the distributive,<sup>168</sup> and like Aristotle he adopts a procedural definition of the latter.<sup>169</sup> Also following Cicero, Aquinas accepts that private property is a civil institution and does not arise under natural law.<sup>170</sup> Aquinas's great innovation, which took root in Western Christendom thereafter, was to tie the philosophical distinction between justice and beneficence to the theological distinction between law and grace. Aquinas explicitly associated Christian grace—which nobody deserves as a matter of merit—with material distribution in the form of “liberality”:

There is a twofold giving. [O]ne belongs to justice, and occurs when we give a man his due [Latin: *debitum*] . . . The other giving belongs to liberality [Latin: *liberalitas*], when one gives *gratis* that which is not a man's due: such is the bestowal of the gifts of grace, whereby sinners are chosen by God.<sup>171</sup>

Thus, in Aquinas' thought, the poor are not *entitled* to material resources as a matter of justice (though, in a famous and innovative passage, he allowed that they may be entitled as a matter of natural right to access or consume certain resources in cases of mortal necessity).<sup>172</sup> Nevertheless, he argued, the well-to-do Christian *ought* to give of their surplus to those less fortunate, in imitation of Christ, as a matter of Christian love or charity [*caritas*] and liberality [*liberalitas*], rather than out of obligation.<sup>173</sup>

Aquinas' association of liberality with grace rather than with merit might have signaled a rejection of the Classical Tradition. After all, if nobody deserves our liberality (just as nobody deserves God's grace), discrimination according to merit would seem to be irrelevant or even antithetical to the just allocation of goods. And in other respects, Aquinas is somewhat more egalitarian than other Classical Tradition thinkers. He even goes so far as to say (in discussing the limits on the duty of obedience to superiors) that “by nature all men are equal.”<sup>174</sup>

But this egalitarianism does not extend to questions of distributive justice outside the aforementioned case of mortal necessity. Because his overarching project was to reconcile Church doctrine with classical philosophy (particularly Aristotle), and because the major theological dispute of his day was the scholastic debate over apostolic poverty and the

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168. *Id.*

169. *Id.* at pt. II-2, q. 61, art. 2 (“Consequently in distributive justice a person receives all the more of the common goods, according as he holds a more prominent position in the community. This prominence in an aristocratic community is gauged according to virtue, in an oligarchy according to wealth, in a democracy according to liberty, and in various ways according to various forms of community.”).

170. *Id.* at pt. II-2, q. 66, art. 2 (“[T]he division of possessions is not according to the natural law, but rather arose from human agreement which belongs to positive law . . .”).

171. *Id.* at pt. II-2, q. 63, art. 1.

172. *Id.* at pt. II-2, q. 66, art. 7.

173. *Id.*

174. *See, e.g., id.* at pt. II-2, q. 104, art. 5 (“[S]ince by nature all men are equal, he is not bound to obey another man in matters touching the nature of the body, for instance in those relating to the support of his body or the begetting of his children.”).

legal concept of *dominium*<sup>175</sup> (in which his own Dominican order argued against the radical poverty of the Franciscans), Aquinas' theology accommodated rather than rejected the Classical Tradition's conservatism regarding private property. With respect to the theological question whether *dominium* was consistent with the apostolic ideal or life before the Fall, Aquinas drew an influential connection between *dominium* and human beings' natural rights to use the resources of the world for their sustenance and benefit.<sup>176</sup> And with respect to the philosophical question of material inequality in general, he strained to "balance[ ] moral universalism with respect for the natural priority of special friendships."<sup>177</sup> The result is that Aquinas's liberality looks in practice remarkably like Ciceronian beneficence, with all its discriminating concern over a donee's desert of a donor's aid.

Like Cicero, Aquinas argued that material aid should be offered preferentially to those socially closest to us,<sup>178</sup> and should also be subject to discrimination on grounds of considerations of "holiness and utility,"<sup>179</sup> though he also allowed that such considerations could be overcome in particular cases by "weightier motives, as need or some other circumstance, for instance the common good of the Church or state."<sup>180</sup> All of these concerns play out against a background assumption that the status quo ought to be maintained: just as Cicero saw justice (conceived of as the maintenance of status quo distributions of property against private or public theft) as a limit on beneficence, and Aristotle thought liberality should be practiced with a view to preserving the donor's own property, Aquinas similarly allows that alms ought not be given out of the property of others, nor out of resources the donor requires to maintain his current standard of living.<sup>181</sup> Though charity (understood as the virtue of Christian love) held pride of place in the Thomist hierarchy of virtues,<sup>182</sup> and was closely associated with almsgiving,<sup>183</sup> Aquinas's defense of private property gave a new theological justification for the material inequality that societies maintain via a system of private property rights.

Given his conciliatory and synthetic objectives, it is unsurprising that Aquinas otherwise did not disturb the Classical Tradition's view of material inequality as both unavoidable and socially useful. Like Aristotle and

175. See TUCK, *supra* note 85, ch. 1.

176. See AQUINAS, *supra* note 167, at pt. II-2, q. 66, art. 1 ("[M]an has a natural dominion over things, as regards the power to make use of them."); VIRPI MÄKINEN, PROPERTY RIGHTS IN THE LATE MEDIEVAL DISCUSSION ON FRANCISCAN POVERTY 159 (2001) ("Aquinas argued that in the natural state of man everyone had a share in common *dominium* when using created goods.").

177. Stephen J. Pope, *Aquinas on Almsgiving, Justice and Charity: An Interpretation and Reassessment*, 32 HEYTHROP J. 167, 187 (1991).

178. AQUINAS, *supra* note 167, at pt. II-2, q. 31, art. 3.

179. *Id.* at pt. II-2, q. 32, art. 9.

180. *Id.* at pt. II-2, q. 31, art. 3.

181. *Id.* at pt. II-2, q. 32, art. 6-7.

182. *Id.* at pt. I, q. 66, art. 6; cf. 1 *Corinthians* 13:13 ("but the greatest of these is charity") (King James).

