

# Jefferson's Taper

## 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 1813 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 tradition that others have cited as inconsistent with Jefferson's views. I further demonstrate how that natural law tradition rests on a classical, pre-Enlightenment notion 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 modern, post-Enlightenment notion of distributive justice as a collective social obligation that proceeds from an initial assumption of human equality. Jefferson's lifetime correlates with the beginnings of a historical pivot in the intellectual history of the West from the classical notion to the modern notion, but contemporary 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 recognized property as a pre-political right. I argue that, to the contrary, Jefferson's Taper should be read from the viewpoint of the Classical Tradition, in which light it not only fits comfortably within a natural law framework, but 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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## I. Introduction

*For vpon euery Inuention of Valen; wee erect a Statua to the Inuentour, and giue him a Liberal and Honourable Reward. These Statua's are, some of Brasse; some of Marble and Touchstone; some of Cedar and other speciall Woods guilt and adorned; some of Iron; some of Siluer; some of Gold.<sup>1</sup>*

- Sir Francis Bacon

By 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 applications for patents on new inventions, 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 this responsibility 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 adminisitrator.”<sup>3</sup>

The Act of 1790 endured for only three years, after which it was repealed by a statute that converted the relevant executive officers from patent examiners to patent registrars, leaving substantive questions of patent validity to be litigated in the courts.<sup>4</sup> But two decades later, Jefferson wrote a letter concerning a lawsuit brought by Oliver Evans to enforce the most

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<sup>1</sup>. FRANCIS BACON, NEW ATLANTIS 46–47 (Alfred B. Gough ed., 1915).

<sup>2</sup>. Act of April 10, 1790, ch. VII, 1 Stat. 109.

<sup>3</sup>. P.J. Federico, *Operation of the Patent Act of 1790*, 18 J. PAT. OFF. SOC'Y 237, 238 (1936).

<sup>4</sup>. Act of Feb. 21, 1793, ch. XI, 1 Stat. 318.

litigated patent of the day—a flour-mill patent Jefferson had granted as Secretary of State and revived as President by signing a private law enacted by Congress specifically for Evans' benefit.<sup>5</sup> This letter, written to Isaac McPherson, has since become part of the fundamental lore of American intellectual property (IP)—the statutory patent and copyright privileges afforded by federal law to inventors and authors, respectively. After expressing his opinions of the strength of Mr. Evans' patent and the claims asserted thereunder, 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 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 the 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

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<sup>5</sup>. For a brief history of the Evans patent and Jefferson's role in it, see Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective Part II*, 49 J. COPYRIGHT SOC'Y U.S.A. [J], 58–65 (2001–2002).. 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).

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.<sup>6</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>7</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 20<sup>th</sup>-century economists Richard Musgrave and Paul Samuelson,<sup>8</sup> is the type of good to which all members of society have equal access, and the consumption of which by any one person does not diminish the quantity available to others. National defense is the paradigm example. As Musgrave and others 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, selfishly rational welfare-maximizers will decline to make such contributions unless compelled to do so.<sup>9</sup> The designation of such goods as "public goods" recognizes that this free-riding problem counsels for public provision of the goods and compulsory taxation to support their production.<sup>10</sup>

The utilitarian theory of IP—which has pretensions to the mathematical rigor of new welfare economics in the Samuelson mold—categorizes information, writ large, as this type

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<sup>6</sup>. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813) , in: 13 ANDREW A. LIPSCOMB, THE WRITINGS OF THOMAS JEFFERSON, 333–34 (1904).

<sup>7</sup>. ABBY SMITH RUMSEY, WHEN WE ARE NO MORE: HOW DIGITAL MEMORY IS SHAPING OUR FUTURE ch. 5 (2016).

<sup>8</sup>. See generally Maxime Desmarais-Tremblay, *Musgrave, Samuelson, and the Crystallization of the Standard Rationale for Public Goods*, 49 HISTORY OF POLITICAL ECONOMY 59 (2017) (discussing the relative contributions of Musgrave and Samuelson to the modern theory of public goods in welfare economics).

<sup>9</sup>. See generally *id.*

<sup>10</sup>. On the economics of public goods, and the role of the criteria of nonexcludability and nonrivalrousness (or zero marginal cost), see generally Agnar Sandmo, *Public Goods*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS 1 (2008); RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS ch. 6–8 (1996).

of public good. But instead of correcting the implied market failure through public provision supported by taxation, it attempts to do so by means of limited, legally enforced private property rights. 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. Information being neither excludable nor rivalrous, 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 results 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 knowledge, and society would go wanting for new works of intellectual labor—or so the model tells us.<sup>11</sup>

The core of utilitarian IP theory built on the classification of information as a public good is the *incentive thesis*: the proposition that the promise of intellectual property rights—the power to prevent would-be free-riders from entering the market for a limited time—allows knowledge creators to charge supra-competitive prices during the term of their rights, thereby providing them an opportunity to recoup their investment and an incentive to create new knowledge that they would not otherwise create.<sup>12</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

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<sup>11</sup>. For applications of this theoretical framework to patents and copyrights, see, respectively, SUZANNE SCOTCHMER, INNOVATION AND INCENTIVES ch. 2 (2004). William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989). For a critical take on the use of this economic model in intellectual property (specifically copyright), see generally Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, U. PA. L. REV. 635 (2007). For a more radically critical take, see generally James Boyle, *Cruel, Mean, Or Lavish - Economic Analysis, Price Discrimination and Digital Intellectual Property Symposium: Taking Stock: The Law and Economics of Intellectual Property Rights*, 53 VAND. L. REV. 2007 (2000).

<sup>12</sup>. Jonathan M. Barnett, *Do Patents Matter? Empirical Evidence on the Incentive Thesis*, in HANDBOOK ON LAW, INNOVATION AND GROWTH 178, 178 (2011).

incentive to knowledge creators at the minimum cost to the public—the costs of IP being primarily the deadweight losses of supracompetitive pricing that result from the owners' restriction of access to their knowledge.<sup>13</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>14</sup> Jefferson's Parable of the Taper, which frames patent legislation as “an encouragement to men to pursue ideas which may produce utility,” is widely understood to endorse the incentive thesis, and with it a utilitarian framework for IP law. As today's foremost IP scholar (and avowed welfarist) Mark Lemley puts it in the very first paragraph of one of the most widely-cited articles ever written on intellectual property:

“Thomas Jefferson was of the view that ‘[i]nventions... 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.”<sup>15</sup>

Even scholars who do not subscribe to the public goods model accept this characterization of Jefferson's Taper: they concede that the parable “forcefully advanced the utilitarian and economic justification of the patent system.”<sup>16</sup> Such scholars typically reject utilitarian justifications of IP rights, looking instead to deontologically-inspired natural rights theories for an alternative. By far the most influential such theory is the Lockean account of property,

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<sup>13</sup>. Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, JOURNAL OF ECONOMIC PERSPECTIVES 57, 58 (2005) (“The tension between incentives and access ... preoccupies the conventional economic analysis of intellectual property”).

<sup>14</sup>. U.S. Const. Art. I § 8 cl. 8.

<sup>15</sup>. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1031 (2005). A recent survey concludes this article is the most widely cited IP article published since 2005. Ted Sichelman, *Written Description: 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>.

<sup>16</sup>. Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 962 (2007).

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>17</sup> John Locke famously identified such rights of property with the moral claims of labor as a matter of natural law, on the theory that all would "unquestionabl[y]" agree to allow individuals to assert property rights over resources they had worked to put to productive use, "at least where there is enough, and as good left in common for others."<sup>18</sup> Lockean theorists have extended Locke's logic from physical resources to intangible ones, identifying the rights of authors or inventors with the labor of the mind.<sup>19</sup> But in the United States for most of the past century, the Lockean, natural law account of IP rights has always had to combat not only the constitutional text, but the dominance of utilitarian theory that traces its pedigree to the founder of the American patent system. After all, with his letter to Isaac McPherson, Jefferson seemed to place his authority squarely against a Lockean "natural rights" account of the patent system, and to gesture towards an as-yet-unarticulated utilitarian account.

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<sup>17</sup>. See generally, e.g., Adam Mossoff, *Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory*, 29 SOCIAL PHILOSOPHY AND POLICY 283 (2012); 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). Hughes' classic treatment also provides a Hegelian account of intellectual property based on the notion of personhood, following the then-recent extension of personhood theory to tangible property by Peggy Radin. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). But for good or for ill, the personhood account has never gained the traction in intellectual property theory that has been enjoyed by the utilitarian and Lockean accounts.

<sup>18</sup>. John Locke, Second Treatise of Government, ch. V, ¶ 27 (1689) ("Though the earth, and all inferior creatures be common to all men, yet every man has a *property* in his own *person*. This no body has any right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other men. For this *labour* being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.").

<sup>19</sup>. See generally, e.g., Lawrence C. Becker, *Deserving to Own Intellectual Property Symposium on Intellectual Property Law Theory*, 68 CHI.-KENT L. REV. 609 (1992). Mossoff, *supra* note 16, at 962. 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). For a more skeptical view of the Lockean justification for IP rights, see generally Seana Valentine Shiffrin, *Lockean Theories of Intellectual Property*, in NEW ESSAYS IN THE POLITICAL THEORY OF PROPERTY (Stephen R. Munzer ed., 2001).

That, at least, is the conventional reading of Jefferson's Taper in contemporary IP policy debate. My central claim in this article is that the conventional reading 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*). In an early section of *De Officiis*, Cicero quotes a three-line passage from a lost play of the poet Quintus Ennius to make precisely the same point—in precisely the same way—as the Parable of the Taper:

“[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>20</sup>

In paraphrasing Cicero (albeit without attribution), Jefferson was invoking a philosophical tradition that stretches from Aristotle through Cicero and Seneca to Thomas Aquinas and Hugo Grotius—a tradition which maintained its hold on Western political philosophy at least up to the Enlightenment. Tracing the genealogy of Jefferson's Taper reveals a deep philosophical architecture undergirding the parable—specifically, a theory of distributive justice firmly 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. In short, casting Jefferson's views on IP as proto-

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<sup>20</sup>. Cicero, *De Officiis* I.xvi.51 (emphasis added). Citations to *De Officiis* are by book, chapter, and section number; English quotations are from the Loeb Classical Library translation by Walter Miller unless otherwise noted.



utilitarian and anti-natural-rights gets those views precisely backwards. On the contrary, Jefferson's Taper situates knowledge as a resource its possessors are under a *natural duty to share*.

The misreading of Jefferson's Taper that we have come to accept—that it rejects natural-right justifications of patent law in favor of utilitarian ones—is an anachronistic reflection of our current ideological battles backwards in time to Jefferson's day. Today, utilitarian and Lockean theoretical frameworks are imperfectly but substantially aligned with opposing ideological agendas regarding the scope of IP rights. Utilitarians argue on the basis of aggregate social welfare that IP rights are threatening—at least in some respects—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>21</sup> Lockeans argue on the basis of respect for creators' labor 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 their creations to unjust misappropriation, mutilation, and abuse.<sup>22</sup> Of course, there are exceptions in each theoretical camp: there are utilitarian analyses tending towards expansionism (or at least anti-restrictionism),<sup>23</sup> and Lockean analyses tending towards restrictionism (or at least anti-expansionism).<sup>24</sup> But on the whole, the theoretical debate has become stale—even hardened—and theoretical commitments have begun to run parallel with ideological ones. The mere recognition of Jefferson as an authority has become a battleground in this ideological war: while restrictionists like Lemley proudly claim him as a champion,

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<sup>21</sup>. 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).

<sup>22</sup>. See generally, e.g., ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011).

<sup>23</sup>. See generally, e.g., JAMES BESSEN & MICHAEL JAMES MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* (2008).

<sup>24</sup>. 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).

expansionists like Justin Hughes and Adam Mossoff dismiss him as self-contradictory and out-of-step with more important authorities of his era.<sup>25</sup>

The congealing of intellectual property scholarship into opposing camps along both theoretical and ideological lines has led to accusations of disingenuousness and even of academic corruption. The overarching climate is one in which IP policy is viewed as a zero-sum game, where owners' interests are pitted against users' interests, and theoretical commitments are mere window-dressing for partisan distributive agendas. Restrictionist scholars are accused of being corruptly beholden to Internet firms who might benefit from laxer and less widely available intellectual property rights, and expansionist scholars are accused of being corruptly beholden to large research-oriented firms who might benefit from broader and more readily obtainable intellectual property rights.<sup>26</sup> While I do not believe that any intellectual property scholar I have ever encountered is guilty of such corruption or disingenuousness, I *do* believe that scholars—like all members of society—have distributive priorities, particularly when it comes to regulating the creation and dissemination of knowledge. I further believe that these priorities, rather than being mere ideological preferences or partisan leanings, have theoretical and scholarly implications. The problem is that we lack the theoretical vocabulary to debate these distributive priorities in a scholarly way, so they hover—unwritten and unspoken—over academic debate without being aired and tested.

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<sup>25</sup>. Compare Lemley, *supra* note 15, at 1031; with Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1026–34 (2005); Mossoff, *supra* note 16.

<sup>26</sup>. These allegations of corruption are, in my view, generally unfounded, and so I will not cite to them here, but I note that the spectre of such accusations recently prompted a number of intellectual property law scholars to propose a disclosure regime for the discipline. Robin Feldman et al., *Open Letter on Ethical Norms in Intellectual Property Scholarship*, SSRN Scholarly Paper ID 2714416 (Social Science Research Network), Jan. 12, 2016. In the spirit of that project: over a decade ago the author represented Qualcomm as a litigation associate at Cravath, Swaine, & Moore LLP. The views expressed herein are the author's alone, and do not reflect the views of either Qualcomm or the Cravath firm, neither of which has to my knowledge provided any form of support for my research.

A re-evaluation of Jefferson's Taper, I think, offers an opportunity to build such a theoretical vocabulary. This is not because we ought to defer to Jefferson as an authority when formulating our present-day normative commitments about IP. We should not relinquish such important ethical responsibilities to long-dead men of privilege, and especially not to men like Jefferson, whose soaring rhetoric on justice, liberty, and equality stands in stark contrast to his life-long abuse of the human beings he claimed as chattel slaves.<sup>27</sup> Rather, it is because the Parable of the Taper gives us a window into a larger universe of normative theory than our current one, which has proven inadequate to engage the problem of distribution in a scholarly rather than a partisan manner.

