

Toward a Lockean Moral Justification of Legal Protection of Intellectual Property

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I. INTRODUCTION

The issue of whether the state is morally justified in affording content creators a legal right to exclude others from the content of their creations is a sharply contested issue in information ethics, law, legal theory, philosophy, and policy. Once taken for granted as legitimate, intellectual property rights have come under fire during the last fifty years as evolving digital information technologies have severed the link between expression of ideas and such traditional material-based media as books and magazines. These advances in digital technology have called attention to unique features of intellectual content thought to problematize the legitimacy of legal intellectual property protections. Any piece of intellectual content, for example, can be simultaneously appropriated by everyone, as the matter is sometimes put, without thereby diminishing the supply of that content available to others.

I will call these rights “intellectual property rights” for convenience. No presupposition is made that content is, as a conceptual matter, property or that it is something that can be *owned*. On my view, it does not matter whether content counts as property or not; that issue strikes me as a distraction. What is important is whether content creators have an interest in the content they create that the law should protect by allowing content creators to exclude others from the content they create

unless the content creator consents to its appropriation. The bundle of powers, liberties, et cetera, of these rights surely resemble those of material property rights but that does not imply that intellectual property really is, as a conceptual matter, a *property right*. Again, it bears emphasizing that the important issue is whether content creators have a moral interest in the content they create that justifies legal protection that allows them to exclude others. This is an issue that does not turn on whether one calls it “property” or “shmoperty”; after all, information privacy rights provide the legal power to exclude others from certain information.

This Article attempts to provide the beginnings of a viable moral justification for recognizing and providing legal protection of intellectual property. The argument follows a line of arguments that is fairly characterized as “inspired” by John Locke’s attempt to justify legal protection of what he took to be a natural,¹ *objective*,² moral right³ to *material* property.⁴ That is to say, it is Lockean in spirit in the following sense: Locke grounds his argument for original acquisition in the idea that a person is justified in acquiring something from the commons in virtue of an *investment* he makes of something that is, in some sense, “his.” In the Lockean case of original acquisition, the relevant investment is a person’s expenditure of labor.

The argument of this Article should be considered as something of a sketch for a couple of reasons. First, the issues of whether persons have

1. By *natural*, Locke means that these “rights” exist even in the state of nature. A person has a natural right to *P* in virtue of having a certain moral status—and not in virtue of being granted it by a social group. For example, a moral right to life would be natural in the sense of being held by someone in virtue of her moral status as a person. Even states must respect natural rights.

2. By *objective*, I mean that the existence and contents of these rights are not social constructs. They might be filtered to the social categories of language, but whether one has an intellectual property right to *P* is determined by mind-independent considerations. It is the hallmark of objectivity that everyone could be mistaken in believing a claim purporting to be objectively true. For example, nearly everyone believed the earth was flat at one point in history. Even if everyone had thought this, the idea that the earth is flat was simply false. The truth-value of the shape of the earth is not determined by what people believe or think about it.

3. *Moral right* has become a term of art in copyright law referring to a specific set of rights that authors retain in their content. I do not mean the term in this sense. By *moral right* in this Article, I mean a right that is conferred by morality, rather than one that is conferred by some social group, such as a club or the legal system. I am indebted to Justin Hughes for this point.

4. See generally JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (Thomas P. Peardon ed., The Liberal Arts Press 1952) (1690).

a morally protected interest in the content they create and, if so, whether those morally protected interests should be protected by law are remarkably complicated issues that have generated tens of thousands of pages of argument. It would be naïve to think, and disingenuous to claim, that the argument in this Article addresses all the relevant issues at a sufficiently high level of depth and breadth to succeed in providing anything more than plausible beginnings of answers to these questions—answers that build upon the work of other theorists but are grounded in different interests than those grounding legal rights to intellectual property in these other works.

Second, the thesis is a highly general one: the thesis is merely that there are morally protected interests in intellectual property that should, as a matter of political morality, be protected by law. The thesis and supporting arguments, although pointing in the direction of the claim that the proper form of legal protection is a legal *right*, say nothing as to the specific shape or content of the protections afforded to this legal right. At most, on the influential Dworkinian assumption that the infringement of a right cannot be justified by the desirable consequences of doing so, the thesis entails that, absent exceptional circumstances, the legal right to intellectual property cannot be defeated by just the desirable consequences of doing so. Only an unjustified infringement of a right, as I use the term, constitutes a violation; justified infringements do not violate the right.

Accordingly, it is important to distinguish the general issue of whether intellectual property is justified from the more specific issue of whether a particular body of intellectual property law (for example, copyright law in the United States) is justified. Obviously, a particular body of law protecting intellectual property will not be justified if intellectual property protection is, as a general matter, unjustified, but the converse is not true. One can reasonably believe that content creators have intellectual property rights that should be protected by law but believe also that many elements of existing copyright and patent law in Western nations are unjustified. The arguments in this Article are concerned primarily with the general issue and not with the more specific issue of whether the law of intellectual property in Western industrialized nations is morally legitimate, although some of the more problematic features of existing law will be discussed briefly at the end of this Article.

Of course, at some point, any theory that purports to show that as a general matter, some legal protection of intellectual property is morally justified will have to engage the more specific normative issues regarding what the content of those protections should be. But these arguments will have to proceed on a case-by-case basis depending on whether the content of any proposed legal norm coheres with the considerations that purport to justify the general claim that some legal protection of intellectual

property is justified. Addressing these latter issues will frequently be difficult for two reasons. First, depending on one's general moral commitments, an adequate analysis might require comparing the moral importance of interests among persons to determine whether some of these interests rise to the level of rights that can be defeated only by weightier rights. Second, addressing these issues might require very difficult empirical analyses that seek to determine which acts best maximize happiness or well-being in the community as a whole. In any event, the difficulties involved in evaluating the various provisions of existing copyright law are sufficiently nuanced and challenging, whatever moral theory is assumed, that I cannot claim to have done anything more than to have offered the beginnings of what I hope will turn out in the end to be a plausible Lockean justification for legal protection of intellectual property rights. It is for this reason that the title of the Article is *Toward a Lockean Moral Justification of Legal Protection of Intellectual Property*.

II. TWO APPROACHES TO GENERAL MORAL THEORIZING

Normative moral theories that attempt to identify moral principles that determine which acts are morally obligatory, prohibited, and permissible are usually divided into two categories: consequentialist and deontological moral theories.⁵ Although there are a number of different ways to define the two types of theory, they are usually defined in such a way as to mutually exclude one another and to jointly exhaust the possible classes of moral theory. Consequentialist theories, on the one hand, claim that the *only* relevant feature in evaluating an act from the standpoint of morality is to determine whether the effects promote some favored value in the community. Deontological theories, on the other hand, simply deny that the consequences of some favored state of affairs are the only relevant features in evaluating the act; sometimes the intrinsic character of an act determines, at least in part, its moral quality. I take the time here to set forth the essentials of the views because it seems to me that the two views are frequently misunderstood in the literature on intellectual properties.

5. There are moral theories that are concerned with assessing character traits and hence the person, such as virtue theory. Aristotle's *Nicomachean Ethics* is, of course, the classic work. *See generally* ARISTOTLE, *ARISTOTLE'S NICOMACHEAN ETHICS* (Robert C. Bartlett & Susan D. Collins trans., 2011) (c. 384 B.C.E.).

A. Consequentialist Theories

Pure or act-consequentialist theories of morality are “reductive” in the sense that they attempt to ground all particular correct moral judgments about acts in one foundational moral principle that takes the promotion of one particular state of affairs as the sole measure of what is objectively morally good. Different act-consequentialist theories disagree on what state of affairs is the sole objective measure of moral goodness or wrongness, but the point is that, according to act-consequentialist moral theories, the only relevant index of moral quality of an act is its consequences in promoting the favored objective state of affairs.