183. See AQUINAS, *supra* note 167, at pt. II-2, q. 31, art. 1, q. 32, art. 1.

Cicero, he accepted the Instrumentalist Argument: “[A] more peaceful state is ensured to man,” he wrote, “if each one is contented with his own. Hence it is to be observed that quarrels arise more frequently where there is no division of the things possessed.”<sup>184</sup> And he similarly accepted the Virtue Argument, in the form of the proposition “that God intentionally places the rich and the poor in their respective social locations in order to encourage them to cultivate certain class-specific virtues.”<sup>185</sup> For many Christian thinkers in the centuries after Aquinas, “[p]overty [was] a necessary evil, an opportunity for salvation both for the poor, through patience, and for the rich, through alms.”<sup>186</sup> Unequal division of the material things of the world could be seen as not only natural, nor even merely useful, but a manifestation of divine will or even a *gift* of Providence: a divinely ordained state of affairs that allows the wealthy to prove their virtue through acts of beneficence, and the poor to prove their virtue through patience, humility, and gratitude. The practice of such virtues, as a matter of private devotion rather than public policy, promised both social harmony and personal salvation for Aquinas’ Christendom as it did for Cicero’s Republic.

### 3. Reformation: A Move Toward Justification

Despite this novel theological justification, a gap remained in the Classical Tradition between the *maintenance* of status quo material inequality within an organized political community and the presumed *absence* of private property outside of civil society. Later thinkers would attempt to fill the justificatory gap with some principled reason for organized societies to accept unequal status quo distributions at all. The most ambitious effort to do so *within* the Classical Tradition can be credited to the great Protestant jurist, Hugo Grotius.

Grotius’ highly influential account of property advanced a natural-law defense of material inequality that has persisted to this day, and he was self-consciously in debt to Cicero. Grotius’ method, which builds on Cicero’s assertions in *De Officiis* regarding the origin of cities, also accounts

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184. *Id.* at pt. II-2, q. 66, art. 2.

185. Pope, *supra* note 177, at 180–81. Aquinas argued, in reference to man’s natural dominion over animals, that “the order of Divine Providence . . . always governs inferior things by the superior,” and makes a similar argument regarding the mastery of some humans over others: “[I]f one man surpassed another in knowledge and virtue, this would not have been fitting unless these gifts conduced to the benefit of others . . . [w]herefore Augustine says . . . ‘The natural order of things requires this; and thus did God make man.’” AQUINAS, *supra* note 167, at pt. I, q. 96, art. 1, 4 (internal citations omitted). Finally, he extends this argument about human inequality to inequality of resources:

[A] rich man does not act unlawfully if he anticipates someone in taking possession of something which at first was common property, and gives others a share: but he sins if he excludes others indiscriminately from using it. Hence Basil says (Hom. in Luc. xii, 18): “Why are you rich while another is poor, unless it be that you may have the merit of a good stewardship, and he the reward of patience?”

*Id.* at pt. II-2, q. 66, art. 2.

186. MICHEL MOLLAT, *THE POOR IN THE MIDDLE AGES: AN ESSAY IN SOCIAL HISTORY* 183 (Arthur Goldhammer trans., 1986).

for the way much of Western philosophy has come to think of the justification of material inequality since: as a *historical* question of how private property “arose” from a supposed pre-political communism. Grotius’ innovation was to place this epochal change in resource allocation *prior* to the formation of civil authority—a move that John Locke mimicked decades later, with more lasting effect on Anglo-American property theory.

Though he broke from Aristotle’s political philosophy in important ways that foreshadowed the pivot to the Modern Tradition,<sup>187</sup> Grotius accepted the Aristotelian premise that people are naturally unequal and that it is accordingly appropriate and just to treat them unequally.<sup>188</sup> He accepted an Aristotelian model of distributive justice, styling it “Attributive Justice” and associating it (at least “in some Cases, but not in all”<sup>189</sup>) with proportional distribution according to merit.<sup>190</sup> He accepted the Instrumentalist Argument for maintaining status quo distributions, identifying it with natural law.<sup>191</sup> And he associates the natural law (as did his predecessors in the Classical Tradition) with “Right Reason” and the divine Will as revealed in nature.<sup>192</sup> But the concept of natural law was of particular importance to Grotius because the problems that concerned him were problems that *positive* law was unavailable to solve: he wrote about relations between sovereigns. Beginning with *Mare Liberum* on the dispute between Portugal and his Dutch patrons over trade routes to the

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187. See TUCK, *supra* note 85, at 74–75. Tuck argues that Grotius was anti-Aristotelian, and recognized as such by his contemporaries, in the sense that he denied that Aristotle’s distributive justice could be thought of as justice at all, insofar as it implied no enforceable *rights*. Grotius does indeed make such a claim in Section I.i.9 of *De Iure Belli ac Pacis*; one possible response would take the word “justice” seriously, and find that distributive claims are in fact enforceable by the state—this is the thrust of the Modern Tradition. See GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 48.

188. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 48, bk. 1, ch. I, § III, ¶ 2, at 136–37 (“But as in Societies, some are equal, . . . [a]nd others unequal . . . So that which is *just* takes Place either among Equals, or amongst People whereof some are Governors and others governed.”).

189. *Id.* bk. 1, ch. I, § VIII, ¶ 1, at 142.

190. *Id.* bk. 1, ch. I, § VIII, ¶¶ 1–2 & nn. 5 & 11, at 142–47. Grotius referred to attributive justice as an “*imperfect Right*, the attendant of those Virtues that are beneficial to others, as Liberality, Mercy, and prudent Administration of Government.” *Id.* at 143. Some argue that Grotius here prefigures Kant’s famous distinction between “perfect” duties of justice and “imperfect” duties of ethics. See, e.g., J.B. SCHNEEWIND, *THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY* 78–80 (1998).

191. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 48, bk. I, ch. I, § X, ¶ 4, at 154 (“*Property* for Instance, as now in use, was introduced by Man’s Will, and being once admitted, this Law of Nature informs us, that it is a wicked Thing to take away from any Man, against his Will, what is properly his own.”).

192. Compare *id.* bk. I, ch. I, § X, ¶ 1, at 150–51 (“NATURAL RIGHT is the Rule and Dictate of Right Reason, . . . that such an Act is either forbid or commanded by GOD, the Author of Nature.”), with ARISTOTLE, *POLITICS* 1287a, *supra* note 153, at 2042–43 (“The law is reason unaffected by desire.”); CICERO, *REPUBLIC* bk. III, ¶ 22 (C.W. Keyes trans., 1928) (“True law is right reason in agreement with nature . . . God . . . is the author of this law, its promulgator, and its enforcing judge.”); and AQUINAS, *supra* note 167, at pt. II-1, q. 91, art. 2 (“[T]he light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light. It is therefore evident that the natural law is nothing else than the rational creature’s participation of the eternal law.”).