Normative theories of intellectual property remain thin when it comes to distribution, owing largely to the capture of the field by (often vulgar) utilitarianism, which by definition treats distribution as a second-order concern (if that).<sup>28</sup> Lockean labor-desert theory is

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<sup>27</sup>. ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY 106–7 (1998) (“[T]he knowledge that Jefferson himself did not live up to the vision he set before us has troubled some Americans from his time until today.... [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.... The allegation that Thomas Jefferson had a long-term liaison with his slave Sally Hemings presents a particular challenge to the grant of forgiveness that Jefferson is almost ritually given.”).

<sup>28</sup>. See JOHN RAWLS, A THEORY OF JUSTICE 67 (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. The concentration seems to be on issues that involve no conflict between different individuals [or groups, or classes].... The concept of Pareto optimality was evolved precisely to cut out the need for distributional judgements.”). HENRY SIDGWICK, THE METHODS OF ETHICS 416–17 (1907) (“[T]here may be many different ways of distributing the same quantum of happiness among the same number of persons; in order, therefore, that the Utilitarian criterion of right conduct may be as complete as possible, we ought to know which of these ways is to be preferred. This question is often ignored in expositions of Utilitarianism.... 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. The principle which most Utilitarians have either tacitly or expressly adopted is that of pure equality... [a]nd this principle seems the only one which does not need a special justification; for, as we saw, it must be reasonable to treat any one man in the same way as any other, if there be no reason apparent for treating him differently.”). Admittedly, attention has been drawn to distributive questions in IP, particularly in the access to knowledge/access to medicines literature, which is informed by a social justice or critical theory perspective. See generally, e.g., *Symposium: Intellectual Property and Social Justice*, 40 U.C. DAVIS L. REV. 559 (2007). But this literature is working almost entirely within the Modern Tradition of distributive justice, and indeed, within a utilitarian framework that argues for distributive mechanisms primarily on efficiency grounds. See generally, e.g., Peter Lee, *Toward a Distributive Agenda for U.S.*

similarly cagey about the problem of distribution among competing claimants, primarily 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 resource competition. Moreover, property rights are just one piece of a larger normative puzzle—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 (albeit a highly influential one) to emerge within the transitional period during which the Classical Tradition was being critically re-evaluated and a new conception of distributive justice founded on a normative commitment to the equality of human beings—which I will refer to as the Modern Tradition—was beginning to emerge. Thus, regardless of whether it makes sense to refer to intangible resources like ideas with the label “property,”<sup>29</sup> the concept of distributive justice has purchase on the justification of our legal regimes governing the creation, dissemination, and use of new knowledge. Such knowledge, after all, is a resource that will often be within the exclusive possession of its creators at the time of its creation, but will also often be useful—even essential—to a life well lived for others.

Formulating and defending such justifications requires us to step back from the hardened utilitarian-versus-Lockean battle lines that have been drawn through intellectual property theory over the past several decades, and examine an orthogonal set of questions. In this Article, I use the genealogy of Jefferson’s Taper as a lens through which to examine normative commitments regarding distribution. I will argue that Jefferson’s Taper, like Jefferson himself, is grounded in the Classical Tradition but looks toward the Modern Tradition. Both traditions of distributive justice continue to attract adherents, many of whom may be ignorant of the older intellectual foundations that have been laid to support their distributive commitments.

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*Patent Law*, 55 HOUS. L. REV. 321 (2017). Recognition of the Classical Tradition and its distinctive normative commitments thus opens up a wider space for engagement on distributive questions implicated by knowledge governance policy.

<sup>29</sup>. See Hughes, *supra* note 25, at 998.

But the two traditions represent deeply incompatible approaches to political economy. Critical evaluation of these intellectual traditions therefore points the way toward radically different programs for organizing the governance of knowledge creation and transmission (and for allocating the resources consumed and produced by that enterprise). This Article, by tracing the contours of the Classical Tradition and contrasting it with the Modern Tradition with which we are familiar, offers tools to theorize distributive aspects of knowledge governance that do not presuppose a commitment to the Modern Tradition. Those tools offer escape from the hardened ideological debates over the scope of intellectual property rights, principally by demonstrating that there are more dimensions to the normative questions implicated by knowledge governance than the contemporary debate has engaged with. Most saliently, it demonstrates the possibility that anti-expansionist IP policy might flow from non-Lockean natural-law theoretical premises—premises drawn from the Classical Tradition.

Part II of this Article makes the case that Cicero's *De Officiis* was the source for Jefferson's Taper, and would have been recognized as such by his contemporaries. This discovery has some surprising theoretical implications, which the rest of this article will explore. Part III undertakes a deeper examination of *De Officiis*, specifically investigating the aspects of justice and property that Cicero was trying to illustrate with Ennius's poetry. This examination reveals that Cicero's vision of distributive justice was both elitist and conservative: it allowed the state no role other than a strict duty to prevent and rectify involuntary transfers that upset the *status quo* distribution of wealth and goods. Transfers of goods, even to alleviate dire need, were for Cicero purely a matter of the private virtue of benevolence—which ought to be exercised with sharp discrimination as to the merit of the recipient and always with a view to the donor's political and social advantage. This view of the relative spheres of the individual and the state in distribution derives from Cicero's view of the distinction between the state of nature and civil society, specifically that property is a civil innovation and indeed the reason for civil society to arise.

Part IV situates Cicero's views in the western intellectual history of distributive justice and natural law, and identifies *De Officiis* as a founding text of the Classical Tradition. Modern theoretical notions of distributive justice, deeply influenced by the philosophy of John Rawls, are firmly embedded in the Modern Tradition. But distributive justice meant something quite different in Jefferson's day. The transition from the Classical Tradition to the Modern Tradition pivots through the Enlightenment and the Age of Revolutions, a period (including Jefferson's lifetime) during which Western political philosophy was reorganized to accommodate the normative principle of human equality. This was a radical departure from the Classical Tradition's assumption of the natural *inequality* of human beings. Unpacking the key features of the Classical Tradition—as represented by thinkers like Aristotle, Cicero, Aquinas, Grotius, and others—may therefore shed light (pardon the pun) on the normative assumptions regarding distribution that motivated Jefferson's Taper. Those normative assumptions—which notably include a belief that allocations of resources ought to be in proportion to merit, that such allocations are strictly a matter of private judgment, and that they are therefore not subject to coercive enforcement by the state—may even have relevance to our own intellectual property system in the present day. Reading Jefferson's Taper as drawing on the Classical Tradition suggests a new, radical position grounded in pre-Lockean conceptions of natural law: that virtuous knowledge-creators have a duty to freely share their knowledge.

Part V sketches this radical, Classical-Tradition-informed understanding of distributive justice as applied to the social institution of property rights in intellectual works, using Jefferson's Taper as a guide. Because it is possible—even plausible—that Jefferson himself failed to fully appreciate the implications of his argument, I offer two possible interpretations of it. One, which I will call the Narrow Reading, merely observes that Jefferson was invoking Cicero as an authority on the scope of natural rights, and simply concludes that Jefferson's Taper therefore offers a natural-law-based argument, rather than a proto-utilitarian one. Even this would be a radical shift in our understanding of this important text. But another

interpretation, which I will call the Broader Reading, would go further: it would derive from Jefferson's invocation of Cicero a subtle natural-law-based argument regarding the just distribution of knowledge. The Broader Reading implies that creators of new knowledge have a *duty*—founded in the virtue of beneficence—to share that knowledge with members of their society, and that the state—which may not properly *compel* compliance with this duty—ought to either (a) *encourage* such virtuous sharing of knowledge by providing appropriate inducements, or (b) point the virtuous knowledge-creator in a practical direction by providing an incentive to focus on creating knowledge that is *useful*.

This Broader Reading is bound to be a controversial interpretation of Jefferson's Taper, but it resonates strongly with the Baconian model of knowledge production and scientific progress that we know Jefferson found attractive—as many others still do. Still, even if this reading fails to persuade, the Narrow Reading—that Jefferson's Taper is neither utilitarian nor opposed to a natural-law understanding of knowledge governance—remains an important corrective to the anachronistic reading contemporary scholars have imposed on it.

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## 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>30</sup> Jefferson's observation of the nature of light was lifted, almost word for word, from Book 1 Section 51 of Cicero's *De Officiis*. Prior to

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<sup>30</sup>. Letter from Jefferson to McPherson, *supra* note 6, in; LIPSCOMB, *supra* note 6, at 333.

this key passage, Cicero has been musing on the duty of beneficence, and its relationship to the duty of justice. This is a complex (and perhaps unstable) 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 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>31</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'.

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<sup>31</sup>. Cicero, *De Officiis* I.xvi.51 (emphasis added).



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>32</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>33</sup> and he recommended it to others at least twice over four decades—in the latter instance, as a recommendation to those studying for a career in law and public life, within a year of his letter to Isaac McPherson.<sup>34</sup> He apparently returned to the work frequently; a letter of April 1818 remarks that he had recently been perusing Cicero's "Offices."<sup>35</sup> Jefferson admitted in other correspondence that his political philosophy was influenced by Cicero's<sup>36</sup> (of which *De Officiis* is the crowning

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<sup>32</sup>. D.L. WILSON, JEFFERSON'S LITERARY COMMONPLACE BOOK 159 (2014).

<sup>33</sup>. 2 E. MILLICENT SOWERBY, CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON, 35 (1953). The translation, by Thomas Cockman, translates *lumen* as "torch." 3 MARCUS TULLIUS CICERO, CICERO: THE ORATIONS TRANSLATED BY DUNCAN, THE OFFICES BY COCKMAN, AND THE CATO AND LÆLIUS BY MELMOTH., 34 (Harper's stereotype ed. ed. 1833).

<sup>34</sup>. Letter from Jefferson, Thomas to John Minor (Aug. 13, 1814) *in*; 11 THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON, 420, 422 (Paul Leicester Ford ed., 1905) [hereinafter THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON]. Letter from Thomas Jefferson to Robert Skipwith, Aug. 3, 1771, *in* 1 THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON, 76, 80 (Julian P Boyd ed., 1950).

<sup>35</sup>. Letter from Thomas Jefferson to Wells & Lilly, Apr. 1, 1818, *in* THOMAS JEFFERSON, THOMAS JEFFERSON CORRESPONDENCE, PRINTED FROM THE ORIGINALS IN THE COLLECTIONS OF WILLIAM K. BIXBY 238 (1916) ("I happened at the time ... to be reading the 5th book of Cicero's Tusculans, which I followed by that of his Offices....").

<sup>36</sup>. In correspondence towards the end of his life, Jefferson explained:

"This was the object of the Declaration of Independence. Not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject.... Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind.... All its authority rests then 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."

example),<sup>37</sup> and in his exchanges with John Adams during the months preceding Jefferson's letter to McPherson, Adams commends Jefferson to review his Cicero not once but twice.<sup>38</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 the education of both philosophers and statesmen for many centuries.”<sup>39</sup> Cicero's last work of philosophy was, “from the twelfth century onward...part of the bloodstream of Western culture.”<sup>40</sup> Over 700 manuscripts of the work survive,<sup>41</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>42</sup> The book's popularity reached a “high-water mark” in the 18th century,<sup>43</sup> just as the American founding generation were turning to Rome as a model and a cautionary example for their new continental republic.<sup>44</sup> Around this time, quoting

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Letter from Jefferson, Thomas to Henry Lee (May 8, 1825), in 17 ANDREW A. LIPSCOMB, THE WRITINGS OF THOMAS JEFFERSON, 117, 118–19 (1904).

<sup>37</sup>. Anthony A. Long, *Cicero's Politics in De Officiis*, in JUSTICE AND GENEROSITY: STUDIES IN HELLENISTIC SOCIAL AND POLITICAL PHILOSOPHY 213, 240 (André Laks & Malcolm Schofield eds., 1995) (“The *De officiis*, not the \*De re publica\*, is Cicero's Republic.”).

<sup>38</sup>. LIPSCOMB, *supra* note 6, at 304, 317. Adams, like most New England lawyers of his day, was particularly enamored of the combination of stoicism and elitism in Cicero's example. See generally Stephen Botein, *Cicero as Role Model for Early American Lawyers: A Case Study in Classical Influence*, 73 THE CLASSICAL JOURNAL 313 (1978).

<sup>39</sup>. Martha C. Nussbaum, *Duties of Justice, Duties of Material Aid: Cicero's Problematic Legacy*, 8 JOURNAL OF POLITICAL PHILOSOPHY 176, 179 (2000).

<sup>40</sup>. ANDREW ROY DYCK, A COMMENTARY ON CICERO, DE OFFICIIS 43 (1996).

<sup>41</sup>. Michael Winterbottom, *The Transmission of Cicero's De Officiis*, 43 THE CLASSICAL QUARTERLY 215, 215 (1993).

<sup>42</sup>. 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).

<sup>43</sup>. DYCK, *supra* note 40, at 46.

<sup>44</sup>. See generally CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT (1995).

Cicero without attribution was not unheard of, because “to mention the source would be to insult the learning of the audience.”<sup>45</sup>

There are other possible sources for Jefferson’s Taper—in particular, Grotius and Seneca the Younger—but they are less convincing. Apart from the general dominance of *De Officiis* in the esteem of the educated classes of Jefferson’s day, there are reasons particular to Grotius and Seneca that make them unlikely sources for the Parable of the Taper. In *De Iure Belli ac Pacis*, Grotius’ discussion of the natural law of property includes the following passage:

There is another right, which is that of making use of the property of another, where such use is attended with no prejudice to the owner. For why, says Cicero, should not any one; when he can do it without injury to himself, allow another to share with him those advantages, which are useful to the receiver, and no way detrimental to the giver? Seneca therefore observes, that it is no favour to allow another to light his fire from your flame.<sup>46</sup>

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

Wilt thou not then (saith he) give counsel to an ungrateful man, who would take thine advice in his affairs: nor permit him to draw water out of thy fountains: nor show him the way if he be out of it? or wouldst thou do these things for an ungrateful man, yet refuse him afterwards all other sorts of good? I will distinguish in this point, or at leastwise I will endeavour to distinguish the same. 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. Two things must concur in making of a benefit. First, the greatness of the thing, for some things there are, that undergo the measure of this name : whoever 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? ... Finally, that I do it with a good will, and that I feel in myself a great joy and pleasure that I do it. Of

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<sup>45</sup>. Nussbaum, *supra* note 39, 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. GLORIA VIVENZA, ADAM SMITH AND THE CLASSICS: THE CLASSICAL HERITAGE IN ADAMS SMITH’S THOUGHT 1–4 (2001).