One example of such a theory is act-utilitarianism, according to which an act is morally good or bad only to the extent that it increases or decreases utility in the community. Different theorists define *utility* differently. Utility has variously been defined, inter alia, as “pleasure,” “happiness,” “subjective well-being,” “objective well-being,” and “satisfied preferences.” It is absolutely crucial to note here that the only thing that matters with respect to morally evaluating an act is the consequences of the act on utility, however defined. Intentions and other mental states might bear on judgments of *culpability*; however, they have no relevance with respect to evaluating the moral quality of an *act*. Consequences, and only consequences, matter with respect to such moral judgments. Thus, one could commit a morally wrong act without being culpable for it, depending on one’s mental state, including intentions, knowledge, et cetera.

It is equally critical to understand that a popular formulation is false. Act-utilitarian and act-consequentialist theories do not require “the greatest good *for the greatest number*.” There is not, and could not be, a distribution requirement that coheres with a basic assumption of all such theories. The assumption is that no one person’s utility, however defined, counts more than any other’s. Assuming for the moment the implausible claim that the various measures of utility could be accurately quantified, one “util” of utility in one person is equal to one util in any other person. Unlike other theories, a person may not count her own utility for more than any other person’s in deliberating on the issue of what to do. Any distribution requirement would be inconsistent with this basic assumption as it would require privileging some set of persons’ utility more than others. The one exception might be: if there are two distributions that maximize utility, one can choose one on other grounds—perhaps to provide the greatest good for the greatest number.

B. Deontological Theories

Deontological theories reject the idea that the moral quality of an act is *entirely* determined by its consequences. According to deontological theories, the moral quality of some acts is determined, in part, by intrinsic or inherent features of the act. For example, one might say lying is wrong, not just because it hurts people, but because it is inherently deceptive and, for that reason, intrinsically wrong.

Indeed, it is important in understanding the difference between the two kinds of theory to realize that deontological theories are typically *defined* in terms of rejecting the consequentialist claim that the consequences of an act on producing the favored state of affairs is the only factor of relevance in assessing it from the standpoint of morality:

In contrast to consequentialist theories, deontological theories judge the morality of choices by criteria different than the states of affairs those choices bring about. Roughly speaking, deontologists of all stripes hold that *some choices cannot be justified by their effects*—that no matter how morally good their consequences, some choices are morally forbidden.⁶

Thus, the theoretical condition that must be satisfied to be properly characterized as a deontological theory is quite weak: there is at least one act *A* such that *A*'s moral value is at least partly determined by something other than the consequences of *A* on some favored state of affairs.

This is theoretically important because it is sometimes thought that any reference to consequences in determining the moral quality of an act is logically inconsistent with a deontological approach. This view is false, as is shown by the italicized portion of the above quote. This portion states that "*some choices cannot be justified by their effects*"; it does not state that *no choice* can be justified by its effects. A deontologist can take consequences into account in a number of ways without any inconsistency, including identifying the limits of some particular right.

This should not be surprising. After all, it is difficult to think of any rights that are absolutely unqualified by some limits. As supporters of the death penalty believe, the right to life is qualified by the moral permissibility of capital punishment in response to murder. The constitutional right to free speech, which presumably is understood to

6. Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCYCLOPEDIA PHIL. (Nov. 21, 2007), <http://plato.stanford.edu/entries/ethics-deontological/> (emphasis added).

reflect the content of the moral right to free speech, is limited by certain exceptions having to do with consequences, such as speech likely to incite a riot or a fight. As will be seen below, I do something very much like this, from a deontological starting point, in weighing the various interests of persons in content created by someone else—and it should not be thought problematic.

Some deontological theorists have taken the very strong view that consequences are never relevant in evaluating the morality of an act. For example, Immanuel Kant took the position that consequences are *never* relevant in assessing the moral quality of an act because the consequences of an act are always beyond our direct volitional control.⁷ If, for example, two people shoot simultaneously at a third person such that each bullet will kill the latter, and one bullet hits the target while the other hits a bird that has flown into the path of the bullet, which is deflected harmlessly—except for the bird—to the ground, Kant claims they are both equally culpable and equally deserving of punishment.⁸ On Kant's view, only those factors that are completely within our control can determine the moral value of an act; the moral worth of an act cannot turn on luck. Thus, according to Kant, extrinsic features of an act—like its consequences—are utterly irrelevant in determining its moral worth because such features are beyond the direct volitional control of the agent. In essence, then, these features turn on “luck.”

Kant believes that the moral value of an act is determined by two characteristics: (1) the mental state of the agent that is involved in the performance of the act; and (2) the intrinsic character of the act itself. To have positive moral worth, an agent must perform an intrinsically right act for the right reason. Thus, Kant rejects consequentialism for a deontological approach that takes the position that the moral quality of an act is determined entirely by features over which agents have complete control: the intrinsically right thing for the right reasons.⁹

Although Kant takes the very strong view that consequences are utterly irrelevant, other deontological approaches, including the one taken in this Article, are compatible with the claim that consequences sometimes determine the moral worth of an act. This Article does not assume any particular deontological theory, which I take to be a merit of

7. See IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 10 (Allen W. Wood ed. & trans., Yale Univ. Press 2002) (1785).

8. This problematizes the common legal practice of punishing successful attempts more severely than unsuccessful attempts.

9. It is worth noting that, partly in consequence, Kant seems to believe that all rights and obligations are absolute in the sense that there are no exceptions or qualifications. See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 63–67 (James W. Ellington trans., Hackett Publ'g Co. 3d ed. 1993) (1785).

the Article since all theories have their critics. It simply makes an assumption that all deontological theories share: the assumption is that *persons*, as a conceptual matter, have certain interests that are protected by morality, such as in the preservations of their own lives, in virtue of falling under the moral category of personhood.¹⁰ In some cases, this rises to the level of a moral *right*, but not in all. Regardless of which particular deontological theory is true, all are committed to this view. Thus, no contentious views are assumed—an advantage of the analysis.

Further, the weaker form of deontological theory applied in this Article reflects commonsense conceptions of morality. Most of us, for example, regard some behaviors as wrong in virtue of inherent essential features. Killing an innocent person is wrong regardless of whether it makes people happy or increases their well-being. The view here is that killing an innocent person violates a *moral* right to life. However, most of us also believe that the consequences of an act sometimes make it morally wrong or morally good. For example, no one person can claim a right to charity. But giving to someone who needs help is good, at least in part, because of the favorable consequences on well-being. The weaker form of deontological theory incorporates the common views that (1) sometimes, but not always, the intrinsic quality of an act entirely determines the moral worth of an act, and (2) consequences on human well-being or happiness determine the moral worth of an act on those occasions where its intrinsic quality is not morally relevant; the effects on human happiness and well-being then *are* morally relevant. That these views reflect how most people seem to think about moral judgments is a merit of the weaker deontological theory.

However, it is also important to note that the deontological view that I adopt is not as strong in a second important respect as Kant's in discounting the weight of consequences in determining the moral status of an act. On my view, consequences will be relevant in limiting the scope of a right and in weighing the various interests that people have relative to the interests of the author in some piece of content. For example, in weighing possibilities, satisfying a basic need, other things being equal, will be morally preferable to satisfying a mere want for content. So the scope of whatever morally protected interest authors have in the contents they create will be weighed against the promotion of

10. In contrast, *human being* is a biological descriptive category that expresses no value and hence has no normative implications.

satisfied needs, wants, or preferences. There is nothing illicit in this approach. As I remarked above, the criteria for being a deontological theory are not as stringent as the criteria for being a consequentialist theory: nothing but consequences are relevant for the latter, but the former includes rights, intrinsic value, and consequences as morally relevant considerations. Although one should explain how it is that consequences qualify the scope of rights, this is not a theoretical task that must be accomplished in this Article.