East Indies (where, as noted above, he characterized the sea as common property by quoting the very passage from Cicero's *De Officiis* that seems to have motivated Jefferson),<sup>193</sup> and culminating with his *De Iure Belli ac Pacis* on just and unjust war, Grotius' career was built on tracing the limits imposed by natural law on actors who were subject to no civil authority. In doing so, he added to the two arguments previously identified with Aristotle two additional arguments that we can identify with the Classical Tradition: the *Historical Argument* and the *Metaphysical Argument*. Importantly, the Metaphysical Argument, unlike the other three identified, suggests *limits* on unequal allocation of resources.

The absence of any civil authority to govern relations among sovereigns generated tensions with the Classical Tradition when Grotius considered one frequently cited *casus belli*: property. "There is no other reasonable Cause of making War," Grotius says, "but an *Injury* received."<sup>194</sup> Among private persons, such an injury would include interference with one's possessions: "for the Preservation of our Goods 'tis lawful, if there's a Necessity for it, to kill him that would seize upon them."<sup>195</sup> But Grotius holds that although "the Right of defending our *Persons and Estates*, principally regards private Wars; . . . we may likewise apply it to publick Wars, . . . arising only between those that acknowledge no common Judge . . ."<sup>196</sup> While Grotius recognized that sovereigns often went to war over claims to territory and other property rights, the Classical Tradition had a long history of treating property rights as a matter of civil—rather than natural—law. Grotius therefore required some basis *outside of civil law* for determining what a sovereign could claim as its own as a matter of *natural* right, such that interference by another sovereign with such rights would constitute a just cause for war. Grotius' famous and innovative solution to this problem, detailed in the second chapter of Book II of *De Iure Belli ac Pacis*, rests on an analogy to Roman Law played out against a potted history of humankind.

Grotius draws a sharp distinction—derived from both Roman law and Aquinas' answer to the Franciscans—between a mere right to use a resource and the full rights of ownership.<sup>197</sup> As Aquinas had argued, people who had not yet entered into civil society could rightfully use and even consume some material resources in order to survive, despite the fact that all resources are naturally in common. And crucially, each such person might claim some natural right to prevent others from dispossessing him of that resource *while it is being so used*, as a corollary to the fundamental

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193. See *supra* notes 48–58 and accompanying text.

194. GROTIUS, THE RIGHTS OF WAR AND PEACE, *supra* note 48, bk. II, ch. I, § I, ¶ 4, at 393.

195. *Id.* bk. II, ch. I, § XI, at 408.

196. *Id.* bk. II, ch. I, § XVI, at 416.

197. See THE INSTITUTES OF JUSTINIAN, *supra* note 166, at II.V (distinguishing between *usufructus*, *usus*, and *dominium*); TUCK, *supra* note 85, ch. 1, 5–32 (charting the development of these distinctions in medieval legal and theological debates, including the debate over apostolic poverty).



natural right of self-preservation, even without a property right.<sup>198</sup> Cicero had illustrated a similar point about the distinction between use and ownership with the example of seats in a public theatre—which are the common property of all, but which cannot justly be taken away from any particular person occupying them at the moment<sup>199</sup>—and Grotius cites Cicero as authority for the distinction.<sup>200</sup> But this intuition, while perhaps persuasive, is very different than saying that people might have claims to exclude others from resources *regardless* of whether those resources are currently in use. That greater right—analogue to the civil-law concept of *dominium*, which occupied Aquinas, and which Grotius identified with the Roman concept of *ius*—required further justification.

Grotius built a bridge from the natural right to use resources necessary to self-preservation—food and water, for example—to the civil law rights of ownership via a historical chain of reasoning. Cicero's sparse account of the formation of cities—political associations designed to secure current possessions through positive law<sup>201</sup>—becomes in *De Iure Belli ac Pacis* a full-blown *justification* of material inequality enforced via property rights—which we may refer to as the *Historical Argument*. The historical narrative underlying the argument proceeds as follows: God originally granted the physical world to humankind in common. But as the human population, its artifice, and its appetites grew (Grotius imagines), “there was no Possibility then of using Things in common,” and therefore, by a “certain Compact and Agreement, either expressly, as by a Division; or else tacitly, as by Seizure . . . all Men were supposed, and ought to be supposed to have consented, that each should appropriate to himself, by Right of first Possession, what could not have been divided”—a solution for which Grotius invokes Cicero himself as authority.<sup>202</sup>

The Historical Argument, which traces its origin to *De Officiis*, would prove immensely influential in the theory of property. After Grotius, most defenders of a pre-political right to property, from Locke to Nozick, would rest their case on some variation of it,<sup>203</sup> and Locke's remains the most durable. Similarly, Hobbes, Locke, and Rousseau would make Gro-

198. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 48, bk. I, ch. I, § X, ¶ 7, at 156–57, bk. I, ch. II, § I, ¶ 3, at 184 (citing OFF., *supra* note 21). This line of argument traces back to Pope John XXII's answer to the Franciscans, that some resources, when used, are used up—wine is drunk, bread is eaten—and thereby removed from the commons to the exclusion of others. See JOHN XXII, *QUIA VIR REPROBUS* § 3 (R. J. Kilcullen & J. R. Scott trans., 1998). Thus, there must be some natural right to exclude others from such resources, if only by consuming them. *Id.*

199. CICERO, *DE FINIBUS* bk. III, at 67–68 (E. Capps et al. eds., H Rackham trans. 1921) Cicero had borrowed the example from the Greek Stoic philosopher Chrysippus. See *id.*; see also Annas, *supra* note 117, at 167.

200. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 48, bk. II, ch. II, § II, ¶ 1, at 421.

201. See *supra* notes 76–85 and accompanying text.

202. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, *supra* note 48, bk. II, ch. II, § II, ¶¶ 3–5, at 426–27 (citing OFF., *supra* note 21 bk. III, ¶ 2).

203. See LOCKE, *supra* note 19, § 45; ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 150–52 (1974).

tius' "Compact and Agreement" the basis of European political philosophy through the metaphor of the social contract that is still with us in Rawls' *Theory of Justice*.

Grotius also popularized one other argument that will prove important to our analysis of Jefferson's Taper: the *Metaphysical Argument*. Grotius claimed that the sea was not amenable to private ownership by any sovereign. His argument rested on rational consideration of the *nature* of the resource at issue and whether it is amenable to discrete delineation and occupation. Grotius claims the sea cannot be acquired by occupation "because the taking of Possession obtains only in Things that are limited . . . but Liquids having no Bounds of their own . . . can never be possessed, unless they are inclosed by something else . . ." <sup>204</sup> Though this argument was deployed in a maritime dispute between rival sovereigns, it was to have far broader consequences.