<sup>46</sup>. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE, at II.ii.xi (p. 94) (A. C. Campbell trans., 1901).

which points there are none at all in these things that we speak of; for 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>47</sup>

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) as Secretary of State,<sup>48</sup> and owned two copies of *De Iure Belli ac Pacis*--one in Latin and the other in French translation.<sup>49</sup> He owned a copy of the above-quoted translation of Seneca as well.<sup>50</sup> But we can be fairly confident that Jefferson had Cicero rather than these other authors in mind in formulating the Parable of the Taper. First, Grotius does not appear in Jefferson's writings other than in connection with discussion of international treaties,<sup>51</sup> whereas (as noted above) Cicero is a source Jefferson refers to more frequently, 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, for what it is worth, Jefferson seemed to hold Cicero in (at least marginally) higher esteem than Seneca in the matter of ethics.<sup>52</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

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<sup>47</sup>. LUCIUS ANNAEUS SENECA, ON BENEFITS 162–63 (Thomas Lodge trans., 1614) (De Beneficiis IV. xxix).

<sup>48</sup>. Opinion on French Treaties, Apr. 28, 1793, in 7 THOMAS JEFFERSON & PAUL LEICESTER FORD, THE WORKS OF THOMAS JEFFERSON, vol. 7 pp. 283, 292–95 (1904).

<sup>49</sup>. SOWERBY, *supra* note 33, at 67–68.

<sup>50</sup>. *Id.* at 39.

<sup>51</sup>. 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. Report on Negotiation with Spain, Mar. 18, 1792, in JEFFERSON & FORD, *supra* note 48, vol. 6 pp. 414, 418. Tellingly, Grotius does not appear in the recommended reading list enclosed in Jefferson's letter to John Minor, though Vattel does. Letter from Jefferson, Thomas to Minor, *supra* note 34 in; JEFFERSON, THE WORKS OF THOMAS JEFFERSON, *supra* note 34, at 420, 422.

<sup>52</sup>. The reading list in Jefferson's letter to John Minor lists Cicero's *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, Thomas to Minor, *supra* note 34 in; JEFFERSON, THE WORKS OF THOMAS JEFFERSON, *supra* note 34, at 420, 422–26.

both—to argue that the nonrivalrous quality of the sea makes it naturally common property.<sup>53</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>54</sup> But Jefferson did not own a copy of *Mare Liberum*.<sup>55</sup> Nor is there evidence 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 makes no reference at all to *Mare Liberum*,<sup>56</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 that tradition 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, in light of the ubiquity of “Tully's Offices,” as *De Officiis* was commonly known. Indeed, it would have lent Cicero's not inconsiderable republican, philosophical, and legal authority to Jefferson's argument. But perhaps owing to the decline of classical education in the United States since the 19th century,<sup>57</sup> the genealogy of Jefferson's Taper has gone

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<sup>53</sup>. HUGO GROTIUS, *THE FREEDOM OF THE SEAS* 38–39 (James Brown Scott ed., Ralph Van Deman Magoffin trans., 1916).

<sup>54</sup>. See generally Ariel Katz, *Data Libera? Canada's Data Strategy and the Law of the Sea*, DATA GOVERNANCE IN THE DIGITAL AGE 100 (Centre for International Governance Innovation May 2018).

<sup>55</sup>. 5 E. MILLICENT SOWERBY, *CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON*, 310 (1959).

<sup>56</sup>. *Thomas Jefferson, Grotius, et al Political Writings, in French and Latin*. -04-18, 1793. Manuscript/Mixed Material. Retrieved from the Library of Congress, [www.loc.gov/item/mtjbib007326/](http://www.loc.gov/item/mtjbib007326/).

<sup>57</sup>. See CHRISTOPHER J. LUCAS, *AMERICAN HIGHER EDUCATION: A HISTORY*, at chs. 5-6 (2016).

essentially unnoticed in the academic literature since the parable was “discovered” by the Supreme Court in 1966.<sup>58</sup> Despite widespread discussion of Jefferson’s Taper in scholarly and teaching texts,<sup>59</sup> I am aware of only one scholar who has even noticed a similarity between Jefferson’s parable and Cicero’s work, and then only in passing in a footnote which cites Ennius as the source for both.<sup>60</sup> The intellectual property community has simply overlooked this important connection of one of our key texts to a wider intellectual tradition.<sup>61</sup> That tradition, it turns out, has deep relevance to the current state of intellectual property law theory.

To understand that relevance, we must undertake a deeper investigation of *De Officiis* and the complex traditions of natural law and distributive justice in which it plays a key role.

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<sup>58</sup>. *Graham v. John Deere Co.*, 383 US 1, 8 n. 2 (United States Supreme Court 1966); Mossoff, *supra* note 16, at 954 (“In 1966, the Supreme Court discovered that Thomas Jefferson was the founder of American patent law.”). The Court apparently discovered Jefferson’s Taper through the work of P.J. 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 In Memoriam, 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 v. John Deere*. Compare Federico, *supra* note 3, at 241–42. with *Graham v. John Deere Co.*, 383 US at 7–8 (quoting Federico’s article and reproducing excerpts of Jefferson’s writings quoted elsewhere in the article).

<sup>59</sup>. JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 20 (2008); *See, e.g.*, Hughes, *supra* note 25, at 998–99, 1026–34; PETER S. MENELL ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 209 n.2 (2017). 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. 6 THE WRITINGS OF THOMAS JEFFERSON, 175 (Henry Augustin Washington ed., 1854).

<sup>60</sup>. Apart from citation of Jefferson’s letter to McPherson, the footnote 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 23 n. 8 (2005). Of course, Ennius’ work is lost, except in fragments cited by other, later authors (such as Cicero). 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, *The Natural Flow of Ideas: Why the Fifth Amendment Takings Clause and an Obscure Water-Rights Decision Might Thwart Attempts at Streamlining the Patent Queue Note*, 20 WM. & MARY BILL RTS. J. 1373, 1394 n. 190 (2011–2012). And as noted above, Ariel Katz has noted the similarity of Jefferson’s Taper to Grotius’ argument about freedom of the seas, but does not make the connection to their common source—*De Officiis*. *See supra* note \_\_\_\_.

<sup>61</sup>. The failure to credit Jefferson’s Taper to Cicero’s example is particularly striking in the work of Professor 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). Mossoff, *supra* note 16. 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. Adam Mossoff, *What Is Property - Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 412 n. 166 (2003); Mossoff, *supra* note 17, at 300–301.

### 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 has been so foundational for so much of the Western tradition, understanding Cicero's vision of nature and of 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

By the end of the year 44 BCE, Marcus Tullius Cicero was a man in desperate straits. He had endured a series of wild reversals, and more were in store. By building a successful legal career during the period of Sulla's ascendancy and dictatorship, Cicero had laid a groundwork for a run at the *cursus honorum* of Republican magistracies, despite being a *homo novus*—a man of equestrian rank with no senators or consuls in his ancestry. Rising to the pinnacle of public life as consul in 63 BCE, 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 the political winds soon shifted: Cicero's excesses in suppressing the conspiracy (he had ordered Roman citizens executed without trial) provided the ambitious tribune Publius Clodius Pulcher of the populist *populares* faction with a pretext to remove him from the political scene by exiling him and confiscating his property. A year later Cicero's exile was lifted and his property restored at the instigation of Gnaeus Pompeius Magnus (Pompey), and for some years he continued to navigate the political eddies of the

First Triumvirate as a politician, an advocate, and the acknowledged leader of the aristocratic *optimates* faction of the Roman Senate.<sup>62</sup>

But this precarious position was not to last. The incompatible ambitions of Pompey and Gaius Julius Caesar broke the fragile political peace of the First Triumvirate, and Rome's Great Civil War erupted between their factions. Then personal tragedy struck: in February of 45 BCE, Cicero's beloved daughter Tullia died, plunging him into months of depression<sup>63</sup> just as the most tumultuous political events of the day—Caesar's final victory over Pompey and the former's designation as dictator for life<sup>64</sup>—seemed to spell doom for Cicero's conservative *optimates*. But then Caesar was assassinated on the Ides of March, 44 BCE, albeit without Cicero's participation (an absence he later regretted).<sup>65</sup> The assassins subsequently fled the popular passion aroused by Mark Antony against them (ultimately to launch a new civil war),<sup>66</sup> and Cicero suddenly found himself once again among the most powerful and respected politicians in the Senate, and possibly the Republic.<sup>67</sup>

Over the ensuing months, as Cicero and Antony jostled for power (and for the favor of Caesar's heir, Octavian), Cicero was distracted by yet another personal crisis. He received word that his only surviving child and namesake, Marcus Tullius Cicero Minor (then a 21-year-old philosophy student in Athens), was falling into dissolution, profligacy, and debauchery.<sup>68</sup> Cicero set sail for Athens in August of 44 BCE in the hopes of setting his son aright, but never arrived: he was called back to Rome soon after embarking to attend to the political

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<sup>62</sup>. For a detailed biography of Cicero's political career, of which this paragraph is a summary, see generally DAVID L. STOCKTON, *CICERO: A POLITICAL BIOGRAPHY* (1971).

<sup>63</sup>. See generally Han Baltussen, *A Grief Observed: Cicero on Remembering Tullia*, 14 *MORTALITY* 355 (2009).

<sup>64</sup>. APPIAN, *ROMAN HISTORY: THE CIVIL WARS*, at II.xv-xvi (Loeb Classical Library ed., Horace White trans., 1913).

<sup>65</sup>. **Cicero, *Ad Familiares* 10.28.**

<sup>66</sup>. APPIAN, *supra* note 64, at II.xvii-III.xviii.

<sup>67</sup>. VII PLUTARCH, *LIVES [CICERO]*, § 45 ("Cicero's power in the city reached its greatest height at this time...").

<sup>68</sup>. DYCK, *supra* note 40, at 12–13.



struggle with Antony.<sup>69</sup> With that struggle still simmering, Cicero retreated into the Italian countryside in September of 44 BCE, and over the ensuing months engaged in two primary pieces of writing: political condemnation of Antony in the form of the *Second Philippic*, and fatherly advice to his faltering heir in *De Officiis* (*On Duties*), completed in late October or early November of 44 BCE.<sup>70</sup> Within a year of completing this work, Cicero's feud with Antony culminated in disaster. After the reconciliation of Octavian and Antony in the form of the Second Triumvirate, Cicero was proscribed and assassinated,<sup>71</sup> his severed head and hands gleefully displayed on the Rostra of the Forum by Antony.<sup>72</sup>

*De Officiis*—a final, urgent transmission from father to son of both advice and patrimony<sup>73</sup>—consists of three books, patterned after the now-lost work of the Stoic philosopher Panaetius of Rhodes.<sup>74</sup> The first, on the duties of morality, sets forth Cicero's particular interpretation of Stoic ethics, shaped through his experience of the vicissitudes of political life in the late Roman Republic. The second, on utility, provides advice on the honest

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<sup>69</sup>. Cicero, *Ad Atticum* 16.7.

<sup>70</sup>. DYCK, *supra* note 40, at 1–2.

<sup>71</sup>. Appian, *Civil Wars* IV.iv.19; Plutarch, *Lives: Cicero* XLVIII–XLIX; Seneca, *Suasoriae* VI. On the historiography of Cicero's death, see generally Andrew Wright, *The Death of Cicero. Forming a Tradition: The Contamination of History*, 50 *HISTORIA: ZEITSCHRIFT FÜR ALTE GESCHICHTE* 436 (2001).

<sup>72</sup>. Cassius Dio, *Roman History* XLVII.8 (“When, however, the head of Cicero also was brought to them one day (he had been overtaken and slain in flight), Antony uttered many bitter reproaches against it and then ordered it to be exposed on the rostra more prominently than the rest, in order that it might be seen in the very place where Cicero had so often been heard declaiming against him, together with his right hand, just as it had been cut off. And Fulvia took the head into her hands before it was removed, and after abusing it spitefully and spitting upon it, set it on her knees, opened the mouth, and pulled out the tongue, which she pierced with the pins that she used for her hair, at the same time uttering many brutal jests.”).

<sup>73</sup>. *De Officiis* I.xxii.77–78 (recounting Cicero Maior's victory as consul over the Catilinarian conspiracy, and adding, “What 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.* III.xxxiii.21 (“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. ... But as you would sometimes give ear to me also, if I had come to Athens (and I should be there now, if my country had not called me back with accents unmistakable, when I was half-way there), so you will please devote as much time as you can to these volumes, for in them my voice will travel to you; and you can devote to them as much time as you will. ... Farewell, my dear Cicero, and be assured that, while you are the object of my deepest affection, you will be dearer to me still, if you find pleasure in such counsel and instruction.”)

<sup>74</sup>. *De Officiis* I.iii.9

acquisition of the things useful to a good life, such as wealth and influence. The third undertakes to instruct Cicero Minor on how best to act when the moral and the useful appear to be in conflict.

## 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 Rome's civil wars and the political turmoil of the late Republic—a period in which public power was accumulated and consolidated by a 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 in his machinations during the First Triumvirate—was the redistribution of land from political adversaries to the victor's veterans and partisans. Sulla had achieved redistribution by a campaign of plunder and proscriptions,<sup>75</sup> Caesar primarily by the privatization of public land and a campaign of eminent domain.<sup>76</sup> Cicero had felt the effects of such measures first-hand: his dispossession at the hands of Clodius Pulcher, though ultimately reversed, was a similar type of move, and it clearly left Cicero angry and embittered.<sup>77</sup>

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<sup>75</sup>. Appian, *Civil Wars* I.XI.