*C. Special Difficulties in Supporting Consequentialist and
Deontological Arguments Regarding Intellectual
Property Rights*

It is important to be aware that the differences between the contents of the two theories entail different methodologies for supporting consequentialist and deontological arguments. The consequentialist considerations frequently adduced in support of claims regarding the legitimacy of intellectual property protection tend to be more general and speculative than is desirable—for even the most general thesis. For example, it is frequently claimed by consequentialists supporting intellectual property protection that a material incentive is necessary to ensure the continuing production of content that conduces to human well-being. But although this claim might be plausible from the standpoint of ordinary pretheoretic intuitions about the motivation to produce, the claim that human well-being is better served by a state of affairs in which there is such protection than a state of affairs in which there is no such protection is, at least in part, an empirical claim that would require a detailed empirical analysis that compares the effects on human well-being of providing some legal protection of intellectual property with the effects on human well-being of not providing that protection—an enterprise that is supremely difficult at even the general level. Each individual proposal for a specific protection would have to be evaluated by a comparison of the effects of accepting and enforcing the proposed protection with the effects of not accepting and enforcing the proposed protection.

The same is true with respect to consequentialist arguments rejecting the legitimacy of intellectual property rights. These arguments typically rely on claims that require empirical support. For example, one frequent consequentialist argument against intellectual property rights is that they stifle innovation that would conduce to the common good. Again, although this is plausible from a pretheoretical intuitive point of view, the only way to justify this claim is by providing an empirical analysis that confirms the claim. Strictly speaking, consequentialist arguments for and against the legal protection of intellectual property rights are

empirical hypotheses that require sociological evidence that is lacking in, at least, the consequentialist literature with which I am familiar.¹¹

Part of the reason there is little if any compelling empirical sociological evidence is that there is no obviously reliable frame of comparison that would provide adequate empirical evidence. Industrial, affluent Western nations typically provide legal protection of intellectual property in the form of copyright law. In consequence, there are no societies close enough in character to such nations as the United States that would provide a reference point for comparison to sufficiently similar nations without copyright law. Of course, the content of copyright law differs among nations. Even so, it would be difficult to assess the comparative consequences on well-being because it is hard to find an accurate index of well-being that would provide a point of reference for sociological study.¹²

There are a number of other considerations further complicating the difficulty in assessing the legitimacy of intellectual property by applying the utilitarian principle. First, it is difficult to see how we can make accurate interpersonal comparisons of utility. Suppose, for example, you and I really like dark chocolate. It is difficult to see how we could decide which person gets more pleasure out of dark chocolate. One might think that one's externalized reactions would provide a reliable guide, but externalized reactions are not necessarily reliable for at least two reasons: (1) people can exaggerate their feelings when expressing them; and (2) some people might have lower thresholds for how much pleasure one must experience to induce an enthusiastic externalized response.

11. I am grateful to Mark Lemley for pointing out to me that the situation is a little better for consequentialist analyses of the existing content of patent law. However, until comparatively recently, there have been almost no empirical studies regarding the effects of various provisions of copyright law on innovation. One exception is Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891. Although more than welcome, this paper examines only one side of the issue—the extent to which copyright law hinders innovation and presumably thereby diminishes well-being. For a complete analysis from a consequentialist perspective, the extent to which copyright law promotes well-being must be considered and balanced against the costs to well-being of copyright law. So this is, at best, a modest first step in the correct direction.

12. This may be part of the reason that articles featuring empirical analysis, such as discussed in note 11, are concerned with identifying only costs. Such an analysis can proceed with a limited frame of reference—policies that have led businesses to make decisions reducing productivity and innovation. But a full frame of reference is needed to balance costs and benefits, and this is comparatively more difficult to identify.

Second, there might be objective facts about what does and does not conduce to human well-being, but it is obvious that a person's subjective tastes, preferences, and desires are sometimes relevant in determining what conduces to that person's well-being. For example, I detest the taste of pungent cheeses (especially bleu cheese). Feeding one of these cheeses to me when there are other food items I enjoy that provide the same nutritional value would trigger a violently unpleasant gag reflex and hence diminish my well-being. If so, the utilitarian would need to know all the objective and subjective constituents of well-being.

Finally, it is not just that promotion of a person's well-being has some subjective determinants; promotion of well-being also has some intersubjective determinants in the form of cultural conditioning. For example, we are culturally conditioned to strongly reject consuming dogs as food while people in other cultures are culturally conditioned to view and consume dogs as food. Given that what promotes any person's well-being is determined partly by subjective and intersubjective considerations, cross-cultural comparisons of the effects of intellectual property law on well-being are, *as far as we can tell*, probably if not inherently unreliable. This is not to say that they are as a matter of fact unreliable; rather, it is to say only that we have no way of ascertaining the extent to which cross-cultural comparisons of utility are reliable.

Deontological arguments face a different challenge: there is no algorithm for discerning the content of moral principles on the assumption that morality is deontological in character, rather than consequentialist. Moral argument, from a deontological perspective, must rely on moral intuitions, which might be incorrect or might not be sufficiently common to provide the basis for a compelling argument. It is not surprising that the debate on the legitimacy of legal protection of intellectual property continues with nothing that commands a consensus. All arguments regarding the legitimacy of intellectual property rights are subject to epistemological limitations that ensure that they fall short of providing all the depth, breadth, and nuance that would optimally be provided in support of whatever position is taken. This is yet another reason I do not pretend to have offered more than the beginnings of a potentially successful argument.

Accordingly, a seemingly somewhat less precise methodology must be assumed for deciding moral issues under a weak deontological theory. The argument of this Article relies on intuitive moral judgments that most readers are assumed to share and indeed enjoy a privileged status in moral belief structures. These particular intuitions are paradigmatic judgments that are foundational in the sense that they define adequacy conditions on theories that purport to justify the coercive authority of the state. That is to say, readers will evaluate a general moral theory that seeks to justify the state's coercive authority partly by determining whether

the theory harmonizes with these foundational intuitions. To put it in terms associated with evaluating scientific theories, these intuitions function in the minds of those who accept them as data points that any successful theory of state legitimacy must capture and explain. Thus, if the reader does not share these moral intuitions, then the reader will not find the argument of this Article persuasive.

Although the methodology proposed here involves the messy process of resorting to shared moral intuitions in order to identify and weigh relevant morally protected interests against one another to see what interests win out, it has one clear advantage. One reason for adopting the methodology described above is precisely that weak deontological theories incorporate a plurality of relevant considerations, including rights and effects on well-being; it is not just that people tend, as a matter of descriptive empirical fact, to reason about moral issues this way. Taken together, these two considerations provide good reasons for adopting this methodology.

In any event, however, the argument is *deontological* rather than *consequentialist* in character insofar as it assumes that there are some moral obligations that do not have their origin in the fact that they conduce to promoting social benefits. These obligations have their origin, at least in part, on the inherent character of the acts.

Not surprisingly, many notable moral and normative political theorists have adopted this methodology—although there might be subtle differences among the particulars of this general approach as adopted by different moral and normative political theorists. For example, John Rawls is well known for his version of the methodology, which he calls *reflective equilibrium*, and which is succinctly and elegantly described by Norman Daniels as follows:

The method of reflective equilibrium consists in working back and forth among our considered judgments (some say our “intuitions”) about particular instances or cases, the principles or rules that we believe govern them, and the theoretical considerations that we believe bear on accepting these considered judgments, principles, or rules, revising any of these elements wherever necessary in order to achieve an acceptable coherence among them. The method succeeds and we achieve reflective equilibrium when we arrive at an acceptable coherence among these beliefs. An acceptable coherence requires that our beliefs not only be consistent with each other (a weak requirement), but that some of these beliefs provide support or provide a best explanation for others. Moreover, in the process we may not only modify prior beliefs but add new beliefs as well. There need be no assurance the reflective equilibrium is stable—we may modify it as new elements arise in our thinking. In practical contexts, this deliberation may help us come to a conclusion about what we

ought to do when we had not at all been sure earlier. We arrive at an optimal equilibrium when the component judgments, principles, and theories are ones we are un-inclined to revise any further because together they have the highest degree of acceptability or credibility for us. An alternative account retains the importance of revisability and emphasizes the positive role of examining our moral intuitions, but rejects the appeal to coherentism in favor [of] treating our intuitive moral judgments as the right sort to count as foundational, even if they are still defeasible.¹³

The idea here is that we start from ordinary moral judgments that are assumed, rather than argued for, on the ground that they seem intuitively plausible and possibly even self-evident in some cases. The argument attempts to show that the conclusion best coheres with—and is possibly entailed by—the moral judgments that are assumed as being shared.