The Metaphysical Argument brings us back to where we began—to the sharing of private resources. The sea and the air are exceptions that prove the rule: outside of these exceptions, most resources are (in Grotius' view) subject to physical appropriation by virtue of their nature and thus amenable to private rights of property, even if the division of them is not equal. However, even naturally justified rights of possession and exclusion secured by positive law must, in Grotius' account, give way to certain natural rights of others to use material resources—conditionally when the non-owner's self-preservation depends on use of the owned resource, <sup>205</sup> and absolutely when the two rights are not in conflict. <sup>206</sup> His reasoning on the latter point will by now be familiar: Grotius holds (citing Cicero and Seneca) that all have a natural right to use the property of others where they can do so without prejudice to the owner—the "no less shines his" condition at the heart of Cicero's *lumen* and Jefferson's Taper. <sup>207</sup>

The new arguments Grotius adds to the Classical Tradition attempt, for the first time, to affirmatively justify the unequal status quo distributions that form the basis for the strict duty of justice. The Historical Argument would ultimately overwhelm the other arguments for property rights found in the Classical Tradition, as the argument was taken up by the social contract theorists—most durably by Locke. But an obvious weakness of the Historical Argument is that it relies on the moral force of agreement—of *consent*—to justify material inequality. Because if consent—rather than fear of civil unrest, natural variation in virtue, or divine providence—is to be the justification for material inequalities, one must ask why *anyone* would consent to being poor if they truly had a choice in the matter. <sup>208</sup> And if they wouldn't, then any society that maintains such

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204. GROTIUS, THE RIGHTS OF WAR AND PEACE, *supra* note 48, bk. II, ch. II, § III, ¶ 1-2, at 428-31 (footnotes omitted).

205. *Id.* § VI, ¶¶ 1-2, at 433-35.

206. *Id.* §§ XI-XII, at 438-39.

207. *Id.* at 438.

208. Similarly, one might ask whether the consent of people long dead, even if it were in evidence, should create obligations for *different* people now living—a question Jefferson

inequalities is arguably in breach of the social contract—giving rise to a claim against the state itself. This is the stuff of which revolutions are—indeed, were—made, and may illuminate a connection between the Historical Argument and the pivot to the Modern Tradition.

The Metaphysical Argument does not have any of the qualities I have just ascribed to the Historical Argument. Indeed, the Metaphysical Argument harkens back to the natural-law origins of the Classical Tradition: the effort to deduce moral truths from nature—here, not the nature of human beings but the nature of the resources we put to use. It is also exactly the type of argument Jefferson makes in the Parable of the Taper, which is at bottom an analysis of the nature of knowledge. What we find when we read Jefferson's Taper against the Classical Tradition thinkers and their arguments is that Jefferson seems to be picking and choosing among them—that he is invoking those arguments he finds useful and ignoring those he finds uncongenial.

This selective argumentation is also a feature of the Classical Tradition as a whole. Some readers of the preceding summary will object that the concept of human equality—which I have identified with the Modern Tradition—can be found in the work of many Classical Tradition thinkers. This is perfectly true—indeed it is true of Cicero himself. As Wood explains:

Cicero is often praised for being the first important social and political theorist to postulate the moral equality of humans, a notion basic to the theory of natural law and justice which he derived from Stoicism. A contradiction, however, exists between his basic ethical position and his acceptance in theory and practice of an inegalitarian society. He never appears to have been conscious of the discrepancy between the two stances, any more than did subsequent natural law theorists from St. Thomas to John Locke. They all take for granted that an inegalitarian society is the only feasible mode of ordering mankind, seemingly unaware that it is at odds with their fundamental moral egalitarianism.<sup>209</sup>

What is true of philosophy is true of theology as well—particularly of the concept of Christian equality. St. Paul declared that “[t]here is neither Jew nor Greek, . . . slave nor free, . . . male and female, for you are all one in Christ Jesus,”<sup>210</sup> and there is a deep anti-property, pro-communism current in Christian thought, stemming from the Gospel of Matthew.<sup>211</sup> Within the Latin Church, this current runs back to Ambrose of Milan and forward to Thomas More,<sup>212</sup> and it motivated the Franciscan model of poverty against which Aquinas had argued. But the most successful, dura-

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himself answered strongly in the negative. See generally Herbert Sloan, “*The Earth Belongs in Usufruct to the Living*”, in JEFFERSONIAN LEGACIES, *supra* note 30, at 281.

209. WOOD, *supra* note 84, at 90.

210. *Galatians* 3:28 (English Standard).

211. *Matthew* 19:24 (“Again I tell you, it is easier for a camel to go through the eye of a needle than for someone who is rich to enter the kingdom of God.”).

212. PIERSON, *supra* note 118, at 66–71, 129–35.

ble philosophers in the Classical Tradition are those, like Cicero, who found a way to put their skills at the service of the propertied ruling classes. Whether couched in philosophy or theology, the Classical Tradition has always accommodated a fundamental contradiction between its moral ideals and its prescriptions regarding social and political life. Indeed, the ability to maintain such contradictions regarding the moral and political status of perceived social inferiors is something of a hallmark of these thinkers. It can be found in the still-popular defense of unequal private property by John Locke, who (as Jeremy Waldron has argued) was deeply informed by a religious commitment to equality.<sup>213</sup> It is painfully evident in Jefferson himself—who wrote that “all men are created equal” while being waited on daily by his enslaved manservant Robert Hemings—brother of Sally.<sup>214</sup>

## V. BACON OVER LOCKE: THE NARROW READING AND THE BROAD READING

We are now in a position to piece together a reading of Jefferson's Taper that is sensitive to its intellectual predecessors. Recognizing Jefferson's allusion to Cicero, and situating that allusion within the broader intellectual tradition of which Cicero was an important founder, suggests at least two readings of Jefferson's Taper. On one reading—call it the Narrow Reading—the discovery of Cicero's influence merely shows that Jefferson's Taper should not be read as a proto-utilitarian, anti-natural-law parable, but rather as a natural law-based application of the Classical Tradition to inventions. If I did nothing more than persuade the reader of this, I would be content. But another reading—call it the Broad Reading—fleshes out additional implications of the Narrow Reading, with some startling results. The Broad Reading suggests that inventors have a *duty* to share their inventions with others, regardless of whether they receive compensation from the state or otherwise. While the Broad Reading is obviously not explicit in the text of Jefferson's letter, it is consistent with both the Classical Tradition from which Jefferson drew and with the philosophy of another important influence on Jefferson: Francis Bacon.