<sup>76</sup>. Appian, *Civil Wars* II.ii; Cassius Dio, *Roman History* XXXVIII.i-vii; XLIII.xlvii. Pompey had tried to enact such a redistribution for the benefit of veterans of his Eastern conquests, but was successfully stymied in the Senate by the *optimates*, including Cicero. JOHN LEACH, *POMPEY THE GREAT* 120 (2014).

<sup>77</sup>. See STOCKTON, *supra* note 62, at 212 (“The compensation voted him for the damage to his property [during his exile] he had thought less than generous.”). In one of his more modern observations, Cicero warns that “when things turn out for our own good or ill, we realize it more fully and feel it more deeply than when the same things happen to others and we see them only, as it were, in the far distance; and for this reason we judge their case differently from our own.” *De Officiis* I.ix.30. This self-awareness does not, however, seem to extend to Cicero's philosophy of property, as is demonstrated below.

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>78</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 material resources is also at the core of Cicero's notion of civil society and the historical transition from the state of nature to the civil state:

[E]ven though nature guides men to gather together [Latin: *congrego*], it was the hope of protecting their property that led them to seek the protection of cities [Latin: *urbs*].<sup>79</sup>

Given this view of the purpose of civil society, it is perhaps unsurprising that redistribution is, for Cicero, the gravest sin on the part of a government official. He repeatedly castigates both Sulla<sup>80</sup> and Caesar<sup>81</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 belongs to him [Latin: *suum*] and that private citizens suffer no invasion of their property rights by act of the state.”<sup>82</sup> Compulsory redistributive measures, he argues,

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<sup>78</sup>. *De Officiis* I.vii.20

<sup>79</sup>. *De Officiis* II.xxi.73 (my translation). Interestingly, Cicero here uses the noun *urbs*—a walled city—rather than *civitas*—city-state. This distinction might suggest a further distinction between physical and legal protections for property owners. But he later makes clear that the distinction does not bear on his view of the relationship between the state and property: “For, as I said above, it is the peculiar function of the state [Latin: *civitas*] and the city [Latin: *urbs*] to guarantee to every man the free and undisturbed control of his own particular property.” *Id.* II.xxii.78.

<sup>80</sup>. *De Officiis* I.xiv.43, II.viii.27.

<sup>81</sup>. *De Officiis* I.viii.26, I.xiv.43, II.xv.54.

<sup>82</sup>. *Id.* II.xxi.73

undermin[e] the foundations of the commonwealth: first of all, they are destroying harmony [Latin: *concordia*], which cannot exist when money is taken away from one party and bestowed upon another; and second, they do away with equity [Latin: *aequitas*], 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 and the city to guarantee to every man the free and undisturbed control of his own particular property.<sup>83</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. On this principle the lands of Arpinum are said to belong to the Arpinates, the Tusculan lands to the Tusculans; and similar is the assignment of private property. 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>84</sup>

Unlike later philosophers, Cicero is supremely unconcerned with the justice of private property's original acquisition, which he considers a matter of civil—not natural—law. Occupancy of vacant land is on equal footing with conquest through war; bargain and sale on

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<sup>83</sup>. *De Officiis* II.xxii.78.

<sup>84</sup>. *De Officiis* I.vii.21 (emphasis added).

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, conventional, and situational (rather than natural) is diametrically opposed to the Lockean natural law framework, but entirely consistent with Jefferson's skepticism of natural rights in property. Just as Jefferson argued that "[s]table ownership is the gift of the social law,"<sup>85</sup> Cicero sees the law of property as arising in the first instance only in political communities—indeed, he sees the defense of property as the *raison d'être* of such communities. This is not to say that either man 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 Lockean pre-political natural right of property—that indeed it is something other than a “property right” as we conceive of it.<sup>86</sup> Neither is this a claim that Cicero's (or Jefferson's) conception of the distinction between the natural and civil relations among persons with respect to things is coherent or well-thought-through; only that they had such a conception, and left evidence of it in their writings.

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, in fact. Indeed, 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*

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<sup>85</sup>. Letter from Jefferson to McPherson, *supra* note 6, in; LIPSCOMB, *supra* note 6, at 333–34.

<sup>86</sup>. Indeed, among scholars of natural law there is debate as to whether the ancient Romans had any concept of a “right” at all. See RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 5–13 (1981).

*law*—that avoiding such resentments—which are *natural* human responses to material loss at the hands of fellow human being—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 the 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>87</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 the law of nature.

Such antipathy to disturbing *status quo* distributions of resources might (uncharitably) be attributed to vulgar self-interest, given Cicero's status as a senator and a *homo novus*: he was a man of considerable—but recently acquired, previously dispossessed, and still precarious—property.<sup>88</sup> As psychology, the argument from resentment might be worthy of empirical investigation.<sup>89</sup> But as moral philosophy, in the absence of such empirical validation, Cicero's justice is an *ipse dixit*, an empty void. And his argument that his conception of justice is a requirement of natural law because human beings are naturally drawn to form property-defending civil societies renders the distinction between natural and civil law unclear at best. Nevertheless—as we will see in the next Part—a considerable amount of the Western tradition

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<sup>87</sup>. *De Officiis* III.v.21.

<sup>88</sup>. Indeed, 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).

<sup>89</sup>. See generally, e.g., Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 JOURNAL OF ECONOMIC PERSPECTIVES 193 (1991).

of property theory can be understood as an effort to save Cicero's conservative notion of distributive justice by backfilling 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>90</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>91</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).<sup>92</sup> As discussed above, Cicero believes that such dispossessions are likely to rend civil society asunder as a result of the resentments of the dispossessed. Beneficence, in contrast, is a virtue that we practice both for our own moral self-improvement and for the *strengthening* of our social bonds with fellow human beings. 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—the bonds of *societas* and *communitas*—are in this view a complex transactional economy of obligation and gratitude among individuals acting according to their nature, without any institutional mediation of the state. The tokens and 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

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<sup>90</sup>. *Id.*

<sup>91</sup>. *De Officiis* I.vii.20.

<sup>92</sup>. *De Officiis* I.vii.23.

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 ought not to 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>

It is against this background that Cicero invokes Ennius, and the reason is now clear. Sharing that which “costs us nothing to give”—directions along the way, a light from our fire, water from a stream, or our honest counsel—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 become 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

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<sup>93</sup>. *De Officiis* I.vii.22.

<sup>94</sup>. *De Officiis* I.xiv.44.

<sup>95</sup>. *De Officiis* I.xiv.43. *See also* SAMUEL FLEISCHACKER, A SHORT HISTORY OF DISTRIBUTIVE JUSTICE 21 (2004) (“Cicero himself makes clear, however, that ... justice *constrains* beneficence...and his point here is precisely to rule \*out\* any kind of beneficence that would violate property rights.”).



“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 *main 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, at bottom, *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 [Latin: *virtus*] 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 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

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<sup>96</sup>. *De Officiis* II.xv.52.

<sup>97</sup>. *De Officiis* II.xv.52.

<sup>98</sup>. *De Officiis* I.xvi.51 (emphasis added).

<sup>99</sup>. *De Officiis* II.v.17-18 (emphasis added). Cicero’s discussion makes clear he is referring here to all the virtues, not merely the virtue of beneficence.

<sup>100</sup>. MARIO PUZO, *THE GODFATHER*, at p.28 (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....”).

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 Book I, on morality. It offers one reason (though admittedly not the only one) 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> The moral economy of Cicero's beneficence is one that ultimately works to the advantage of the shrewd and calculating. This explains both the preference for donations of personal service and the invocation of Ennius: they reflect a "buy low, sell high" strategy. If one must be generous in order to obligate others to one's service, better to do so at the lowest possible cost.

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

In 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

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<sup>101</sup>. On the patron-client relationship in the late Republic, see P.A. BRUNT, *THE FALL OF THE ROMAN REPUBLIC AND RELATED ESSAYS*, at chs. 7-8 (1 edition ed. 1988); ALEXANDER YAKOBSON, *ELECTIONS AND ELECTIONEERING IN ROME: A STUDY IN THE POLITICAL SYSTEM OF THE LATE REPUBLIC*, at chs. 3-4 (1999).

<sup>102</sup>. *De Officiis*. III.XIII.57 ("Is it not inexpedient to subject oneself to all these terms of reproach and many more besides?"). Cicero also argues, circularly, that because a good man loves virtue, he would find it inexpedient to behave immorally. *Id.* III (passim).

<sup>103</sup>. *De Officiis* II.xix.65 ("[T]he kindnesses shown not by gifts of money but by personal service are bestowed sometimes upon the community at large, sometimes upon individual citizens. 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." (internal editorial marks omitted)).

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 the past have a first claim on our aid.<sup>106</sup> But most important in selection of a recipient of beneficence is that recipient's moral desert, or "worthiness." "[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>107</sup> This concern over merit and desert is a key feature of Cicero's judgment of the appropriate allocation of beneficence, and thus of material aid: "in 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>108</sup>

Calculating each person's "due" is a matter of merit and 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 version of beneficence. While he concedes that relieving the poor is a worthwhile service to the state, and<sup>109</sup> that "all else equal," it is better to give aid to those with greater need, rather than those from whom we might expect greater reward,<sup>110</sup> material

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<sup>104</sup>. *De Officiis* I.xiv.45.

<sup>105</sup>. *De Officiis* I.xvi.50-57; III.vi.28; *see generally* Nussbaum, *supra* note 39 (critically examining Cicero's cosmopolitanism with respect to material aid).. This feature of Cicero's beneficence has echoes in Richard Rorty's equation of justice with loyalty to a particular social group—a similarity which makes some sense in light of both philosophers' grounding of justice in the actual practices of social groups. *See generally* Richard Rorty, *Justice as a Larger Loyalty*, 4 *ETHICAL PERSPECTIVES* 139 (1997).

<sup>106</sup>. *De Officiis* I.xv.47-48.

<sup>107</sup>. *De Officiis* I.xv.46.

<sup>108</sup>. *De Officiis* I.xviii.59.

<sup>109</sup>. *De Officiis* II.xviii.63.

<sup>110</sup>. *De Officiis* I.xv.49.

need remains at best secondary to merit in allocating our 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>111</sup> But even here the transactional nature of his 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 of 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 what ever 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 a better investment [Latin: *collocari*] than kindness to the favourites of fortune.<sup>112</sup>

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#### 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 *institia*),

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<sup>111</sup>. *De Officiis* II.xviii.62 (emphasis added).

<sup>112</sup>. *De Officiis* II.xx.69-70.

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 as an investment (*collocari*) according to merit or desert in the recipient (the measure of *debitio*).

Importantly, need has no necessary bearing on Cicero's concept of merit, which is otherwise highly sensitive to social context. In the environment of late republican Rome, need played at best a minor role in determining the appropriate allocation of resources, and then only to the extent that such need can be translated into a debt to the savvy man of property by acts of generosity—it was in no wise a permissible basis for the state or its authorities to intercede on behalf of the needy at the expense of the comfortable.

Against Cicero's three principles, Ennius's *lumen* is a residuum, or a special case. The resources that are appropriately treated as common property—either freely available to all by nature or made freely available by their private owners—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.”

Jefferson's theory of ideas has been controversial among those who profess a natural-law justification for their knowledge-governance-policy choices. For example, some who work within the Lockean natural law tradition have argued that Jefferson affords insufficient

consideration to the natural moral claims of labor.<sup>113</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 intellectual property rights, or not to do so, “according to the will and convenience of the society, without claim or complaint from anybody.”<sup>114</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. This principle, and the tradition of distributive justice built upon it, is one that dominated the Western philosophy of property for two millennia. But it is one with which contemporary intellectual property scholars appear to be wholly unfamiliar.

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<sup>113</sup>. See generally Mossoff, *supra* note 16.

<sup>114</sup>. Letter from Jefferson to McPherson, *supra* note 6, in; LIPSCOMB, *supra* note 6, at 333–34.

## IV. From Modern to Classical: A Natural Law Theory of Distributive Justice

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>115</sup> This position is, in the view of modern scholars, “deeply problematic,”<sup>116</sup> even “pernicious,”<sup>117</sup> insofar as his defense of *status quo* distributions of material resources is “utterly unjustified”<sup>118</sup> and yet has become so central to the Western tradition.

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>119</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>120</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 there is any close relation between existing distributions and the property rights that justice would assign.”<sup>121</sup> This lacuna opens Cicero to the charge of hypocrisy and “partisan politicking,” particularly given his claimed allegiance to Stoic principles: “His Stoic forbears, as he well knows, thought all property should be held in common; he himself has staked his entire career

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<sup>115</sup>. Julia Annas, *Cicero on Stoic Moral Philosophy and Private Property*, in *PHILOSOPHIA TOGATA: ESSAYS ON PHILOSOPHY AND ROMAN SOCIETY* 151, 170 (Miriam T. Griffin & Jonathan Barnes eds., 1989).

<sup>116</sup>. CHRISTOPHER PIERSON, *JUST PROPERTY: A HISTORY IN THE LATIN WEST* 49 (2013).

<sup>117</sup>. Nussbaum, *supra* note 39, at 180.

<sup>118</sup>. *Id.* at 187.

<sup>119</sup>. *See generally* Nussbaum, *supra* note 39.

<sup>120</sup>. *Id.* at 202.

<sup>121</sup>. *Id.* at 182.

on an opposition to any redistributive takings. So it is no accident that he skates rather rapidly over the whole issue of how property rights come into being....”<sup>122</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 forbears notwithstanding—is hardly surprising in historical context. Nussbaum is working within what I have referred to as the Modern Tradition of distributive justice (indeed, she is a primary exponent of that tradition), under which access to resources can be a matter of individuals’ rights-based claims, and resource inequalities among human beings accordingly require some justification. But as applied to Cicero, these propositions are both anachronisms. 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 and judicial institutions have a duty to respect and enforce.<sup>123</sup> And in the second instance, the idea that material inequality requires justification is itself of recent vintage. It is a byproduct of the intellectual and political upheavals of the Enlightenment and the Age of Revolution in the 17<sup>th</sup> and 18<sup>th</sup> Centuries—episodes in which Jefferson played a not insignificant part. The ideas and events of this era situated a deeply radical and still-unfulfilled principle at the heart of Western political and moral philosophy: the proposition that “all men are created equal.”<sup>124</sup> Today we may chafe at the gender exclusion encoded into Jefferson’s declaration of equality, and either deride it as not going far enough 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 of natural law up

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<sup>122</sup>. *Id.* at 202.