A similar methodology has been adopted and defended by Bernard Gert, which he calls the method of “common morality.”¹⁴ The point here is to ground moral judgments and moral theories, as much as possible, in the common morality, a widely shared set of particular moral judgments on specific cases and general principles. Gert believes not only that this is the right account of how to reason when evaluating actions from a moral point of view but also that this is the way in which most people reason when they seek to evaluate the morality of an act.¹⁵

It is worth reiterating one consequence of this methodology: if the reader rejects one or more of the moral claims that are assumed rather than argued for, the argument is unsuccessful in its principal aim, which is to show readers that they hold certain assumptions that logically commit them to a conclusion that they might have rejected prior to the argument. This is a common argument strategy, and one of the reasons that strategies like this are very common in political philosophy, applied ethics, and normative legal philosophy is that one cannot give an argument for every claim one makes in defending a conclusion. Attempting to do so would require the ability to give arguments of infinite length.

D. Consequentialism, Deontology, and the U.S. Constitution

As is well known, the Constitution delegates the authority to Congress to make copyright law for instrumentalist reasons. Section 8 of Article I of the Constitution provides that “Congress Shall have the Power . . . To promote the Progress of Science and useful Arts, by securing for limited

13. Norman Daniels, *Reflective Equilibrium*, STAN. ENCYCLOPEDIA PHIL. (Jan. 12, 2011), <http://plato.stanford.edu/entries/reflective-equilibrium/> (citations omitted).

14. *See generally* BERNARD GERT, COMMON MORALITY: DECIDING WHAT TO DO (2004).

15. *See id.* at 4.

Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁶

Nevertheless, it is important to realize that there is no assumption in the Constitution that any consequentialist theory is true. First, although this provision grants Congress the power to protect copyright for reasons having to do with the consequences and social benefits, the Constitution, strictly speaking, provides the *legal* justification for protecting copyright. It does not so much as even purport to provide a moral justification.

There is a good reason for this, although this might not have been part of the thinking of the Framers. The claims that the Constitution delegates the authority to Congress does not and cannot constitute a foundational justification because it must be shown, not merely assumed, that the system of law established by the Constitution is justified by political morality and is therefore morally legitimate. It might be that the particular form of democracy that is established by the Constitution, along with the enumerated powers of the federal legislature, is illegitimate in some respects. Although this might seem obviously implausible, our sense of what is obviously or self-evidently true has frequently been mistaken.¹⁷ It is for this reason that an argument is needed, and there have been many articles addressing the legitimacy of constitutional democracy.

Indeed, it might turn out that intellectual property rights do not have the social benefits the Framers of the Constitution assumed they would have. Given the stated constitutional purpose of copyright law, Congress would lack authority to protect these “rights.” Even so, intellectual property rights might be morally justified by other considerations that have nothing to do with the social benefits. Many legal theorists argue legal intellectual property rights are morally legitimate in virtue of some inherent natural moral right each person has to “own” his or her writings and discoveries. The Constitution is a legal document that sets up the mechanisms and institutions of a system of law that claims a limited monopoly on force and enforces valid enactments with coercive mechanisms. For this reason, the very system of law that the Constitution defines is in need of the foundational moral justification. It cannot, so to speak, pull itself up by its own bootstraps.

16. U.S. CONST. art. 1, § 8, cl. 8.

17. For example, Euclid’s Parallel Postulate was regarded as self-evident for many years until it was learned that Einstein’s theory of relativity presupposed non-Euclidean geometry. Instead of there being one line passing through a point parallel to a given line off that point, Einstein’s theory of relativity presupposes an infinite number.

It might be that the foundational principle that can be adduced as a moral justification for legitimate coercive state authority is a consequentialist principle. Insofar as this is true, it is true that the legal order defined by the Constitution is morally justified in virtue of its effects on social utility. Further, on this assumption, it would also be true that the legitimizing purpose of intellectual property law *is* to maximize social benefits. Hence, it is in line with the Constitution's stated purpose for assigning power to Congress to protect intellectual property rights and accords with the foundational moral principles that justify the use, by a state with a Constitution like ours, of coercive mechanisms to enforce valid legal norms, including ones protecting intellectual property interests of authors and creators. But, again, this is not something that can be simply assumed, as consequentialist moral theories are contested in the philosophical literature and vulnerable to many objections.

Moreover, other provisions of the Constitution are incompatible with a reductionist moral theory of act-consequentialism. The enumeration of rights in the Bill of Rights is inconsistent with act-consequentialist theories because the latter says that the only relevant consideration in evaluating the normative correctness of an act is the consequences of the act in promoting the relevant objective measure of good. But rights, according to both conceptual considerations and according to the relevant constitutional jurisprudence, cannot justifiably be infringed by the social benefits or desirable consequences of doing so; as Ronald Dworkin famously puts it, rights "trump" consequences in the sense that the infringement of a right can be justified only to secure the satisfaction of a more important right.¹⁸ Indeed, the very existence of a moral right seems logically inconsistent with moral act-consequentialism because the desirable consequences of infringing a right can never justify violating it—and there are no other relevant factors, according to act-consequentialism, in evaluating an act than the consequences.

It is commonplace that act-utilitarianism is vulnerable to a host of counterexamples where the correct outcome under an act-utilitarian analysis permits the killing of an innocent person to maximize utility. Here is just one of many such examples:

Another problem for utilitarianism is that it seems to overlook justice and rights. One common illustration is called Transplant. Imagine that each of five patients in a hospital will die without an organ transplant. The patient in Room 1 needs a heart, the patient in Room 2 needs a liver, the patient in Room 3 needs a kidney, and so on. The person in Room 6 is in the hospital for routine tests. Luckily (for them, not for him!), his tissue is compatible with the other five patients, and a specialist is available to transplant his organs into the

18. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xi–xiii (1977).

other five. This operation would save their lives, while killing the “donor”. There is no other way to save any of the other five patients.¹⁹

What causes the problem here is that the only morally salient factor in evaluating an act is its tendency to promote the favored consequences. When an agent decides how to act, no one’s interests or utility count for more than another person’s, and this is simply logically incompatible with there being moral rights. In the example above, it is permissible to kill the person in Room 6 because he has no right to life that would trump the effects on utility.

Finally, constitutional jurisprudence treats the fundamental rights granted by the Amendments in a way that is inconsistent with act-consequentialism. The strict scrutiny standard, by its own terms, allows the infringement of a right only if it is *necessary* and hence the only way to achieve a *compelling* state interest; this states a test that is fundamentally different from a test that makes the weighing of desirable and undesirable consequences the only relevant factor in ascertaining the permissibility of an act.

On the assumption that a general moral theory is implicit in the text of the Constitution, that theory simply could not be an act-consequentialist one. Other considerations than consequences are relevant in assessing the constitutionality of a legislative act, and that makes any moral theory presupposed by the Constitution, if there is one, a deontological theory.

III. TWO MORAL ISSUES CONCERNING THE JUSTIFICATION OF INTELLECTUAL PROPERTY RIGHTS

It is important to note that there are two ethical issues regarding intellectual property not clearly distinguished in the literature. The first is whether authors have a morally significant interest—one that receives some protection from morality—in controlling the disposition of the contents of their creations, which would include some possibly limited authority to exclude others from appropriating those contents subject to payment of an agreed-upon fee; this interest might, or might not, rise to the level of a moral right. The second is whether it is morally permissible for the state to use its coercive power to protect whatever such interests authors might have in the contents of their creations.