### A. THE NARROW READING

Thomas Jefferson, like most educated Anglophones in the late eighteenth century, clearly held John Locke in very high esteem. In one letter, Jefferson listed Locke as one of “the three greatest men that have ever lived, without any exception . . . having laid the foundations of those superstructures which have been raised in the Physical & Moral sci-

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213. *See generally* JEREMY WALDRON, *GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS OF LOCKE'S POLITICAL THOUGHT* (2002).

214. ANNETTE GORDON-REED, *THE HEMINGSSES OF MONTICELLO: AN AMERICAN FAMILY 125* (2008).

ences.”<sup>215</sup> But regardless of whether one views Jefferson’s conspicuous omission of property from the “inalienable rights” of the Declaration of Independence as a conscious distancing from Locke, or merely as an expression of an independent view of natural law,<sup>216</sup> it is far from clear that Jefferson subscribed to Locke’s theory of property, or to the version of the Historical Argument on which it (at least partly) rests. To the contrary (as Justin Hughes has pointed out), in another portion of his letter to Isaac McPherson, Jefferson expresses the view that “*all* property ownership ‘is the gift of social law, and is given late in the progress of society.’”<sup>217</sup> In short, he seems to reject Grotius’ consent-based justification for material inequality—and Locke’s adoption of that argument—in favor of Cicero’s skepticism of any natural foundation for property rights.

But we project our own theoretical baggage onto Jefferson when we assume from his apparent rejection of Lockean property that he must be a utilitarian, despite his reference to “utility” in his letter to McPherson. Jefferson’s concession that “[s]ociety may give an exclusive right to the profits arising from [ideas], as an encouragement to men to pursue ideas which may produce utility,”<sup>218</sup> reflects an understanding of the word “utility” that is foreign to the modern IP theorist. Today, utility is the unit of account of consequentialist moral theory. And to be fair, there are passages in Jefferson’s letter that are consistent with utilitarian (and more general consequentialist) IP theory—such as his identification of the nonexcludable and nonrival qualities of knowledge and the dependence of IP rights on their benefit to society more broadly.<sup>219</sup> But in Jefferson’s day, the battle lines between consequentialists and deontologists had not even been clearly drawn, yet alone hardened as they are today. John Stuart Mill’s *Utilitarianism* was not published until decades after Jefferson died,<sup>220</sup> and there is no evidence that Jefferson was acquainted with—let alone an adherent of—Jeremy Bentham’s “principle of utility.”<sup>221</sup> Jefferson’s “utility” is not Bentham’s or Mill’s or Sidgwick’s principle of moral calculation by reference to individual pleasure, pain, or happiness; it is Cicero’s *utilitas*—the subject of Book II of *De Officiis* and the guiding principle of the Baconian scientific revolution.

215. Letter from Thomas Jefferson to John Trumbull (Feb. 15, 1789), in 14 THE PAPERS OF THOMAS JEFFERSON: 1788–1789, 561 (Julian P. Boyd ed., 1958).

216. For an overview of various scholarly theories as to Jefferson’s influences in drafting the Declaration of Independence, see generally ALLEN JAYNE, JEFFERSON’S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY, AND THEOLOGY (1998).

217. Hughes, *Copyright and Incomplete Historiographies*, *supra* note 61, at 1029 (emphasis added).

218. Letter from Jefferson to McPherson, *supra* note 5, at 334.

219. *See id.* at 333–35.

220. JOHN STUART MILL, UTILITARIANISM (1861) (Thomas Jefferson died in 1826).

221. The only work of Bentham’s in Jefferson’s library is the *Panopticon*. 5 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON, *supra* note 1, at 250. The Paul Leicester Ford compilation of Jefferson’s collected writings includes no reference to Bentham’s name. *An Introduction to the Principles of Morals and Legislation* was first printed in 1780, first published in 1789, and republished in a revised edition by the author in 1823. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789).

Cicero's *utilitas* is a practical consideration essential to the exercise and recognition of virtue. In introducing the concept, Cicero defines it as "the question whether the action contemplated is or is not conducive to comfort and happiness in life, to the command of means and wealth, to influence, and to power, by which [people] may be able to help themselves and their friends."<sup>222</sup> Under this definition, *utilitas* seems analogous to the Benthamite or Millian principles of utility. But elsewhere, Cicero uses *utilitas* interchangeably to refer to service or benefit to one's state, to one's society, or to the general well-being of humanity. Indeed, he does so explicitly by reference to the "no less shines his" principle, when he says:

On this principle we have the following maxims: "Deny no one the water that flows by;" "Let anyone who will take fire from our fire;" "Honest counsel give to one who is in doubt;" for such acts are useful [Latin: *utilia*] to the recipient and cause the giver no loss. We should, therefore, adopt these principles and always be contributing something to the common weal [Latin: *ad communem utilitatem*].<sup>223</sup>

Cicero uses *utilitas* to refer to this concept of service or benefit to society in several other contexts in *De Officiis*.<sup>224</sup> And Jefferson seems to evaluate the production of "ideas which may produce utility" in the same sense: as contributing something useful to society at large.

But perhaps more important for present purposes than the definition of *utilitas* is the contrast between *utilitas* on the one hand and *cognitio*—abstract or theoretical knowledge—on the other. Cicero claims that pursuit of even the most significant abstract knowledge must immediately give way to works that provide a tangible benefit to society:

For who is so absorbed in the investigation and study of creation, but that, even though he were working and pondering over tasks never so much worth mastering [Latin: *res cognitione dignissimas*] and even though he thought he could number the stars and measure the length and breadth of the universe, he would drop all those problems and cast them aside, if word were suddenly brought to him of some critical peril to his country, which he could relieve or repel? And he would do the same to further the interests of parent or friend or to save him from danger.

From all this we conclude that the duties prescribed by justice must be given precedence over the pursuit of knowledge and the duties imposed by it; for the former concern the welfare of our fellow-men [Latin: *ad hominum utilitatem*]; and nothing ought to be more sacred in men's eyes than that.<sup>225</sup>

This understanding of "utility," as the antithesis of contemplation with no obvious application, is an important consideration in evaluating Jeffer-

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222. OFF., *supra* note 21, bk. 1, ¶ 9, at 11.

223. *Id.* bk. 1, ¶ 52, at 57.

224. *See, e.g., id.* bk. 1, ¶ 79, at 81, ¶ 85, at 87, ¶ 88, at 91, ¶ 151, at 117.