<sup>123</sup>. See *supra* note \_\_\_ and accompanying text; see also TUCK, *supra* note 86, at 5–13; cf. G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1, 5–6 (1958) (arguing that a duty-based conception of ethics would have been foreign to the ancients and is most likely derived from the legalism of Judeo-Christian morality centered on a divine lawgiver).

<sup>124</sup>. Declaration of Independence (1776).



to the Enlightenment. To them, the most fundamental concern of distributive justice was to *identify inequalities* among human beings and to shape one's behavior accordingly. Understanding the implications of a normative commitment to human equality for conceptions of distributive justice is therefore key to unpacking the distinctions between the Classical Tradition and the Modern Tradition, and thereby tracing the natural-law argument of Jefferson's Taper.

### E. 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>125</sup> which is itself the culmination of two and a half centuries of philosophers working through the implications of a normative commitment to the 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 18<sup>th</sup> Century. Samuel Fleischacker, in his brief but powerful history of the philosophical concept of distributive justice,<sup>126</sup> traces its stirrings in the philosophical programs of 18<sup>th</sup>-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>127</sup> The history of western political movements and political philosophy since the Age of Revolutions is in no small part a history

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<sup>125</sup>. The canonical articulation of the domain of social justice in the modern sense comes from John 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.” JOHN RAWLS, *A THEORY OF JUSTICE* 4 (Rev. ed ed. 1999).

<sup>126</sup>. FLEISCHACKER, *supra* note 95.

<sup>127</sup>. *See generally id.* ch. 2.

of factional warfare over the principle of equality and its implications: a “politicization of poverty” in which a diverse array of advocates for the poor pressed states to recognize a justice-based claim of their poorer citizens to resources (with the example of the French Revolution as an implied threat), and reactionaries (such as Malthus, Burke, Spencer, and Nozick) argued that such a claim would be immoral, impracticable, or counterproductive.<sup>128</sup> By the late 20<sup>th</sup> Century, the various threads of political and moral philosophy built on the fundamental commitment to equality had become mutually reinforcing and ripe for synthesis as a fully-fleshed-out theory of distributive justice. Fleischacker outlines the key tenets of this theory—what I refer to here as the Modern Tradition:

1. Each individual, and not just societies or the human species as a whole, has a good that deserves respect, and individuals are due certain rights and protections in their pursuit of that good;
2. Some share of material goods is part of every individual’s due, part of the rights and protections that everyone deserves;
3. The fact that every individual deserves this can be justified rationally, in purely secular terms;
4. The distribution of this share of goods is practicable: attempting consciously to achieve it is neither a fool’s project nor, like the attempt to enforce friendship, something that would undermine the very goal one seeks to achieve; and
5. The state, and not merely private individuals or organizations, ought to be guaranteeing the distribution.<sup>129</sup>

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<sup>128</sup>. *See generally id.* ch. 3.

<sup>129</sup>. *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 work of Amartya Sen and Martha Nussbaum on human capabilities.<sup>130</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), Deontology (Rawls), and Virtue Ethics (Nussbaum).<sup>131</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." 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>132</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>133</sup> It Martha Nussbaum who has most fully developed the capabilities approach into a program of social justice enforceable by law.<sup>134</sup> And all these modern theorists of economic or social justice have in common that their approach is grounded in the idea that the commitment to equality has normative force.

The Modern Tradition of distributive justice finds expression in IP policy and theory in the form of a commitment to "access to knowledge." Intangible goods that are subject to IP

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<sup>130</sup>. See generally RAWLS, *supra* note 28; AMARTYA KUMAR SEN, THE IDEA OF JUSTICE (2009); MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH (Reprint edition ed. 2013).

<sup>131</sup>. See generally Amartya Sen, *Capability and Well-Being*, in THE QUALITY OF LIFE (Martha C. Nussbaum & Amartya Sen eds., 1993); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (2001); Martha Nussbaum, *Nature, Function, and Capability: Aristotle on Political Distribution*, OXFORD STUDIES IN ANCIENT PHILOSOPHY: SUPPLEMENTARY VOLUME (1988). Interestingly, Nussbaum's reliance on Aristotle invokes his perfectionism regarding the good human life, rather than the (comparatively thinner) account of justice—particularly distributive justice—that is examined below.

<sup>132</sup>. See generally Amartya Sen, *Equality of What?*, in 1 THE TANNER LECTURES ON HUMAN VALUES 198 (1980); Sen, *supra* note 131.

<sup>133</sup>. See generally SEN, *supra* note 130.

<sup>134</sup>. See generally, e.g., NUSSBAUM, *supra* note 130 (especially chapter 4); Nussbaum, *supra* note 131.

claims—such as educational materials, medical and communications technologies, and cultural products—are often central to a life well-lived, and are thus things that all human beings, in this view, 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 they limit the ability of the poor and otherwise disadvantaged to access IP-covered goods that can ameliorate their condition, or even to exploit their own knowledge for the benefit of themselves and their societies.<sup>135</sup> And these critiques have led to some qualifications and limitations of IP rights in distinct areas—as with the Doha Declaration concerning compulsory licensing and parallel importation of pharmaceuticals as a limit on patent rights, or the Marrakesh Treaty expanding access to copyrighted works for the visually impaired.<sup>136</sup> More recently, it has spurred renewed academic interest in alternatives to intellectual property rights—such as prizes and<sup>137</sup> direct government investment in knowledge production—that might generate as much new knowledge as the intellectual property system without the price-rationing that generates inequalities of access under that system.

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

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<sup>135</sup>. See generally, e.g., Amy Kapczynski, *Access to Knowledge: A Conceptual Genealogy*, in ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY 17 (Amy Kapczynski & Gaëlle Krikorian eds., 2010); Margaret Chon, *Intellectual Property from Below: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803 (2007).

<sup>136</sup>. Doha Declaration on the TRIPS Agreement and Public Health (2001), available at [https://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm). Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (2013), available at <https://wipolex.wipo.int/en/treaties/textdetails/13169>.

<sup>137</sup>. See generally, e.g., Daniel J. Hemel & Lisa Larrimore Ouellette, *Beyond the Patents-Prizes Debate*, 92 TEX. L. REV. 303 (2013); Lisa Larrimore Ouellette & Daniel J. Hemel, *Innovation Policy Pluralism*, 128 YALE L.J. (2018).

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. In contrast, viewed from the standards of his own day and indeed many centuries thereafter, Cicero's position is fully consistent with the normative commitments of a much older philosophical tradition. That tradition—The Classical Tradition—saw *inequality* among persons as *natural* and potentially even *useful*.

For most of the history of Western thought, most political theorists assumed the existence of a natural social order—wherein poverty and inequality of material resources were accepted as inescapable, if perhaps unfortunate, features of human life.<sup>138</sup> In the 17<sup>th</sup> and 18<sup>th</sup> Centuries, thinkers like Thomas Hobbes, John Locke, Jean-Jacques Rousseau, David Hume, Adam Smith, and Immanuel Kant destabilized this traditional conception simply by attempting to rationalize it. Their self-described “Enlightenment” 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>139</sup> This pivotal period includes the American and French Revolutions, as well as Jefferson's lifetime.

Fleischacker persuasively contends that this period of intellectual and social revolution ultimately *changed the meaning* of distributive justice, and with it the West's philosophical architecture of private property. Material well-being, rather than being a matter of luck, merit,

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<sup>138</sup>. FLEISCHACKER, *supra* note 95.

<sup>139</sup>. See generally GREGORY CLARK, A FAREWELL TO ALMS: A BRIEF ECONOMIC HISTORY OF THE WORLD (2009). It is thus that Hume could write in his *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 necessities, and even most of the comforts of life,” concluding that material inequality is justified only because the alternative is impracticable. David Hume, *Enquiry Concerning the Principles of Morals*, in ENQUIRIES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 167, 155–56 (L. A. Selby-Bigge ed., 2d ed. 1777).

or divine providence, became something that human beings could conceivably demand of their societies as a matter of justice—something governments might have a moral *obligation* to provide to their citizens, even at the expense of other citizens. This is the conception of distributive justice that most of us, today, associate with the term. But to unpack the import of Jefferson's reliance on Cicero, we must remember that the Parable of the Taper was conceived prior to the full development of this Modern Tradition. Rather than try to shoehorn Jefferson's Taper into our own modern conceptions of distributive justice, we would do well to instead try to understand it as a late expression of the Classical Tradition.

## F. The Classical Tradition

For the Classical Tradition, distributive justice was a matter of private virtue and beneficence—it implied no claims to redistribution of resources that others were strictly *obligated* to respect, and the only duty it imposed on the state was to stay out of the way.<sup>140</sup> The Classical Tradition's commitments regarding distribution of material resources include:

- A default acceptance of the *status quo* allocation of resources;
- 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;
- 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

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<sup>140</sup>. FLEISCHACKER, *supra* note 95, at 27 (“Not a single jurisprudential thinker before [Adam] Smith—not Aristotle, not Aquinas, not Grotius, not Pufendorf, not Hutcheson, not William Blackstone or David Hume—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.”).

- 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 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 natural resources and cultivating social relationships (particularly by reciprocating the kindnesses or injuries visited upon them by one another). The Classical Tradition's conception of justice 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.<sup>141</sup>

Distributive justice, in the Classical Tradition, consists in giving to each his due. That which is due to each individual depends fundamentally on that individual's merit, but merit is socially contingent: it may be measured by different standards in different societies. Moreover, because the assessment of merit is a practical exercise based on rich and varied circumstances, distribution is properly the province of individual virtue in the Aristotelian sense—subject to the soft pressure of context-sensitive norms and the judgment of the moral agent according to a properly cultivated disposition—rather than justice—subject to the strict and, as necessary, external compulsion of the law. Alternatively, it is the domain of what a Kantian

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<sup>141</sup>. See Brian Bix, *Natural Law Theory*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 211, 212 (Dennis Patterson ed., 2010) (“Within Cicero’s work, and the related remarks of earlier Greek and Roman writers, there was often a certain ambiguity regarding the reference of ‘natural’ in ‘natural law’: it was not always clear whether the standards were ‘natural’ because they derived from ‘human nature’ [our ‘essence’ or ‘purpose’ ], because they were accessible by our natural faculties [that is, by human reason or conscience], because they derived from or were expressed in nature, that is, in the physical world about us, or some combination of all three.”).

would call wide and imperfect duties of Virtue, rather than narrow and perfect duties of Right.<sup>142</sup> Indeed, the Classical Tradition is deeply distrustful of state involvement in questions of distribution, both because of anxiety that the earth's bounty is fundamentally insufficient to satisfy the needs of all humanity, and because of fear that resentment and recrimination over state-enforced distribution will lead to civil dissolution. In short, the Classical Tradition is well-represented in *De Officiis*, but that work is only one link in a philosophical chain stretching over two millennia, from Aristotle's naturalism through Roman stoicism, past medieval Scholasticism to Protestant natural law theory. And Jefferson, by invoking Cicero's illustration of this tradition in action, situated what we now call intellectual property within this interlocking set of normative commitments regarding the distribution of goods 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 intellectual property theory.

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### 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

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<sup>142</sup>. IMMANUEL KANT, *THE METAPHYSICS OF MORALS*, at <i>240, </i>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).



(for in these it is possible for one man to have a share either unequal or equal to that of another).”<sup>143</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>144</sup>

Aristotle’s definition and criteria of distributive justice are “formal rather than ... substantial”:<sup>145</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>146</sup> Thus, commutative justice concerns the things that are due to a victim from one who has injured him; distributive justice concerns the things that are due to men (always men, in the Classical Tradition) according to their merit.

We can see in Cicero’s distinction between justice and beneficence a mirror of Aristotle’s distinction between commutative and distributive justice. Just as Aristotle’s commutative justice is concerned with restoring a baseline upset by an act of injury,<sup>147</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.

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<sup>143</sup>. Aristotle, *Nicomachean Ethics* 1130b. English translations of Aristotle are from **The Complete Works of Aristotle: The Revised Oxford Translation** (Jonathan Barnes, ed. 1984), unless otherwise noted.

<sup>144</sup>. *Id.* 1131a24-28.

<sup>145</sup>. FLEISCHACKER, *supra* note 95, at 19.

<sup>146</sup>. *Id.* at 20.

<sup>147</sup>. Aristotle, *Nicomachean Ethics* 1131b-1132b.

The two thinkers' theories of property and their attitudes toward material inequality are similar as well. Cicero's view of the nature of beneficence is foreshadowed centuries earlier in Aristotle. Even the Greek aphorism with which Cicero sets the stage for Ennius—"amongst friends all things in common"—is quoted by Aristotle in the *Politics*.<sup>148</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>149</sup> But on this question of distribution Cicero was following Aristotle, who favors a system of private property under which owners are voluntarily generous towards their fellow citizens, 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; and the special business of the legislator is to create in men this benevolent disposition."<sup>150</sup> Aristotle's reasons for this position are twofold, and both mirror Cicero's pragmatic conservatism, rather than any notion of natural right.

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>151</sup> This practical argument is consistent with the abstract 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

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<sup>148</sup>. Aristotle, *Politics* 1263a.

<sup>149</sup>. For a brief summary of the literature on the Greek Stoics' complex and evolving views on property, See PIERSON, *supra* note 116, at 40–44.

<sup>150</sup>. Aristotle, *Politics* 1263a.

<sup>151</sup>. *Id.*

the discontentment of the presently 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 consumption), and crafts distributive principles around—indeed, in proportion to—that inequality. The natural inequality of human beings is a deep assumption of Aristotle's philosophy and of the Western intellectual tradition generally for thousands of years. In Aristotle's moral and political framework, human beings are naturally unequal,<sup>152</sup> and it is both unjust and inexpedient to treat unequal things as if they were equal.<sup>153</sup> 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>154</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 a source of individualized good. Specifically, Aristotle argues

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<sup>152</sup>. Aristotle thought people were naturally diverse and unequal both with respect to virtue generally and with respect to their ability to contribute to particular social purposes, though he allowed that those deficient in virtue generally could improve themselves to some extent. See **Aristotle, *Politics*** 1252a-b (distinguishing among men and women, rulers and slaves, Hellenes and barbarians according to the way "nature...makes each thing...for one and not for many uses"); *id.* at 1252b-1253a ("For what each thing is when fully developed, we call its nature, whether we are speaking of a man, a horse, or a family."); *id.* at 1254a ("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.* at 1331b-1332a ("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; for a good life requires a supply of external goods, in a less degree when men are in a good state, in a greater degree when they are in a lower state.")