19. Walter Sinnott-Armstrong, *Consequentialism*, STAN. ENCYCLOPEDIA PHIL. (Sept. 27, 2011), <http://plato.stanford.edu/entries/consequentialism/> (citations omitted).

These two issues are logically distinct. The first is an issue concerning moral standards that apply to the acts of individuals, while the second is an issue concerning moral standards that apply to the acts of governmental entities. Not every morally protected interest an individual has is legitimately protected by the state. For example, I have a morally protected interest in not being told lies, but it would not be legitimate for the state to create a criminal or civil cause of action that makes people liable for any or every lie they tell.²⁰ Conversely, not every morally legitimate law protects some interest that is antecedently protected by morality. Apart from the existence of a law requiring people to drive, say, on the left-hand side of the road, no one has a morally protected expectation that people drive on the left-hand side of the road. Such an interest arises only after the enactment of a law requiring as much—and it arises *because* that law has been enacted.²¹ What individuals morally ought to do and what the law morally ought to do are issues that fall into two different areas of normative ethical theorizing.

This is not to say that the two issues are utterly unconnected. It seems reasonable to think that there are a number of legitimizing purposes of law. Arguably, one of them is to protect moral rights, such as the right to life. The moral importance of this right seems a sufficient justification to use the coercive mechanisms of law to protect it. This is not, however, to say that one of the legitimizing purposes of the state is to enforce all moral rules. As mentioned above, it would be illegitimate for the state to enforce laws prohibiting all lying.

Abortion presents an interesting example where the individual and political ethical issues are related in arriving at a position on whether abortion rights should be legally protected. The abortion rights opponent typically puts a moral principle governing individual behavior together with a moral principle governing the law to produce the conclusion that abortion should be criminalized. The moral principle governing individual acts is that to perform an abortion at any stage in the pregnancy is to commit murder—the *morally* wrongful intentional killing of a person. The moral principle governing state behavior is something like: any legitimate state should criminalize any act that is properly characterized as murder. Thus, the abortion rights opponent concludes that abortion should, as a matter of political morality, be criminalized. In contrast, the

20. Certainly, this has been presupposed in some Supreme Court decisions. Most recently, *United States v. Alvarez*, 132 S. Ct. 2537, 2547–48 (2012), invalidated the Stolen Valor Act, which criminalized lying about one's service record under certain conditions.

21. This is not to say that every law creates morally protected interests, much less moral obligations. There are some laws so evil that they utterly fail to create moral interests or obligations. But some laws, like certain traffic laws that properly regulate the flow of traffic to make it safe, clearly do create such interests.

abortion rights proponent denies the moral principle that to perform an abortion at any stage in the pregnancy is to commit murder, relying on the denial of early fetal personhood, which is another moral claim. Further, the abortion rights proponent argues that the privacy interests of the mother that are legitimately protected by the state, as a matter of political morality, include the right to abortion in the early stages of pregnancy.²²

But there are presumably other legitimizing purposes, such as to promote the public good. It is widely accepted, if not adequately theorized, that people have a moral right to *material* property that should be protected by the state. But this does not imply that the state should afford absolute protection to the right to property. The state may be morally justified in coercively taxing people for the express purpose of redistributing income from affluent to less affluent persons. In this case, the legitimizing purpose of promoting the public good qualifies the state's legitimate purpose of protecting *material* property rights. It is simply a mistake to think that the only legitimate purpose of the state is to coercively enforce norms that protect morally significant interests. This is a point that bears emphasizing because it will become important later on in the analysis.

At the risk of belaboring the point, the moral principles governing individuals and those governing the state are quite different. The moral principles governing the state are largely concerned with the issue of whether and when the state is justified in using *force* to ensure compliance with the law—"the problem of state legitimacy." At the most basic level, the problem of state legitimacy arises because the state's use of coercive enforcement mechanisms presumptively violates a person's right to autonomy—the qualified right to make and execute decisions about what goals to pursue and how to go about pursuing them. Indeed, it is precisely because people are presumed to have moral autonomy rights that the problem of legitimate state authority arises.

Here it is helpful to note that the state's use of coercion bears some resemblance to a robber who threatens to harm or kill a person if the

22. Murderers of abortion providers have offered some chillingly plausible reasoning defending their acts. The reasoning proceeds as follows: (1) A person with a right to life begins at conception; (2) Killing an innocent person is murder; (3) Fetuses are innocent persons; (4) Abortion kills fetuses; (5) Therefore, abortion is murder; (6) It is morally permissible to use deadly force when necessary to defend the lives of innocent persons; and (7) Therefore, it is morally permissible to use deadly force to prevent abortions.

victim does not hand over his or her money. The robber is clearly violating moral autonomy rights but it is commonly assumed that at least some states are morally justified in doing so. The question, however, is why these states are permitted by morality to do what no one else may do. How is any state different, from the standpoint of morality, from the robber? That is, assuming some states are *legitimate*²³ in being morally justified in doing so, what properties or practices explain why the state may do so? Why is it morally legitimate for the state to significantly infringe upon autonomy rights when no one else may?

In fact, the state's behavior seems worse than the behavior of a robber in a number of respects. First, the transaction with the robber is transient: the robber simply demands that you do something at a particular moment in time. In contrast, the state demands that you do as it directs for as long as you are within the confines of its boundaries. Second, a robber typically demands just one kind of act—whether it is to hand over your money or something else of value. The demands of the state, however, cover a large range of behaviors. The state not only enacts laws restricting violence but also frequently enacts laws that restrict sexual behavior, having criminalized at various times masturbation and sexual activity that involves oral-genital contact. In comparison, the robber seems far less presumptuous in infringing upon one's autonomy. It is because philosophical anarchism—the position that the use of coercion is never morally justified as a means of inducing certain acts—seems plausible, given that morality seems to afford a presumptive autonomy right to be free of coercive interference, that any body of law stands in need of a foundational justification in political morality. In particular, any legal protection of intellectual property is in need of such a justification.

In what follows, I argue (1) that as a matter of individual ethics, people have a morally protected interest in the content that they create that (2) should as a matter of political morality receive legal protection in certain cases. Thus, the argument will consist, as it should according to the argument given above, of two planks: a plank that draws from individual ethics and a plank that draws from political morality. Of course, the reader should always bear in mind that moral claims are always

23. See generally JOSEPH RAZ, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 194 (1994), for a discussion of the concept of legitimacy and the distinction between legitimacy and legality. An authoritative directive is legitimate if the authority has a moral "right to rule" that permits, from the standpoint of political morality, the state to coercively enforce the law. *Id.* at 210. A normative directive has the property of legality if and only if it is enacted in accordance with the grounds of law, as Dworkin put it, or with the criteria of legality, as Hart might have said. *See id.* at 206–10, 214–16. The latter simply expresses that the directive counts as law.

contestable; the best that can be done here is to ground both pieces of the argument in assumptions about morality the reader shares. There is nothing unusual about this; this is standard operating procedure in applied ethics and applied political morality.

IV. A TELLING SHORTCOMING WITH CONSEQUENCE-BASED
ARGUMENTS FOR AND AGAINST THE MORAL
LEGITIMACY OF LEGAL PROTECTION OF
INTELLECTUAL PROPERTY

As noted above, the Constitution vests Congress with the authority to enact copyright law to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁴ But, as also noted above, the Constitution provides the legal foundation for vesting Congress with this authority. But this is not the issue with which this Article is concerned, again, because the moral legitimacy of such authority and the resulting content of exercising this authority in the form of the existing content of copyright law is, at best, assumed. This Article is concerned with the more general issues of (1) whether persons have, as a matter of individual ethics, a morally protected interest in the content they create, which might or might not rise to the level of a moral right; and (2) whether the state should, as a matter of political morality, protect these interests with the coercive force of law. The second issue is a general moral issue that does not address the precise contours any law protecting intellectual property, if morally legitimate, should take. The moral legitimacy of a particular body of law protecting intellectual property is obviously an important issue, but it is an issue that depends in part on there being a compelling reason to think that legal protection of intellectual property is morally justified as a general matter.