225. *Id.* bk. 1 ¶¶, 154–55, at 159.

son's argument in its historical context, especially in light of the philosophy of another of Jefferson's heroes: Francis Bacon.

In the early seventeenth century, Bacon attacked the scholastic disputations of the philosophers of his day, insisting that the pursuit of knowledge must take as its goal "the relief of man's estate," as opposed to "vain speculations" that do not bear "fruit and honest solace."<sup>226</sup> Bacon's empiricist epistemology of induction, grounded in this notion that knowledge should have practical application, was in marked contrast to the deductive argumentation from assumed first principles that characterized philosophy in medieval Europe—argumentation that might well have been denigrated by Cicero as mere *cognitio*. In his *Novum Organum*, Bacon draws exactly the same distinction between idle speculation and useful investigation that Cicero had drawn:

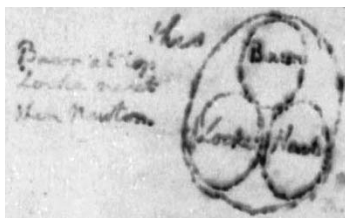
For they will say that the contemplation of truth is more dignified and exalted than any utility or extent of effects . . . . [But] we are founding a real model of the world in the understanding, such as it is found to be, not such as man's reason has distorted. . . . *Truth, therefore, and utility, are here perfectly identical*, and the effects are of more value as pledges of truth than from the benefit they confer on men.<sup>227</sup>

Jefferson considered Francis Bacon to be another of the "three greatest men that have ever lived"—he literally placed Bacon in a position of honor *above* both John Locke and Isaac Newton in a composite portrait he sought to commission for his home.<sup>228</sup> Jefferson used Bacon's taxonomy of the sciences as the basis for organizing his own library,<sup>229</sup> and he planned the departments of the University of Virginia around the Baco-

226. FRANCIS BACON, OF THE DIGNITY AND ADVANCEMENT OF LEARNING 25 (Gilbert Wats trans., 1674).

227. 1 FRANCIS BACON, *Novum Organum*, in THE WORKS OF FRANCIS BACON 130, 309–10 (James Spedding et al. eds., 1740). The translation is from FRANCIS BACON, NOVUM ORGANUM 99–100 (Joseph Devey ed., 1902) (emphasis added). See also THOMAS BABINGTON MACAULAY, *Lord Bacon*, in CRITICAL AND HISTORICAL ESSAYS 349, 392 (1883) ("Two words form the key of the Baconian doctrine, Utility and Progress. The ancient philosophy disdained to be useful, . . . [i]t could not condescend to the humble office of ministering to the comfort of human beings.").

228. Letter from Jefferson to Trumbull, *supra* note 215, at 561. The margin of this letter includes a sketch by Jefferson himself of his desired arrangement of the composite portrait, with the explanatory caption "thus/Bacon at top/Locke next/then Newton.":



Thomas Jefferson to John Trumbull, February 15, 1789, LIBR. CONGRESS, <http://hdl.loc.gov/loc.mss/mtj.mtjbib004110> [<https://perma.cc/PBK8-75ES>].

229. THOMAS JEFFERSON'S LIBRARY: A CATALOG WITH THE ENTRIES IN HIS OWN ORDER 2 (James Gilreath & Douglas L. Wilson eds., 1989).

nian principle of utility.<sup>230</sup> In Bacon's program for scientific progress, we find a model of "ideas which may produce utility" that provides corroborative insight into Jefferson's Taper.

Recognizing the Baconian and Ciceronian influences on Jefferson's notion of "utility" suggests that we misread Jefferson as endorsing today's utilitarian IP theory. While utilitarians consider the time-limited exclusive rights of IP law to be a sort of quid-pro-quo incentive for a knowledge creator's investment in and disclosure of their ideas, this is probably not the view implicit in Jefferson's use of the word "encouragement." Rather than an encouragement for the inventor to share ideas already developed, or even to develop any ideas whatsoever in the first place, Jefferson's "encouragement" may be understood as a way for the state to guide citizens' energies in knowledge-production toward "ideas which may produce utility," *as contrasted with less useful ideas*. Reading "encouragement" in this latter sense more closely aligns Jefferson's Taper with the Classical Tradition, insofar as it limits the state's role in the distribution of knowledge to "creat[ing] in men [the] benevolent disposition" of liberality,<sup>231</sup> or beneficence, in the form of service to others.

It is thus strange, and anachronistic, for today's Lockean and natural law theorists to see in Jefferson a utilitarian theoretical adversary. He is nothing of the sort. His views on the patent system are deeply rooted in his view of "the Laws of Nature and of Nature's God,"<sup>232</sup> not in Millian utility or economic calculations. Though Jefferson's Taper might be read as *consistent with* modern utilitarian IP theory, that could not have been Jefferson's point. A better reading would accept the parable on its own terms: as a natural-law argument for social cooperation around knowledge creation wedded to a Baconian argument that human progress is the goal of such intellectual labor.

## B. THE BROAD READING

If Cicero is right that giving away that which costs us nothing is a virtue to be practiced for the benefit of the giver and for the prevention of social strife, Jefferson's identification of ideas as this type of resource is a potentially radical move. And this radicalism is compounded by the association of IP policy with Baconian science. Taken together, these various lines of authority and argument can be read to suggest that *inventors have an ethical obligation to freely share their inventions with others*.

We can identify precursors of this radical argument in Cicero's views on knowledge creation. The best type of intellectual pursuits in Cicero's estimation were (perhaps unsurprisingly) inquiries into the types of

230. Letter from Thomas Jefferson to Thomas Cooper (Aug. 25, 1814), in 14 THE WRITINGS OF THOMAS JEFFERSON 173, 173 (Andrew A. Lipscomb ed., 1903); accord Letter from Thomas Jefferson to Augustus B. Woodward (Mar. 24, 1824), in 16 THE WRITINGS OF THOMAS JEFFERSON 17, 17–18 (Andrew A. Lipscomb ed., 1903).