<sup>153</sup>. **Aristotle, *Nicomachean Ethics*** 1131a ("And the same equality will exist between the persons and between the things concerned; for as the latter—the things concerned—are related, so are the former; if they are not equal, they will not have what is equal, 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 ("For example, justice is thought by [all men] to be, and is, equality—not, however, for all, but only for equals. And inequality is thought to be, and is, justice; neither is this for all, but only for unequals."); *id.* at 1332b ("Equality consists in the same treatment of similar persons, and no government can stand which is not founded upon justice.")

<sup>154</sup>. Stefan Gosepath, *Equality*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* § 2.3 (Edward N. Zalta ed., Spring 2011 ed. 2011).

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>155</sup> The Aristotelean virtue of “liberality” [Greek: ἐλευθεριότης]<sup>156</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>157</sup> Call this the *Virtue Argument* for material inequality. The Virtue Argument, to Aristotle, is the import of the aphorism “among friends all things in

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<sup>155</sup>. *Id.* at 1263b.

<sup>156</sup>. The translation of this term is complicated, and it has somewhat different connotations than the “good-doing” implied by *beneficentia*.

Generosity (“liberality,” “open-handedness”) is the standard or typical virtue governing the use of possessions. Aristotle seems to regard it as the virtue by which someone expresses his view as to the point or purpose of having possessions at all.... The relevant Greek term is *eleutheriotēs*, which means literally “being in a free condition,” that is, in the condition characteristic of a free citizen, as opposed to a slave. This contrast is the clue to Aristotle’s governing insight. *Eleutheriotēs* is the virtue by which someone is not, as we would say, “bound” or “tied down” by concerns about his possessions; it is meant to be a posture by which someone “rises above” his possessions, and, with a certain lack of concern, puts them to good use, in order to achieve admirable goals. It protects a person from being “driven” by his possessions or beholden to them.... To translate this as “generosity” is not entirely apt, because “generosity” carries the suggestion, perhaps, of “giving more than what would be expected,” which is not essential to the virtue; “open-handedness,” on the other hand, suggests indiscriminate giving; and although “liberality” gets at the correct fundamental notion, it is now an old-fashioned word. So “generosity” seems the least objectionable choice.

MICHAEL PAKALUK, ARISTOTLE’S NICOMACHEAN ETHICS: AN INTRODUCTION 173 (2005).

<sup>157</sup>. *Id.* For more on Aristotle’s theory of property, see generally Robert Mayhew, *Aristotle on Property*, 46 THE REVIEW OF METAPHYSICS 803 (1993).

common”: things are “in common” among friends not because either civil or natural law makes them so, but because virtuous friendship entails liberality.<sup>158</sup>

Thus, for Aristotle as for Cicero, defending rights of property despite its unequal distribution has the salutary effect of giving those with 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 one’s 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 time.... Nor will he neglect his own property, since he wishes by means of this to help others.”<sup>159</sup>

Finally, Aristotle’s vision of justice introduces 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. As Aristotle famously put it in the *Rhetoric*:

It will now be well to make a complete classification of just and unjust actions. We may begin by observing that they have been defined relatively to two kinds of law... particular law [νόμος ἰδιος] 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>160</sup>

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<sup>158</sup>. See Aristotle, *Politics* 1263a.

<sup>159</sup>. Aristotle, *Nicomachean Ethics* 1120a-b.

<sup>160</sup>. Aristotle, *Rhetoric* 1373b. For a fuller discussion of this distinction in the natural law tradition, and its interactions with more modern jurisprudential distinctions, see generally J. Finnis, *Natural Law Theory: Its Past and Its Present*, 57 AM. J. JURIS. 81 (2012); John Finnis, *The Truth in Legal Positivism*, in IV PHILOSOPHY OF LAW: COLLECTED ESSAYS 174 (1996).

And similarly in the *Nicomachean Ethics*:

Of political justice part is natural, part legal,—natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent, e.g. that a prisoner's ransom shall be a mina, or that a goat and not two sheep shall be sacrificed, and again all the laws that are passed for particular cases.... Now some think that all justice is of this sort, because that which is by nature is unchangeable and has everywhere the same force (as fire burns both here and in Persia), while they see change in the things recognized as just. This, however, is not true in this unqualified way, but is true in a sense; or rather, with the gods it is perhaps not true at all, while with us there is something that is just even by nature, yet all of it is changeable; but still some is by nature, some not by nature.<sup>161</sup>

Aristotle never tells us explicitly whether his preferred principles of distributive justice ought to be associated with natural/universal law or particular/positive 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 the West 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*].”<sup>162</sup> In the medieval period “*ius suum*” became particularly associated with the ownership of property, through the debates of the Catholic Church's Scholastic philosophers. The foremost among these, Thomas Aquinas, imported the Classical Tradition into Christian theology and irrevocably blended the two.

<sup>161</sup>. Aristotle, *Nicomachean Ethics* 1134b-1135a.

<sup>162</sup>. J. Inst. 1.1 (“Iustitia est constans et perpetua voluntas ius suum cuique tribuens.”).

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## 2. The Thomist Synthesis: Virtue and Grace

Aquinas enters into his consideration of justice by citing—what else?—Cicero's *De Officiis*.<sup>163</sup> But he ends up distinguishing himself from Cicero and resting instead on the authority of Aristotle: he accepts the division of justice into the commutative and the distributive,<sup>164</sup> and like Aristotle he adopts a procedural definition of the latter.<sup>165</sup> Aquinas also defends the institution of private property: like Cicero he considers it a matter of civil—rather than natural—law.<sup>166</sup> Aquinas's great innovation, which took root in Western Christendom thereafter, was to tie the classical 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. One 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>167</sup>

Thus, in Aquinas' thought the poor are not *entitled* to material resources as a matter of justice (though they may be entitled to access or consume certain resources in cases of mortal necessity),<sup>168</sup> but the well-to-do Christian *ought* to give of their surplus to those less fortunate,

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<sup>163</sup>. Thomas Aquinas, *Summa Theologiae* II-2 Q61 A1.

<sup>164</sup>. *Id.*

<sup>165</sup>. *Id.* II-2 Q61 A2. (“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.”).

<sup>166</sup>. *Id.* II-2 Q66 A2 RO1.

<sup>167</sup>. *Id.* II-2 Q63 A1.

<sup>168</sup>. *Id.* II-2 Q66 A7.

in imitation of Christ, as a matter of Christian love or charity [*caritas*] and liberality [*liberalitas*], rather than out of obligation.

Aquinas' association of liberality with grace rather than merit might have signaled a rejection of the Classical Tradition of distributive justice. 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. But 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 property-rights concept of *dominium*<sup>169</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. His attitude toward material charity strained to “balance[] moral universalism with respect for the natural priority of special friendships.”<sup>170</sup> The result is that Aquinas's liberality, while explicitly associated with divine grace, looks in practice remarkably like Ciceronian beneficence, with all its discriminating concern over a donee's desert of a donor's aid.

The relationship between liberality [*liberalitas*], beneficence [*beneficentia*], and charity [*caritas*] in Aquinas' thought is complicated,<sup>171</sup> but they are clearly deeply related to one another, and to his view of property. For example, gifts of material resources—alms—are a form of

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<sup>169</sup>. See TUCK, *supra* note 86, ch. 1.

<sup>170</sup>. Stephen J. Pope, *Aquinas on Almsgiving, Justice and Charity: An Interpretation and Reassessment*, 32 THE HEYTHROP JOURNAL 167, 187 (1991).

<sup>171</sup>. It appears that Aquinas views beneficence as a category of acts which can partake in both the lesser virtue of liberality and the highest virtue of charity. Liberality as a virtue has to do with the effect of a gift on the donor's attitudes toward wealth, while charity as a virtue has to do with the love of human beings for one another, as a reflection of the love of God for human beings. *Id.* II-2 Q31 A1. But in associating acts of liberality with acts of divine grace, Aquinas cannot be understood to mean that the nature of grace lies in God's attitude toward the content of particular acts of grace (as would be the analogue for liberality), as opposed to God's attitude toward human beings (as would be the analogue for charity). So it seems appropriate to associate acts of material aid with charity as well as with liberality, and to view Aquinas' comments on beneficence as applicable to both virtues. See generally Pope, *supra* note 170.



beneficence that can partake of both the virtue of liberality and the virtue of charity.<sup>172</sup> But like Cicero, Aquinas argued that beneficent material aid should be offered preferentially to those socially closest to us,<sup>173</sup> and should also be subject to discrimination on grounds of meritorious considerations of “holiness and utility,”<sup>174</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>175</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) 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, or out of resources the would-be donor requires to maintain his current standard of living.<sup>176</sup> Still, at the end of the day, charity (understood as the virtue of Christian love) held pride of place in the Thomist hierarchy of virtues<sup>177</sup>, and it was closely associated with voluntary acts of material beneficence. Aquinas’s valorization of charity and his tolerance of private property thus gave a new theological dimension to 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 Cicero, he accepted the Instrumentalist Argument for material inequality enforced via property rights: “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

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<sup>172</sup>. Thomas Aquinas, *Summa Theologiae* II-2 Q31 A1; Q32 A1.

<sup>173</sup>. *Id.* II-2 Q31 A3.

<sup>174</sup>. *Id.* II-2 Q32 A9.

<sup>175</sup>. *Id.* II-2 Q31 A3.

<sup>176</sup>. *Id.* II-2 Q32 A6-7.

<sup>177</sup>. *Id.* I Q66 A6; *cf.* I Corinthians 13:13 (Vulgate trans.) (“Nunc autem manent fides, spes, caritas, tria hæc: major autem horum est caritas.”).

more frequently where there is no division of the things possessed.”<sup>178</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>179</sup> With Aquinas’ authority behind it, material inequality could be seen as not only natural, nor even merely useful, but a manifestation of divine will.

There is, to be sure, an anti-property, pro-communism counter-current in Christian thought. This dissenting strain stems from the Gospel of Matthew;<sup>180</sup> within the Latin Church it stretches back to Ambrose of Milan and forward to Thomas More,<sup>181</sup> and it motivated the Franciscan model of poverty against which Aquinas had argued. But the Classical Tradition, with the theological authority of Aquinas and the worldly concerns of the Papacy behind it, was the intellectual mainstream of Western Christendom for centuries. 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>182</sup> Unequal division of the material things of the world could, in this view, be seen as 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.

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<sup>178</sup>. Thomas Aquinas, *Summa Theologiae* II-2 Q66 A2.

<sup>179</sup>. Pope, *supra* note 170, 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” (Thomas Aquinas, *Summa Theologiae* I Q96 A1), 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 conducted to the benefit of others... [w]herefore Augustine says ... ‘The natural order of things requires this; and thus did God make man.’” (*Id.* I Q96 A4 (internal citations omitted)). Finally, he extends this argument about natural 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.* II-2 Q66 A2 RO2).

<sup>180</sup>. **Matthew** 19:23-24 (“Then Jesus said to his disciples, ‘Truly I tell you, it will be hard for a rich person to enter the kingdom of heaven. 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.’”).

<sup>181</sup>. PIERSON, *supra* note 116, at 66–71, 129–35.

<sup>182</sup>. MICHEL MOLLAT, *THE POOR IN THE MIDDLE AGES: AN ESSAY IN SOCIAL HISTORY* 183 (1986).

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.

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### 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. Cicero's defense of *status quo* distributions was admittedly unjustified by abstract reason, and Aristotle's principle of proportionality in distribution was by its own terms socially contingent. The Thomist synthesis accommodated these lacunae rather than attempting to fill them, and certainly without using available tools from the Christian tradition to argue against them. But later thinkers would attempt to fill the justificatory gap within the Classical Tradition 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.

In Grotius's work, the Classical Tradition's tolerance of material inequality—and Aquinas' theological cast on it—managed to survive the great crises of Western Christendom: the Protestant Reformation and the ensuing wars of religion in Europe. Grotius' highly influential account of property created a natural-law defense of material inequality that persisted to the eve of the Enlightenment, and he was self-consciously in debt to Cicero's notions of justice.<sup>183</sup>

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<sup>183</sup>. As one commentator on Grotius's natural law theory of property describes it, "[P]roperty is the first and most essential element of justice; justice is the pillar on which society rests; and society, in its turn, is necessitated by the essential features of human nature." STEPHEN BUCKLE, *NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME* 2–3 (1993).

Grotius' method, which builds on Cicero's assertion in *De Officiis* regarding the origin of cities, also accounts for the way much of Western philosophy has come to think of the justification of *status quo* material inequality since: as a *historical* question of how private property "arose" from a supposedly natural (*i.e.*, pre-political) communism. Grotius' innovation was to place this epochal change in resource allocation *prior to* the formation of civil authority—a move mimicked decades later, with more lasting effect on Anglo-American property theory, by John Locke.

Though he broke from Aristotle's political philosophy in important ways that foreshadowed the pivot to the Modern Tradition,<sup>184</sup> Grotius accepted the Aristotelian premise that people are naturally unequal, and that it is accordingly appropriate and just to treat them unequally.<sup>185</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>186</sup>) with proportional distribution according to merit.<sup>187</sup> He accepts the Instrumentalist Argument for maintaining *status quo* distributions, identifying the argument with the natural law.<sup>188</sup> And he associates the

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<sup>184</sup>. See TUCK, *supra* note 86, 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*. Of course, one could respond to the claim in at least two ways, both of which find expression in 20th Century moral philosophy. One response is to 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. The other would be to argue that Grotius' view of "justice" is too legalistic for a plausible ethics; this is essentially the argument made by Elizabeth Anscombe which sparked the revival of virtue ethics. See *supra* note \_\_\_\_.

<sup>185</sup>. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE*, at I.i.iii.2, pp. 136–37 (Richard Tuck ed., 2005) ("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.").