It is worth noting that consequentialist arguments for or against legal protection of intellectual property seem to fall short in one important respect: none pays sufficient attention to the issue of whether authors have some distinctive, morally protected interest in the contents of their creations in virtue of the investment they make in producing that content. Indeed, such arguments do not, in virtue of their very character, even address the issue of whether content creators have a distinctive interest

24. U.S. CONST. art. 1, § 8, cl. 8.

in the content they create that deserves legal protection, much less whether people have different morally protected interests in the content created by others that outweigh the morally protected interest, if any, that content creators have in the content they create.

This is because the only factor that matters in consequence-based arguments is whether legal protection of intellectual property maximally conduces to the favored state of affairs, whether it be maximal happiness, human well-being, pleasure, or satisfied preferences. That is, there is only one variable of moral salience, and it is measured on the same scale for every person; for this reason, no one person has distinctive interests that receive special protection from morality. Moreover, since there is only one such variable, no weighing of interests takes place; the changes in the relevant variable for each person that result from some proposed act are simply aggregated and compared to the aggregates of the other options.

The author's investment of time, energy, or labor into the content the author creates matters only insofar as it implicates the favored variable, and the relevant interest on the part of the author counts for no more and no less than those of other persons; one util of a positive move in the variable for the author counts for no more than one util of a positive move in the variable for any other person.

This seems intuitively problematic because the interests and value that other people assign to the content are quite different from the interest and value that authors assign to their content. My interest in someone else's music is just the enjoyment I will get listening, whereas it is unlikely that the songwriter would value the content for just that reason even assuming songwriters write music to enjoy listening to it.

That this is a flawed approach can be seen in thinking about whether, as a general matter of political morality, the law should protect a person's interest in her life. If all that matters is whether the continuation of a person's life maximally conduces to some element of the common good, then it would follow that it is morally permissible for a particular person to be killed if it maximally conduces to the common good. No consideration whatsoever would be given to whether people have a morally protected interest in their lives that warrants legal protection. Consequence-based arguments presuppose the interests of all persons in, say, John Doe's life are aggregated and assessed on the same scale. Although in most cases John Doe's interests will be such that protecting his life conduces maximally to the relevant index of utility, there will be some possible cases in which it does not. Some of these cases might require killing him even though he has done nothing wrong.

This is why general consequentialist theories of morality command progressively fewer defenders in philosophy than they once did. The idea that no person has any morally protected interests that cannot

justifiably be infringed because of the desirable consequences on the lives of other persons seems radically implausible to contemporary sensibilities, which increasingly emphasize the importance of moral rights. Again, this might define the constitutional limits on Congress's authority to enact copyright law. But, to reiterate, this is a quite different issue, which has to do with evaluating the constitutionality of the various provisions of copyright law.

If people have distinctive moral interests in content, then a fully adequate evaluation of whether intellectual property protection is justified will have to be grounded in part in an analysis that does four things: (1) considers whether authors have a morally protected interest in the content that they create, discover, or otherwise make available in virtue of the investments they make in creating content; (2) considers whether other persons have a morally protected interest in that content; (3) weighs the respective interests; and (4) provides reasons grounded in political morality that justify legal protection of the weightier interests, which might require law's making access to content free for all persons. As we will see below, many of the arguments in favor of intellectual property protection are grounded in the view that authors have a moral right to control the disposition of their intellectual creations. These arguments are discussed and assessed in the following Parts. As we will see, these arguments tend to share a different, albeit related, shortcoming.

V. ARGUMENTS FROM INVESTMENT

There are a number of "arguments from investment." What these arguments all have in common is the idea that content creators invest something in which they have a strong morally protected interest, possibly rising to the level of a moral right, into the creation of content that should, as a matter of justice or fairness, be protected by a legal right to intellectual property. Each of these arguments will be discussed separately below.

A. *The Classical Lockean Argument for Material Property Rights*

It is instructive to begin with a brief look at the classical Lockean argument for "original acquisition" of *material* property. Original acquisition is the conversion of an object that no one owns into an object that someone owns. Locke realized that the existence of a moral right to property depends critically on the idea that persons can acquire a

property right in objects to which no one else has a prior moral claim or entitlement, which applies to objects that are not the property of anyone else. As Locke expressed the problem: if God gave the material world to all men to use in common to survive and thrive, how can someone acquire a right to exclude others from appropriating a material resource taken from the commons?²⁵ Property rights, unlike other rights, permit a person to appropriate something external to him and exclude others from appropriating it, even if the former does not use it and others need it. To put the problem of original acquisition another way: how can I take something that is not my property and turn it into something that is my property and allows me to exclude others?

Original acquisition is the core concern of theories justifying material property rights. Transfer of something to which one has an ownership claim is, in most cases, easily justified on the strength of autonomy considerations; if I have an interest in something, then my autonomy rights are such that I can abandon that interest unilaterally or in exchange for payment of some amount. If, in contrast, no one is ever justified in asserting ownership rights in something antecedently owned by no one else, then no one could ever come to have an ownership right in anything because every material entity has a history that can ultimately be traced back to parts that were owned by no one—perhaps before human beings arrived to appropriate those objects. The basic problem in justifying the claim that there are moral rights to property of any kind is showing that original acquisition is morally justified under certain specified circumstances that harmonize with basic intuitions about fairness and justice.²⁶

25. LOCKE, *supra* note 4, at 16–17. According to Locke:

Whether we consider natural reason, which tells us that men, being once born, have a right to their preservation, and consequently to meat and drink and such other things as nature affords for their subsistence: or revelation, which gives us an account of those grants God made of the world to Adam, and to Noah and his sons; it is very clear that God, as King David says (Psalm cxv. 16), “has given the earth to the children of men,” given it to mankind in common. But this being supposed, it seems to some a very great difficulty how any one should ever come to have a property in anything. I will not content myself to answer that if it be difficult to make out property upon a supposition that God gave the world to Adam and his posterity in common, it is impossible that any man but one universal monarch should have any property upon a supposition that God gave the world to Adam and his heirs in succession, exclusive of all the rest of his posterity. But I shall endeavor to show how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners.

Id. (quoting *Psalms* 115:16).

26. It should be recalled here that the methodology of this Article is the method of reflective equilibrium, which relies heavily on basic intuitions on the relevant issue.

Although this Article will not address this problem, it turns out that what Robert Nozick called the “principle of justice in transfer” in his libertarian theory of state legitimacy is somewhat more problematic than commonly thought.²⁷ Some problems described as being moral flaws in the content of copyright law can, I think, more plausibly be conceived of as caused by problems with a failure to properly frame and enforce contract and antitrust law, which presumably attempt to incorporate, at least in part, moral principles of justice in transfer. For example, the recording industry is frequently criticized as exploitive of both musicians and consumers. First, music prices are inflated beyond what would be the equilibrium in a freely competitive marketplace because the industry is controlled by something resembling an oligopoly. Second, royalties to musicians are less than what they should be because musicians lack the leverage to bargain at arm’s length because of the oligopolistic character of the mainstream recording industry. Here the problem arises because the oligopolistic character of the major labels affords them a leverage to which the content creator has no answer. What strikes many critics of copyright law as emblematic of what is wrong with existing copyright law is, in large measure, a problem that arises because of problematic market conditions and problematic contracts.

In any event, the argument of this Part of the Article should be considered as exclusively concerned with “original acquisition,” so to speak, of intellectual property, which amounts to original creation of novel content. It is worth noting here that Locke’s argument for the existence of a natural objective moral right to *material property* is concerned entirely with original acquisition. Like most theorists, Locke seems to regard principles of justice in transfer of material property as largely unproblematic.