231. ARISTOTLE, POLITICS, *supra* note 153, at 2005; *see also supra* notes 161–163 and accompanying text.

232. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).



knowledge most valuable to him personally—political and moral philosophy—and even then only where the philosopher’s knowledge is disseminated through writing and teaching:

[S]cholars, whose whole life and interests have been devoted to the pursuit of knowledge, have not, after all, failed to contribute to the advantages and blessings of mankind. For they have trained many to be better citizens and to render larger service to their country. . . . And not only while present in the flesh do they teach and train those who are desirous of learning, but by the written memorials of their learning they continue the same service after they are dead. . . . The principal thing done, therefore, by those very devotees of the pursuits of learning and science is to apply their own practical wisdom and insight to the service of humanity [Latin: *ad hominum utilitatem*].<sup>233</sup>

As with the distinction between *utilitas* and *cognitio*, laboring to produce knowledge is worthwhile to Cicero only insofar as it may be of benefit to others.<sup>234</sup> And the surest way to secure those benefits is to write one’s knowledge down so that others may have access to it, even after the author’s death. Ultimately, Cicero deems it virtuous to pursue and disseminate knowledge in this way, without suggesting the need for any compensation, subject always to the supervening demands of justice.

This is precisely the view of knowledge governance that was long identified with Baconian scientific progress. As Merton documented in charting the development of the norm of scientific communism, the first English scientists who formed the Royal Society were “[f]ollowing Bacon’s ambitious scheme for such cooperation,”<sup>235</sup> as most famously illustrated by Salomon’s House, the cooperative community of experimental learners described in Bacon’s *New Atlantis*.<sup>236</sup> When read as a juxtaposition of Baconian scientific collaboration with Ciceronian virtue in the Classical Tradition, Jefferson’s Taper suggests an argument that useful knowledge *ought to be freely shared*. This argument is consistent with not only the Metaphysical Argument on which Jefferson relies, but also with the Instrumentalist and Virtue Arguments, insofar as sharing knowledge might promote gratitude and social cohesion, and might cultivate a disposition of liberality without diminishing the donor’s property. The Classical Tradition thus provides all the intellectual foundations needed to support a normative case for scientific communism, and Jefferson’s Taper can be read broadly to support such a case.

233. OFF., *supra* note 21, bk. I, ¶¶ 155–56, at 159.

234. *Id.* bk. I ¶¶ 157, at 161 (“And so, if that virtue [Justice] which centres in the safeguarding of human interests, that is, in the maintenance of human society, were not to accompany the pursuit of knowledge, that knowledge would seem isolated and barren of results.”).

235. ROBERT K. MERTON, SCIENCE, TECHNOLOGY AND SOCIETY IN SEVENTEENTH CENTURY ENGLAND 115 (1970); *see also* THE RECORD OF THE ROYAL SOCIETY OF LONDON, *supra* note 23, at 1–3 (describing the Royal Society as “one of the earliest practical fruits of the philosophical labours of Francis Bacon”).

236. BACON, *New Atlantis*, *supra* note 1, at 45–46.

There are, nevertheless, some obvious objections to the Broad Reading. First, it is almost certain that Jefferson did not fully appreciate or consciously intend these wider philosophical implications of his identification of ideas with Cicero's *lumen*. Jefferson "was a creature of mood and sentiment much more than a rigorous thinker,"<sup>237</sup> and he likely would not have done the work of integrating his Ciceronian insight about knowledge into the broader system of thought from which it came. And second, those steeped in modern IP theory would likely dispute the premise that sharing an idea costs its owner nothing—that in fact, *creating* an idea is costly and labor-intensive, and those costs and labor affect the moral calculus in ways that are overlooked if one focuses only on *possession* of the idea.

As to the first objection, the fact that Jefferson did not consciously offer up a fully-fleshed-out Classical-Tradition theory of knowledge governance doesn't mean none is available. Such a theory would be at least as consistent with the text of Jefferson's famous letter as the modern utilitarian reading, and in light of Jefferson's documented influences, probably does a better job of situating that text in the appropriate intellectual-historical context. Again, this is not to say that we ought to defer to Jefferson in formulating IP policy for today; only that if we are going to invoke his writings as authority, we ought to try to understand those writings on their own terms rather than imposing our own anachronistic theoretical structures on them.

As to the second objection, Jefferson's view that sharing knowledge costs us nothing obviously assumes a baseline of resources *after* the knowledge has been created but *before* it has been shared: the costs of creating knowledge are not considered to be a subtraction from the status quo distribution. Modern IP theories are built on the opposite premise—that the creator's labor or investment in the process of creation is an essential consideration in crafting IP policy. Jefferson's baseline might be criticized as a product of his privileged and blinkered status in the landed gentry: men of leisure, who live on inherited wealth and the toil of others (including, in Jefferson's and Cicero's cases, enslaved persons), are uniquely in a position to direct time and resources to knowledge creation without considering—or even being aware of—the costs (including opportunity costs) of their investigations. Such men may not depend on knowledge creation for their livelihood, but most knowledge creators today are not so fortunate.

Even so, the status quo baseline has to cut both ways. If my *current* material possessions are to be defended as a matter of justice regardless of the manner of their acquisition, I can't rightly complain that my *past expenditures* in creating knowledge ought to be considered a cost to me of sharing that knowledge *after it has been created*. Conversely, I can't claim a right to the future value others might derive from my knowledge if

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237. Paul K. Conkin, *The Religious Pilgrimage of Thomas Jefferson*, in JEFFERSONIAN LEGACIES, *supra* note 30, at 19, 35.

*those others* have a similar right to *their own* possessions in some future status quo. The Classical Tradition is simply not concerned with how people came into possession of the resources under their control, so long as they did not take those resources from somebody else without that person's consent. And Jefferson's Taper, with all its philosophical forbears, makes clear that those who use an inventor's idea deprive the inventor of *nothing* by the mere fact of that use. The question, in this view, is not whether an inventor expended effort or resources in developing new knowledge, but whether they did so *voluntarily*.

This argument may be difficult for modern IP scholars to accept, but that does not make it wrong. It is coherent, whether or not it is complete. And importantly, it leaves open the possibility of alternative arguments grounded in the Classical Tradition that find some way of accounting for the investments of knowledge creators—especially through the criterion of merit. Indeed, I believe many modern arguments for IP rights are in fact motivated by such considerations.