<sup>186</sup>. *Id.* at I.i.viii.1, 144.

<sup>187</sup>. *Id.* at I.i.viii.1–2, pp. 142–47 & nn.5, 11. 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.* There are some who argue that Grotius here prefigures Kant's famous distinction between the "perfect" duties of justice and the "imperfect" duties of ethics. See, *e.g.*, JEROME B. SCHNEEWIND, *THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY* 78–80 (1998).

<sup>188</sup>. GROTIUS, *supra* note 185, at I.i.x.4, 154 ("Natural Law does not only respect such Things as depend not upon Human Will, but also many Things which are consequent to some Act of that Will. Thus, 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." [footnote omitted]).

natural law (as did his predecessors in the Classical Tradition) with “Right Reason” and the divine Will as revealed in the nature of creation.<sup>189</sup> But this conception 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 his *Mare Liberum* on the dispute between Portugal and his Dutch patrons over trade routes to the 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>190</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 legal authority.<sup>191</sup> 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 *Teleological Argument*. Importantly, the Teleological Argument, unlike

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<sup>189</sup>. Compare *id.* at I.i.x.1, pp. 150–51 (“**Natural Right** is the Rule and Dictate of Right Reason, shewing the Moral Deformity or Moral Necessity there is in any Act, according to its Suitableness or Unsuitableness to a reasonable Nature, and consequently, that such an Act is either forbid or commanded by GOD, the Author of Nature.” [footnotes omitted]). with **Aristotle, Politics** 1287a (“The law is reason unaffected by desire.”); **Cicero, De Legibus** I.vii.23 (“Therefore, since there is nothing better than reason, and since it exists both in man and God, the first common possession of man and God is reason. But those who have reason in common must also have right reason in common. And since right reason is Law, we must believe that men have Law also in common with the gods.”); *id.* I.xii.33 (“For those creatures who have received the gift of reason from Nature have also received right reason, and therefore they have also received the gift of Law, which is right reason applied to command and prohibition.”); **Thomas Aquinas, Summa Theologiae** Q91 A2 (“[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.”).

<sup>190</sup>. See *supra* note \_\_\_ and accompanying text.

<sup>191</sup>. It should be remembered that Grotius was not a disinterested philosopher; he was an advocate. His writings have been characterized as “an apology for the United Dutch East India Company,” with “no intention of producing an objective historical account,” but rather to advance, “in lawyerlike fashion,” the interests of his patrons “in order to win his case in the court of public opinion.” KNUD GROTIUS, HUGO, COMMENTARY ON THE LAW OF PRIZE AND BOOTY, at xiv–xv (Martine Julia van Ittersum ed., Gwladys L. Williams trans., 1603). This characterization refers in particular to Grotius’ *De Iure Praedae Commentarius* (*Commentary on the Law of Prize and Booty*). A chapter of *De Iure Praedae* was published as *Mare Liberum*, and the ambition of the former work—to compose “an in-depth study of the ‘universal law of war’”—was ultimately fulfilled in *De Iure Belli ac Pacis*, but *De Iure Praedae* was not itself published until the late 19th Century. See *id.* at xvii–xxi.

the other three identified, suggests *limits* on inequalities of resources that can be justified as a matter of natural law.

The absence of an agreed 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>192</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>193</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>194</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 right, such that interference by another sovereign with such rights would constitute a just cause of war.<sup>195</sup>

Grotius’ famous and innovative solution to this problem, detailed in the second chapter of Book 2 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 from Aquinas’ answer to the Franciscans—between a mere right to use a resource and

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<sup>192</sup>. GROTIUS, *supra* note 185, at II.i.4, 393.

<sup>193</sup>. *Id.* at II.i.xi, 408.

<sup>194</sup>. *Id.* at II.i.xvi, 416.

<sup>195</sup>. *Id.* at II.ii.i, 420 (“It follows now, that in treating of those Causes that justify a War, we speak of Injuries already done; and first of those that regard what is properly *ours*.”). Natural law scholar Richard Tuck has traced the association of property with the notion of rights that distinguishes the medieval natural law tradition from pre-Christian Roman law; it is this tradition on which Grotius is building. *See generally* TUCK, *supra* note 86, ch. 1.

the full rights of ownership.<sup>196</sup> People who had not yet entered into civil society might rightfully put some material resources to use, 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 natural right of self-preservation:

[E]ven tho' what we call Property had never been introduced[, ....] our Lives, Limbs, and Liberties, had still been properly our own, and could not have been, (without manifest Injustice) invaded. So also, to have made use of Things that were then in common, and to have consumed them, as far as Nature required, had been the Right of the first Possessor: And if any one had attempted to hinder him from so doing, he had been guilty of a real Injury.<sup>197</sup>

Thus, before Property was introduced, every Man had naturally a full Power to use whatever came in his Way. And before Civil Laws were made, every one was at Liberty to right himself by Force.<sup>198</sup>

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<sup>196</sup>. **Just. Inst.** Bk. II (distinguishing between *usufructus*, *usus*, and *dominium*); TUCK, *supra* note 86, ch. 1 (charting the development of these distinctions in medieval legal and theological debates, including the debate over Franciscan apostolic poverty). The distinction traces back to antiquity; Seneca himself distinguishes between types of ownership—including a distinction between the ownership of a literary work by its author and the ownership of a copy of that work by its possessor. **Seneca, De Beneficiis** VII.6 (“In all these cases that I have just cited there are two owners of one and the same thing. How is it possible? Because one is the owner of the thing, the other of the use of the thing. We say that certain books are Cicero’s; Dorus, the bookseller, calls these same books his own, and both statements are true. The one claims them, because he wrote them, the other because he bought them; and it is correct to say that they belong to both, for they do belong to both, but not in the same way. So it is possible for Titus Livius to receive his own books as a present, or to buy them from Dorus.”).

<sup>197</sup>. GROTIUS, *supra* note 185, at I.ii.i.3, 184 (citing *De Officiis*) (footnotes omitted). This line of argument traces back to the answer of Pope John XXII 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. Thus there must be some natural right to exclude others from such resources, if only by consuming them. **John XXII, Quia Vir Reprobus** §3 (R.J. Kilcullen & J.R. Scott, trans.) available at [https://www.mq.edu.au/about\\_us/faculties\\_and\\_departments/faculty\\_of\\_arts/mhpir/staff/staff-politics\\_and\\_international\\_relations/john\\_kilcullen/john\\_xxii\\_quia\\_vir\\_reprobis/](https://www.mq.edu.au/about_us/faculties_and_departments/faculty_of_arts/mhpir/staff/staff-politics_and_international_relations/john_kilcullen/john_xxii_quia_vir_reprobis/) (“But it is certain that in things consumable by use, as long as their substance is preserved and remains whole, no utility can come—for example, bread and wine, from which no fruit or utility can be gathered or had while the substance of the thing is preserved. It clearly follows, therefore, that in things consumable by use a right of using separate from ownership or lordship of the thing cannot be established or had.”)

<sup>198</sup>. *Id.* at I.i.x.7, pp. 156–57 (footnotes omitted).

Cicero had illustrated this 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 it would be improper to try to take away from any particular person occupying them at the moment<sup>199</sup>—and Grotius cited 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 they are currently in use. That greater right—analogue to the civil-law concept of *dominium* which occupied Aquinas, and identified by Grotius 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. A gloss on Cicero's 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, and in this state “every Man converted what he would to his own Use, and consumed whatever was to be consumed; and such a Use of the Right common to all Men did at that Time supply the Place of Property.”<sup>202</sup> (So far we have the same distinction between ownership and use—*dominium* and usufruct—that would have been familiar to Aquinas, or for that matter to civil lawyers going back to Justinian's day.) But as the human population, its artifice, and its

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<sup>199</sup>. Cicero, *De Finibus*, III.xx.67-68 (“[J]ust as, though the theatre is a commons, yet it is right to say that the particular seat a man has occupied [Latin: *occupo*] belongs to him, so in a city [Latin: *urbs*] or in the world, though these are common to all, it is not contrary to law for each person to have things of his own.” (my translation; others translate the latter phrase as “private property”)) This particular example is placed by Cicero in the mouth of his interlocutor, Cato the Younger, and cites the Greek Stoic philosopher Chrysippus as its source. *See id.*; *see also* Annas, *supra* note 115, at 167.

<sup>200</sup>. GROTIUS, *supra* note 46, at 31, 35.

<sup>201</sup>. *See supra* note \_\_\_ and accompanying text.

<sup>202</sup>. GROTIUS, *supra* note 185, at II.ii.ii.1, pp. 420–21 (footnote omitted).



appetites grew (Grotius imagines), the pressures of scarcity made the natural commons untenable, leading to the *consensual* division of the world into property at some time in the unrecoverably distant past—a division Cicero himself is imagined to approve as natural and just:

... [T]he Number of Men, as well as of Cattle, being very much increased, it was thought proper at last to assign a Portion of Lands to each Family; whereas before they were only divided by Nations...

From hence we learn, upon what Account Men departed from the antient Community, first of *moveable*, and then of *immoveable* Things: Namely, because Men being no longer contented with what the Earth produced of itself for their Nourishment; being no longer willing to dwell in Caves, to go naked, or covered only with the Barks of Trees, or the Skins of wild Beasts, wanted to live in a more commodious and more agreeable Manner; to which End Labour and Industry was necessary, which some employed for one Thing, and others for another. And there was no Possibility then of using Things in common; first, by Reason of the Distance of Places where each was settled; and afterwards because of the Defect of Equity and Love, whereby a just Equality would not have been observed, either in their Labour, or in the Consumption of their Fruits and Revenues.

Thus also we see what was the Original of Property, which was derived not from a mere internal Act of the Mind ... but it resulted from a certain Compact and Agreement, either expressly, as by a Division; or else tacitly, as by Seizure. For as soon as living in common was no longer approved of, 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. *'Tis no more, saith Cicero, than what Nature will allow of, that each Man should acquire the Necessaries of Life rather for himself than for another.*<sup>203</sup>

The Historical Argument, which traces its origin to Cicero's theory of the formation of cities, would prove immensely influential in the theory of property. After Grotius, defenders of the pre-political right to property, from Locke to Nozick, would rest their case on some variation

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<sup>203</sup>. *Id.* at II.ii.ii.3-5, pp. 425-27 (footnotes omitted; emphasis in original). Grotius here cites *De Officiis* III.v.22: "For, without any conflict with Nature's laws, it is granted that everybody may prefer to secure for himself rather than for his neighbour what is essential for the conduct of life; but Nature's laws do forbid us to increase our means, wealth, and resources by despoiling others."

of it,<sup>204</sup> and Locke's remains the most durable. Moreover, Hobbes, Locke, and Rousseau would make Grotius' "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*.

But Grotius also popularized one other argument that will prove important to our analysis of Jefferson's Taper: the Teleological Argument. As noted earlier, in *Mare Liberum* Grotius argued that the sea was not amenable to private ownership by the crowns of Spain and Portugal. This argument rests on rational consideration of the *nature* of the resource at issue, and whether that resource is by nature amenable to discrete delineation and occupation:

This being admitted, we affirm that none can have a Property in the Sea, ... first, from a moral Reason; and that is, the Cause which obliged Mankind to desist from the Custom of using Things in common, has nothing at all to do in this Affair: For the Sea is of so vast an Extent, that it is sufficient for all the Uses that Nations can draw from thence, either as to Water, Fishing, or Navigation. The same might be alledged of the Air too, could we put it to any Use, without being posted on the Surface of the Earth.... There is also a natural Reason which forbids, that the Sea, thus considered, should be any Body's Property, 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>205</sup>

The Teleological 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: most resources are, in Grotius' view, subject to appropriation *by virtue of their nature* and thus 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>206</sup> and absolutely when the two rights are

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<sup>204</sup>. See JOHN LOCKE, SECOND TREATISE ON GOVERNMENT, at s. 45 (1689); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 150–52 (1974).

<sup>205</sup>. GROTIUS, *supra* note 185, at II.ii.iii.1–2, pp. 428–31 (footnotes omitted).

<sup>206</sup>. *Id.* at II.ii.vi.1–2, pp. 433–35.

not in conflict.<sup>207</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 such use is attended with no prejudice to the owner”—the “no less shines his” condition at the heart of Cicero’s *lumen* and Jefferson’s Taper.<sup>208</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 John 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 is forced to ask why *anyone* would consent to being poor if they truly had a choice in the matter. And if they wouldn’t, then any society which maintains such inequalities is arguably in breach of the social contract—giving rise to a claim for relief against the state itself. This is the stuff of which revolutions are—indeed, were—made, and may illuminate a connection between social contract theory and the pivot to the Modern Tradition.

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<sup>207</sup>. *Id.* at II.ii.xi-xii, pp. 438–39.

<sup>208</sup>. See GROTIUS, *supra* note 46, at 94.

The Teleological Argument does not have any of the qualities I have just ascribed to the Historical Argument. Indeed, the Teleological Argument hearkens 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 synthesizing those arguments he finds persuasive and ignoring those he finds unpersuasive. Now that we have reviewed those arguments, we can start to piece together a reading of Jefferson's Taper that is sensitive to its intellectual predecessors.

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## V. Bacon over Locke: The Narrow Reading and the Broad Reading

As I noted above, 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—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—the Broad Reading—fleshes out the implications of the Narrow Reading, with some startling and, to my mind, intriguing implications. In particular, the Broad Reading suggests that Jefferson was arguing 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 and another important influence on Jefferson's thought: the scientific method.

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### A. The Narrow Reading

Thomas Jefferson, like most educated Anglophones in the 18<sup>th</sup> Century, clearly held John Locke in very high esteem. Indeed, in one letter Jefferson listed Locke as one of “the three greatest men that have ever lived, without any exception...having laid the foundation of those superstructures which have been raised in the Physical & Moral sciences.”<sup>209</sup> But regardless of whether one views Jefferson's 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>210</sup> there

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<sup>209</sup>. Letter from Thomas Jefferson to John Trumbull, February 15, 1789, in 14 **The Papers of Thomas Jefferson** 561 (Julian P. Boyd, ed. 1958), *available at* <http://founders.archives.gov/documents/Jefferson/01-14-02-0321>.