Locke argues that one can acquire through the expenditure of one’s labor a property right in material objects that are otherwise unowned:

Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself. The labor 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 has provided and left it in, he has mixed his labor 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 has by this labor something annexed to it that excludes the common right of other men.²⁸

27. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 179 (1974).

28. LOCKE, *supra* note 4, at 17.

There are two provisos, according to Locke, that restrict original acquisition: (1) there must be enough of the material object for everyone else to appropriate; and (2) no one may acquire a material object to spoil or destroy it. Presumably, the second proviso is intended to ensure that one uses the material object or adds value to it.

According to this particular statement of the argument, then, one acquires a property right in unowned material objects by investing one's property on the object in the form of one's labor. There are a couple of possible explanations for how laboring on an object might give rise to a property right. First, it might be that one has mixed one's labor and hence one's property into the object such that it cannot be retrieved; on this view, putting my property into an object to which no one has any prior property interests creates in me a property right to that object. Second, it might be that one has, by one's labor, improved that material object thereby creating value that did not previously exist in the world; on this view, it is only fair that I have the value that I have created by investing my property into an object.

Either way, this argument does not clearly succeed in justifying *material* property rights. The first question has to do with the idea that we have property rights in our bodies and labor.²⁹ First, and of little consequence because contemporary Lockeans do not ground their theories of property in any assumptions about God's existence and nature, all things, on a traditional Christian view, are God's property, including ourselves. We do not "belong to" ourselves; we belong to God, as God's property, suitably defined. Although Locke starts from a point of view that is a theistic one, if not a Christian one, his first step out of the block is inconsistent with these theological underpinnings. Strictly speaking, we do not *own* ourselves from this point of view.³⁰ There is a missing moral premise in the argument.

Second, from a commonsense point of view, we simply do not conceive of the relationship of ourselves to our bodies as one of ownership. Although we naturally use the term *my* to refer to our bodies, we do not

29. One might think the inclusion of a premise that we own our bodies begs the question of whether there are natural objective moral rights to material property. To ground an argument for *material* property rights in a premise that presupposes that we have property rights in our bodies, which are material objects, might seem to assume what it seeks to prove. The problem with this objection is that Locke is concerned with whether we can acquire property rights in material objects that *are distinct from us*, and it is not clear that a person's body is *distinct* from the person. I am indebted to Sam Rickless for this observation.

30. Indeed, Locke's position is in tension with the Christian doctrine he frequently seems to presuppose. On one common view, we are holding our bodies in trust for God, who is the sole owner of those bodies. I find it somewhat odd to think of human beings as being divine *property*, but this seems a plausible view to many Christians.

intend this pronoun in the same way that we use it in talking about other objects. I am not my house, but I am my body. To characterize the relationship between me and my body as one of ownership seems misleading at best and confused at worst. Indeed, if *A* hits *B* and breaks *B*'s nose, *B* will have many complaints: assault, injury, suffering, and so on. But one complaint *B* does not seem to have, and one that would not be actionable in any jurisdiction, is that *A* damaged *B*'s property when *A* broke *B*'s nose.

Traditionally, what has been regarded as the most important problem with the Lockean argument seems to be far less problematic when the Lockean provisos are considered. To his credit, Robert Nozick, who grounds his theory of property rights in the Lockean argument for original acquisition, points out that one might plausibly think that we simply forfeit the expenditure of our labor-property when we mix our labor-property into some object that does not belong to us. If I swim out to the middle of the Atlantic Ocean and somehow fence off a portion and improve it by cleaning it of all pollution, most people will agree that I do not thereby acquire a property right in that portion of the ocean. The claim that I own my labor, even if true, does not imply that I own whatever unowned object I mix it with.³¹

In any event, it is important to realize that Locke's analysis did not end here. At this point, all he has shown, at most, is that people have a natural moral right to property—a conclusion grounded in principles of individual ethics. In addition, he must provide reason to think that the law should recognize and protect these rights. As will be recalled, the analysis here is two-pronged.

Locke's second prong is concerned with showing that a legitimate state *must* protect these natural rights because we have these rights in virtue of being moral persons. This job was done with his social contract theory. This piece of Locke's argument is concerned with showing that we actually contract with one another to put ourselves under an obligation

31. As Robert Nozick puts the point:

But why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?

NOZICK, *supra* note 27, at 174–75. For neo-Lockean responses to this point, see, for example, A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 271–75 (1992), and David Schmidtz, *When Is Original Appropriation Required?*, 73 *MONIST* 504 (1990).

to obey the state as long as it respects natural moral rights and makes law through democratic procedures.

One feature of Locke's theory is crucial to note. Locke believes that in the state of nature one has a moral right to defend oneself against threatened violations of one's moral rights to life, liberty, and property, as well as a moral right to *punish* violations of those rights. As one of the features of a legitimate state is a limited monopoly on the use of force, Locke argues that it is part of the social contract that each party to the contract give up her natural right to punish violations to the state. Persons in a legitimate state can defend themselves against threatened violations but they may not punish them; that is the exclusive province of the state—a claim that I will rely on in what follows.

B. Applying the Lockean Approach to Intellectual Objects

It is important to note that both interpretations of Locke's argument for original acquisition of material property depend critically on the assumption that we causally interact with preexisting material objects. To "mix" one's labor with some preexisting object is, at the very least, to causally interact with that object. I can put my labor into a piece of wood only because I can causally interact with the wood in the following sense: my labor changes the form taken by the piece of wood. Likewise, we can improve some material object only by changing it in a way that is more easily appropriated for the satisfaction of human wants or needs. It should be clear that we can *change* a material object only by causally interacting with it.

Even if Locke's argument were successful in justifying original acquisition of material property, it does not have any direct or obvious application to intellectual property because this assumption does not apply to intellectual content. If it makes sense to think of intellectual content as constituting objects that exist independently of us, they are *abstract* objects with radically different properties than material or mental objects—ideas, thought, perceptions, minds, et cetera. In contrast to material objects, abstract objects, if there be such, lack extension, solidity, and spatio-temporal location; it should be clear, for example, that the object denoted by the symbol 2 is an entity of a very special kind: it is intangible and neither here nor there. In contrast to mental objects, abstract objects exist without being present to anyone's consciousness. It seems reasonable to think that the number denoted by 2 and the proposition expressed by $2 + 2 = 4$ exist in a world where there are no minds to think about those objects; however, there are no ideas or other mental states in a world where there are no minds.

Of course, there are some difficult issues regarding the nature of certain artistic content.³² It seems clear, for example, that a sculptor must causally interact to mix labor with preexisting materials when she creates a sculpture; sculptures are, after all, physical objects. Here it is helpful to note that the sculptor has potentially two interests. One is in the physical object that is the sculpture. But this is not the relevant interest from the standpoint of intellectual property debates; there is no issue, after all, about whether the sculptor can exclude people from appropriating the physical object that is that particular sculpture. The relevant interest is the sculptor's interest in the "content" of that sculpture; her interest is in protecting the content of that sculpture so that it cannot be reproduced in some other material object.³³ Although the ontological nature of this content is not entirely clear, I am inclined to think that it is an abstract object. Perhaps, it is something like the "form" that the sculpture has.

However, if the ontological character of sculptural content is not entirely clear, it should be clear that much intellectual content has the form of an abstract object. A set of propositions, such as is expressed by a novel, constitutes an abstract object that contains as its members abstract objects because both sets and propositions are abstract objects if anything is an abstract object. Likewise, a string of linguistic symbols (as opposed to their representations on a page) is an abstract object containing abstract objects as members if, again, anything is an abstract object. Accordingly, novels, plays, and other forms of intellectual content that are linguistic in character are abstract objects.