Today, utilitarian and Lockean theoretical frameworks are imperfectly but substantially aligned with opposing ideological agendas regarding the scope of IP rights. Utilitarians argue that IP rights are threatening to become too broad, imposing too great a cost on the potential users and improvers of the knowledge they restrict to justify any incentivizing benefit to the creators of that knowledge.<sup>238</sup> Lockeans argue that the control creators may legally exercise over others' use of their work is, if anything, too thin, depriving those creators of a fair livelihood and exposing the fruits of their labor to unjust misappropriation and abuse.<sup>239</sup> Of course, there are exceptions in each theoretical camp: there are utilitarian analyses tending towards expansionism (or at least anti-restrictionism)<sup>240</sup> and Lockean analyses tending towards restrictionism (or at least anti-expansionism).<sup>241</sup> But on the whole, the theoretical debate has become stale—even hardened—and theoretical commitments have begun to run parallel with ideological ones. Jefferson himself has become a flash point in the debate: while anti-expansionists like Mark Lemley proudly claim him as a champion, anti-restrictionists like Justin Hughes and Adam Mossoff dismiss Jefferson as self-contradictory and out-of-step with more important authorities of his era.<sup>242</sup>

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238. See generally, e.g., DAN L. BURK & MARK A. LEMLEY, *THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT* (2009); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 *SCI.* 698 (1998).

239. See generally, e.g., ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011) [hereinafter MERGES, *JUSTIFYING INTELLECTUAL PROPERTY*].

240. See generally, e.g., Robert P. Merges, *A Few Kind Words for Absolute Infringement Liability in Patent Law*, 31 *BERKELEY TECH. L.J.* 1 (2016).

241. See generally, e.g., Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533 (1993).

242. Compare Lemley, *supra* note 16, at 1031, with Hughes, *Copyright and Incomplete Historiographies*, *supra* note 61, at 1026–34, and Mossoff, *Who Cares What Thomas Jefferson Thought About Patents?*, *supra* note 17, at 955–59.

The Classical Tradition offers a new perspective on this debate. Today's IP anti-restrictionists, rather than invoking Locke, could instead recast their valorization of intellectual labor as an assessment of merit in the Classical Tradition. In this view, knowledge creators are simply more meritorious—that is, they are *better people* and therefore more deserving—than others who would lay claim to their knowledge (or to the fruits of that knowledge). Such an argument would direct both public honors and private beneficence toward knowledge creators. Indeed, this type of judgment does appear to underlie the work of at least some scholars who claim to be working within a deontological framework, as when Rob Merges argues that “creative professionals ought to be a special object of interest for IP law and policy,” deserving of “nurturing” and “[s]pecial [s]olicitude”;<sup>243</sup> or when he and Justin Hughes write that their “central concern” is “[t]he level and distribution of wealth flowing to creative individuals,” and particularly “whether the pattern of earnings from [IP] can be called fair.”<sup>244</sup> These types of arguments make sense only when there is some framework for determining what is due to each person with an interest in the distribution of knowledge—the key concern of the Classical Tradition.<sup>245</sup>

IP anti-expansionists, who usually work within the Modern Tradition, can meet such anti-restrictionist arguments in terms of the Classical Tradition as well. The Broad Reading of Jefferson's Taper lays out the argument: knowledge creators are under no *strict natural obligation* to share their knowledge with others, but doing so voluntarily and freely is a virtue and beneficial to our society. In this view, a just knowledge-governance policy should provide appropriate conditions to facilitate such voluntary sharing. Whether such a policy has room for *legally enforceable* private IP rights—as opposed to some other form of reward to those who share their knowledge—is not at all clear.<sup>246</sup>

## VI. CONCLUSION

The question of what society owes to inventors and other knowledge creators is deeply contested right down to its premises, and this Article has not tried to resolve that contest. Instead, it has tried to provide a better understanding of one of the key texts in the debate, and in doing so, it has tried to introduce the discipline to a new set of perspectives and considerations. Chief among those is the idea that creators of new knowl-

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243. MERGES, JUSTIFYING INTELLECTUAL PROPERTY, *supra* note 239, at 196.

244. Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513, 516 (2016).

245. A more modest and less inegalitarian argument might hold that IP rights are a conventional instrument to afford the possessor of knowledge the power to decide *in each instance* whether or not to share it with those who ask, subject to the understanding that it is always virtuous to share but that it is nevertheless within the right of a possessor to deny others even that which costs the possessor nothing to give (perhaps, following Aquinas, subject to the superior moral claims of mortal necessity).

246. *See supra* note 145 and accompanying text.

edge, simply by virtue of possessing knowledge that might benefit other human beings, could have *obligations* with respect to that knowledge and those people, not just *rights* in and against them, respectively. It is difficult to reach such a position from the perspective of utilitarian or Lockean IP theory as currently constituted, but the position flows naturally from the basic premises of the Classical Tradition.

The identification of such obligations, and the ability to derive them theoretically, offers a tantalizing new avenue of inquiry into questions of knowledge-governance law and policy. It suggests that serious attention ought to be paid to the modern-day heir to the Classical Tradition: virtue ethics,<sup>247</sup> which alone among the three great schools of Western moral philosophy is not seriously represented in IP theory or scholarship.<sup>248</sup> But the avenues of scholarly inquiry opened up by these new readings of Jefferson's Taper do not necessarily make the Classical Tradition, or even virtue ethics, a *superior* theoretical basis for knowledge-governance policy.

This is not a pressing objection to the new readings in my view, because I do not subscribe to the moral-realist view that *any* theoretical foundation for normative reasoning can be proven true to the exclusion of others. I personally find the Classical Tradition unattractive because I share the normative commitment to political equality that is distinctive of the Modern Tradition. But I also find the Baconian model of scientific collaboration deeply attractive, and sadly on the wane in IP theory as it is in knowledge-governance policy.<sup>249</sup> The fact that two centuries ago the first administrator of the American patent system suggested a way to reconcile these two frameworks with each other does not necessarily convince me that he was right. But it does convince me that deeper thinking about the range of normative possibilities in justifying (or criticizing) IP law is warranted.

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247. For a summary of modern virtue ethics and its relation to deontology and consequentialism, see generally ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* (1999).

248. See Jeremy N. Sheff, *Philosophical Approaches to Intellectual Property Law Scholarship*, in *HANDBOOK ON INTELLECTUAL PROPERTY RESEARCH* 8 (Irene Calboli & Maria Lilla Montagnani eds.) (forthcoming Oxford Univ. Press), available at <https://ssrn.com/abstract=3273926> [<https://perma.cc/Y78T-YHU7>].

249. The most recent vigorous defenses of Mertonian scientific communism to gain significant attention in IP scholarship are already decades old. See generally Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1017 (1989); Rebecca S. Eisenberg, *Proprietary Rights and the Norms of Science in Biotechnology Research*, 97 YALE L.J. 177 (1987); Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77 (1999). A typical rebuttal to these defenses can be found in F. Scott Kieff, *Facilitating Scientific Research: Intellectual Property Rights and the Norms of Science—A Response to Rai and Eisenberg*, 95 NW. U. L. REV. 691 (2001).