<sup>210</sup>. *Compare* GILBERT CHINARD, THOMAS JEFFERSON THE APOSTLE OF AMERICANISM 71–77 (1929) (noting widespread assumption that Jefferson was invoking Locke in the Declaration of Independence). *with* GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE, at chs. 16–18 (2017) (arguing that there is little evidence Jefferson was even familiar with Locke's Second Treatise, and that it is more likely he was drawing on Scottish Enlightenment thinkers, and particularly the moral-sense philosophy of Francis Hutcheson, in his enumeration of natural

is no evidence 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>211</sup> In short, he seems to reject Grotius' novel consent-based justification for material inequality—and Locke's adoption of that argument. But we project our own ideological battles onto Jefferson when we assume from his rejection of Locke that he must be a utilitarian, despite his reference to "utility" in his letter to Isaac MacPherson. Rather than a coded reference to a moral theory that would not be fully expressed until decades after his death, Jefferson's reference to "utility" was yet another nod to Cicero and the Classical Tradition.

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," reflects an understanding of the word "utility" that is uncongenial to the modern IP theorist. Today, "utility" is the unit of account of consequentialist moral theory; as noted above<sup>212</sup> the modern IP scholar is steeped in the language of utilitarianism. But in Jefferson's day, the battle lines between consequentialism and non-consequentialism had not even been drawn, yet alone hardened as they are today. John Stuart Mill's *Utilitarianism* was not published for decades after Jefferson died, and there is no evidence that Jefferson was acquainted with—let alone an

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rights). and Ronald Hamowy, *Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's Inventing America: Jefferson's Declaration of Independence*, 36 THE WILLIAM AND MARY QUARTERLY 503 (1979) (critiquing Wills as exaggerating the influence of the Scottish Enlightenment on Jefferson, and conversely underemphasizing Locke's influence).

<sup>211</sup>. Hughes, *supra* note 25, at 1029.

<sup>212</sup>. See *supra* Part I.

adherent of—Jeremy Bentham’s “principle of utility.”<sup>213</sup> Jefferson’s “utility” is not Bentham’s or Mill’s or Sidgwick’s principle of moral calculation, it is Cicero’s *utilitas*—the subject of Book

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<sup>213</sup> The only work of Bentham’s in Jefferson’s library is the *Panopticon*. SOWERBY, *supra* note 55, at 250. The Paul Leicester Ford compilation of Jefferson’s collected writings includes no reference to Bentham’s name. The *Introduction to 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, at front matter (1879).

The argument has admittedly been made that Jefferson was an adherent of the “moral sense” philosophy of Francis Hutcheson, who is credited with originating the practical principle of the greatest happiness for the greatest number that Bentham would later make famous. See generally WILLS, *supra* note 210. but see Hamowy, *supra* note 210 (arguing that Jefferson’s acquaintance with Hutcheson and other Scottish Enlightenment philosophers does not establish his devotion to their ideas). But even if this were true, Hutcheson’s formulation of this principle explicitly accounted for the “Dignity, or moral Importance” of persons in “compensat[ion]” for their smaller numbers in the moral calculus. FRANCIS HUTCHESON, AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE: IN TWO TREATISES 177 (1726) (“In comparing the *moral Quality*s of Actions, in order to regulate our \*Election\* among various Actions propos’d, or to find which of them has the greatest \*moral Excellency\*, we are led by \*our moral Sense of Virtue\* to judge thus; that in \*equal Degrees\* of Happiness, expected to proceed from the Action, the \*Virtue\* is in proportion to the \*Number\* of Persons to whom the Happiness shall extend; [and here the \*Dignity\*, or \*moral Importance\* of Persons, may compensate Numbers] and in equal

II of *De Officiis*. This utility is a practical consideration in the exercise of virtue—it would have been accepted by Aristotle, Cicero, or Aquinas as a relevant consideration in the evaluation of a possible *voluntary* transfer of material resources by their owner. Jefferson seems to consider the grant of “an exclusive right ... to the profits arising from” ideas as precisely such a voluntary transfer—an exercise of social virtue by the inventor with a view to achieving a useful end for society. This is the mirror-image of Cicero’s view that state-ordered redistribution is merely private theft made public policy. The patent grant in this sense is either *beneficence*—in the Ciceronian sense of an investment in a person of merit with the hope for later reciprocation—or *gratitude*—in the Ciceronian sense of the fulfillment of an obligation for previously-received beneficence—made public. In short, on the most plausible account of Jefferson’s notion of “utility,” and of its role in his view of social policy concerning inventions, Jefferson remains firmly within the Classical Tradition—a moral framework that is orthogonal to our modern division of moral philosophy into consequentialist and non-consequentialist camps.

It is thus strange, and anachronistic, for today’s avowed Lockean and other natural law theorists see in Jefferson a utilitarian theoretical adversary. He is nothing of the sort. Of course, recognizing that many Lockean are also anti-restrictionists, there may be *ideological*

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\*Numbers\*, the \*Virtue\* is as the \*Quantity\* of the Happiness, or natural Good; or that the \*Virtue\* is in a \*compound Ratio\* of the \*Quantity\* of Good, and \*Number\* of Enjoyers.

In the same manner, the \*moral Evil\*, or \*Vice\*, is as the \*Degree\* of Misery, and \*Number\* of Sufferers; so that, \*that Action is best\*, which procures the \*greatest Happiness\* for the \*greatest Numbers\*; and \*that\*, \*worst\*, which, in \*like manner\*, occasions \*Misery\*.”).



reasons for them to be wary of Jefferson's Taper. If Cicero is right that giving away that which costs us nothing—such as light from a fire—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 by nature is a potentially radical move. It suggests that the inventor *has an ethical obligation to freely share his inventions with others*.

## B. The Broad Reading

We can identify precursors of this argument in Cicero's views on knowledge creation. Cicero recognized that the skilled arts were necessary to the well-being of human society,<sup>214</sup> but he situated those arts within his transactional view of beneficence in civil society and social connection,<sup>215</sup> and he held artisans themselves in rather low esteem: "All mechanics [Latin: *opifices*] are engaged in vulgar trades," he says, "for no workshop can have anything noble [Latin: *ingenuum*] about it."<sup>216</sup> He thought somewhat better of the pursuit of knowledge, though with qualification. Natural philosophy was, for him, a luxury of leisure; it was to be valued only insofar as it could be put to the use of society.<sup>217</sup> The best type of intellectual pursuits in

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<sup>214</sup>. Cicero, *De Officiis* II.iv.15 ("Why should I recount the multitude of arts without which life would not be worth living at all? For how would the sick be healed? What pleasure would the well enjoy? What comforts should we have, if there were not so many arts to minister to our wants?")

<sup>215</sup>. Cicero, *De Officiis* II.iv.15 ("In consequence of city life, laws and customs were established, and then came the equitable distribution of private rights and a definite social system. Upon these institutions followed a more humane spirit and consideration for others, with the result that life was better supplied with all it requires, and by giving and receiving, by mutual exchange of commodities and conveniences, we succeeded in meeting all our wants.")

<sup>216</sup>. Cicero, *De Officiis* I.xlii.150 (my translation).

<sup>217</sup>. Cicero, *De Officiis* I.xliii.153 ("[S]ervice is better than mere theoretical knowledge, for the study and knowledge of the universe would somehow be lame and defective, were no practical results to follow. Such results, moreover, are best seen in the safe-guarding of human interests. It is essential, then, to human society; and it should, therefore, be ranked

Cicero's eyes were therefore (perhaps unsurprisingly) inquiries into the types of knowledge most valuable to him personally—political and moral philosophy—and even then only if 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.<sup>218</sup>

Thus, the pursuit of new knowledge fits well within Cicero's view of beneficence: it is worthy only insofar as it may be of benefit to others who will be appropriately grateful. 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 one's death. Ultimately, Cicero deems it virtuous to pursue and disseminate knowledge in this way.

This is precisely the view of knowledge creation that has long been identified with scientific progress. It is consistent with Robert Merton's famous norm of scientific "communism"—the proposition that all scientific discoveries *ought* to be shared among the entire scientific community—which was informed by Merton's study of the development of the scientific method in 17th-century England.<sup>219</sup> As Merton recognizes, those English

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above speculative knowledge. ...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 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?"

<sup>218</sup>. Cicero, *De Officiis* I.xliv.155-56.

<sup>219</sup>. R.K. Merton, *The Normative Structure of Science*, in *THE SOCIOLOGY OF SCIENCE*: THEORETICAL AND EMPIRICAL INVESTIGATIONS 267, 273–75 (Norman W. Storer ed., 1979) ("‘Communism,’ in the nontechnical and extended sense of common ownership of goods, is a second integral element of the scientific ethos. The substantive findings of science are a product of social collaboration and are assigned to the community. They constitute a common heritage in which the equity of the individual producer is severely limited.").

scientists were “[f]ollowing [Sir Francis] Bacon’s ambitious scheme for such cooperation,”<sup>220</sup> most famously illustrated by Salomon’s House, the community of experimental learners described in Bacon’s *New Atlantis*.<sup>221</sup> And fittingly, Bacon was, in Jefferson’s estimation, another of the “three greatest men that have ever lived”—in fact Jefferson literally placed Bacon in the position of honor *above* both John Locke and the third of his heroes, Sir Isaac Newton, in a composite portrait he commissioned for his home.<sup>222</sup> Jefferson used Bacon’s work as the basis for organizing his own library,<sup>223</sup> and as a guide to organizing the departments of the University of Virginia.<sup>224</sup> By invoking the Teleological Argument to identify ideas as a resource that by nature costs their possessors nothing to share, Jefferson grounded Baconian scientific communism in the moral philosophy of the paragon of Republican virtue: Marcus Tullius Cicero.

When read as a juxtaposition of Baconian scientific idealism with the Classical Tradition of distributive justice, Jefferson’s characterization of the patent right as “an exclusive right to the profits arising from [inventions], as an encouragement to men to pursue ideas which may produce utility” becomes far more complex than a mere exercise in cost-benefit analysis. In the first instance, as already noted, the Virtue Argument would suggest that a virtuous inventor would gratuitously share his inventions with anyone who asked, and for these inventors the patent right is unnecessary as a means to obtaining such disclosure. But this quid-pro-quo view

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<sup>220</sup>. Robert K. Merton, *Science, Technology and Society in Seventeenth Century England*, 4 OSIRIS 360, 115 (1938).

<sup>221</sup>. BACON, *supra* note 1, at 45–46.

<sup>222</sup>. Letter to Trumbull, *supra* note \_\_\_\_.

<sup>223</sup>. THOMAS JEFFERSON’S LIBRARY: A CATALOG WITH THE ENTRIES IN HIS OWN ORDER 2 (James Gilreath & Douglas L. Wilson, eds., 1989) (“When Jefferson offered his library to Congress in September 1814, he sent along his handwritten catalog ... arrang[ing] the books in subject categories...adapted from the second book of Francis Bacon’s *The Advancement of Learning*.”).

<sup>224</sup>. Letter from Thomas Jefferson to Dr. Thomas Cooper, Aug. 25, 1814, in 14 THE WRITINGS OF THOMAS JEFFERSON, 173 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903) (“[I]t had long been in contemplation to get an university established in this State, in which all the branches of science useful *to us*, and \*at this day\*, should be taught in their highest degree... But what are the sciences useful to us, and at this day thought useful to anybody? A glance over Bacon’s \*arbor scientiæ\* will show the foundation for this question....”).

of patents that we have come to accept in utilitarian IP theory may not be the view implicit in Jefferson's use of the word "encouragement." First, such "encouragement" can be seen as reflecting Aristotle's view that the role of the state in distribution is "to create in men [the] benevolent disposition" of liberality—<sup>225</sup>to encourage in inventors the development of a disposition to engage in the scientific community on communistic terms. Second, rather than an encouragement for the inventor to share ideas already developed, Jefferson's "encouragement" may be understood as a way for the state to guide citizens' energies toward "ideas which may produce utility," as contrasted with less useful ideas, on the assumption that both would be shared by the virtuous inventor in any case. 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 distributive questions to encouraging private beneficence.

There are some obvious objections to the Broad Reading. First, it is almost certain that Jefferson did not fully appreciate or consciously intend these implications of his identification of inventions with Cicero's *lumen*. And second, those steeped in utilitarian IP theory would likely dispute the implicit assumption that sharing an idea costs its owner nothing—that in fact, *creating* an idea is costly, and those costs 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 in his letter on a particular patent dispute is not surprising. But that doesn't mean such a theory is unavailable, and indeed the invocation of Cicero offers an opportunity to develop precisely such an argument more rigorously than Jefferson himself did. Given the current stagnation in IP theory, that is an opportunity I believe we should seize.

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<sup>225</sup>. Aristotle, *Politics* 1263a; see *supra* note \_\_\_\_.

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. But this is consistent with Jefferson's Baconian outlook and his status in the landed gentry: men of leisure, who live on the toil of others (including, in Jefferson's case, enslaved persons), are uniquely in a position to direct time and resources to invention without considering the costs (including opportunity costs) of their investigations. Moreover, 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* expenses in creating knowledge ought to be considered a cost to me of sharing that knowledge once it has been created. Conversely, I can't claim a right to the future value others might derive from my knowledge if *those others* have a similar right to *their own* material possessions in the *status quo*. The Classical Tradition up to Grotius 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 the Parable of the Taper, with all its intellectual history, 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 only whether they did so voluntarily.

This baseline-indifference is a view that is hard to accept for IP scholars who are most familiar with the calculations of utilitarian IP theory or its rococo extrapolations into net-present-value social welfare functions and intertemporal optimizations. But that does not make it wrong. At bottom, the question what society owes to inventors 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 to introduce the discipline to a new set of perspectives and considerations. Chief among those

is the idea that creators of new knowledge, 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 even Lockean IP theory, but the position flows naturally from the basic premises of the Classical Tradition.

The emergence of such obligations, and the ability to derive them theoretically, does not make the Classical Tradition a superior theoretical basis for knowledge governance policy. For my part, I still find the Classical Tradition unattractive because I share the normative commitment to human 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.<sup>226</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 our knowledge governance policy design is warranted. I hope that other IP scholars will agree.

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<sup>226</sup>. The most recent vigorous defense of the principle of scientific communism to gain significant attention in IP scholarship is probably Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1017 (1989).