What this means, it seems, is that we cannot causally interact with such objects, assuming they exist in a genuine way and are not merely theoretical posits. I can think about the abstract object denoted by 2 but I cannot causally interact with that object in any way. I can express some idea about 2 by means of the appropriate linguistic representation and communicate that idea to you, but I do not seem to have any direct causal access to that object; I cannot perceive 2 by any of the five senses, nor is it plausible to think that I have a sixth sense made for "perceiving" abstract objects. An abstract object might be important enough to warrant the expenditure of a great deal of human energy, but that energy will not be appropriately spent trying to causally interact with it. Reasoning about

32. I am indebted to Steve Layman for pointing this out to me.

33. At this point, no claim is being made about the legitimacy of this interest.

an abstract object is the way in which we come to understand it and does not involve causal interaction with such objects.³⁴

It is not clear what Locke thought, if anything, about intellectual property, but the foregoing analysis suggests that neither version of the classical Lockean argument can be directly deployed to justify property rights in, at the very least, intellectual objects that are linguistic in character, such as novels, poems, et cetera. If I cannot causally interact with abstract objects, then I can neither mix my labor with an abstract object nor use my labor to create new value by improving some existing abstract intellectual object. The Lockean argument, as he formulated it, would have to be modified in some significant way to apply to these intellectual objects. Further, if all intellectual content is abstract in character, as seems eminently reasonable to me, the Lockean argument would have to be modified to apply to any intellectual content whatsoever. As Locke formulates the argument, it has no bearing on the issues of intellectual property that currently divide us.

C. Learning from Locke: Contemporary Lockean Arguments for Intellectual Property Protection

As we saw above, the original Lockean argument for material property is not directly applicable to intellectual property because it relies on a notion of *mixing of labor* that does not apply in circumstances in which one does not, or in the case of intellectual property, *cannot* labor on a preexisting object in the world, such as the creation of new content, either because there is no preexisting object at all or because it is the kind of object with which human beings cannot causally interact. The Lockean argument must be modified to avoid reliance on this notion that applies only to material property, if at all.

One way of doing this to avoid the problems that arise with the original Lockean argument is to make a variation of a move that Locke himself makes. At first the sole emphasis in the argument is that a moral right to property in original acquisition is acquired by mixing one's property with an object and thereby having "fixed [one's] property in [it]."³⁵ Then Locke begins to observe that labor "improves" the objects in the world and adds value to it:

34. This is a standard view of abstract objects. See Gideon Rosen, *Abstract Objects*, STAN. ENCYCLOPEDIA PHIL. (Mar. 6, 2012), <http://plato.stanford.edu/entries/abstract-objects/>.

35. LOCKE, *supra* note 4, at 18 ("The labor that was mine, removing them out of that common state they were in, has fixed my property in them.").

But the chief matter of property being now not the fruits of the earth and the beasts that subsist on it, but the earth itself, as that which takes in and carries with it all the rest, I think it is plain that property in that, too, is acquired as the former. As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labor does, as it were, enclose it from the common. Nor will it invalidate his right to say everybody else has an equal title to it, and therefore he cannot appropriate, he cannot enclose, without the consent of all his fellow commoners—all mankind. God, when he gave the world in common to all mankind, commanded man also to labor, and the penury of his condition required it of him. God and his reason commanded him to subdue the earth, i.e., improve it for the benefit of life, and therein lay out something upon it that was his own, his labor. He that in obedience to this command of God subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him.³⁶

In Chapter V, Locke does not exploit what seems a plausible moral principle that could form the basis for a second, more persuasive version of the argument—the moral principle that when a person labors on an object from the commons and creates new value in it, that person is entitled, as a matter of both fairness and just desert, to the value he creates and hence the object, as long as there is enough as good left for everyone else.³⁷ This, it seems, is a missed opportunity, as this seems to be a true statement of a moral principle. It is so intuitively plausible, indeed, that Locke should have dropped the claims about mixing labor and made this argument.

When one substitutes the idea that the laborer creates the majority of the value of an object in the commons for the mixing-labor idea, there is a *prima facie* reason to think that she deserves, as a matter of fairness, to keep that value. But putting this together with the idea that there is enough of the resource, just as good in quality, for everyone else, strengthens the argument. Now it is not just a matter of one person having a claim in an object to which no one else has an antecedent claim, which would be why it might seem fair that the laborer may keep the object. It is also a

36. *Id.* at 19–20.

37. One might object that one is entitled to only the value one creates and not the object. There are a couple of responses to this. First, there is no way to extract the value from the object, so to speak, and give the laborer just that value—other than in modern times to pay someone the amount of the value added. Second, labor, on Locke's view, is responsible for nearly all the value in an object: 99/100, according to Locke. As Locke puts it: "[I]f we will rightly estimate things as they come to our use and cast up the several expenses about them, what in them is purely owing to nature, and what to labor, we shall find that in most of them ninety-nine hundredths are wholly to be put on the account of labor." *Id.* at 25.

matter of no one else being *harmed* by the appropriation. Strictly speaking, the laborer's acquisition of a property right takes nothing away from anyone else that cannot easily be replaced. Each consideration provides a good reason to think the laborer deserves a property right in the object; it is hard to see how a plausible objection to the laborer's ownership could even get off the ground when the two ideas are put together. It is not enough to ask the question; an argument is needed to support the idea that the laborer gains no right to the object, and it must be grounded in some plausible moral claim.

Nozick's concern that someone who labors on a material object simply loses his labor is directed at Locke's idiosyncratic metaphysics of labor and the equally idiosyncratic moral principle that must be assumed—that a person acquires a property right in an unowned object by laboring on it solely by virtue of having *mixed his property* into it. Less plausible is the assumption that I lose any new value I have created by laboring on an unowned object. It is reasonable to think that a person who fences off a portion of the Atlantic Ocean and cleans it of pollution gains no property right to it. But that arguably is because the laborer has not significantly improved the value of any portion of the ocean that could be appropriated without violating the Lockean proviso. To what fruitful use could that portion of the ocean be put that improves on the uses to which it is currently put? If one, on the other hand, fences off a sufficiently large portion to violate the Lockean proviso and cleans it of pollution, then she has certainly significantly added value in one sense. But in another she has detracted from the value by reducing the amount of ocean available for transporting people and goods, which is, of course, its most valuable use. That reduction of value outweighs the value added by labor to amount to an appropriation that spoils the resource, which would violate the other Lockean proviso. So it appears that one would rightly lose one's labor because both provisos are violated and the relevant moral principle of fairness is not satisfied.

In the context of making a Lockean-style argument for intellectual property protection, the analogous move would be simply to argue that, regardless of whether authors mix their labor with anything, they bring new value into the world that was not available prior to the expenditure of their labor. Since authors are responsible for the creation of this value, it would be unfair not to allow them to define the terms upon which others may take advantage of this value. They are responsible for that value and hence deserve its full benefits. Moreover, if it makes sense to think that there is enough left for others in the "intellectual commons" or if there is nothing that would count as an intellectual commons at all, then the argument for intellectual property protection seems that much stronger.

This is a particularly significant alteration of the original version of the argument emphasizing the mixing of labor (and hence one's property) with the object. Even if there were some relevant sense in which one could mix one's labor with an object, the argument remains somewhat unpersuasive because of its metaphysical character. This character requires the argument to rely on a principle that does not seem sufficiently plausible from the standpoint of ordinary moral intuitions to succeed. First, the idea of mixing one's property into an unowned object by laboring on it does not obviously justify legal protection of the laborer's property rights in part because, without reliance on a premise that requires the creation of new value through labor, the principle justifying original acquisition would seem to be overbroad. There would be many cases of something more appropriately characterized as "vandalism" that would incorrectly result in gaining a property right over the vandalized unowned object. Second, and as noted above, such a premise, because of its abstract premise, seems to lack a firm foundation in moral rules governing fairness or justice. Indeed, this is why Nozick's concern about the labor-mixing metaphor can be grounded in an example that seems clearly not to justify an instance of original acquisition; merely mixing one's property (in the example, tomato juice) with an unowned object (in the example, a substantial portion of the ocean) does not have any obvious normative implications.

What seems true of the Lockean argument for original acquisition of *material* property also seems true of a Lockean-style argument for original acquisition of *intellectual* property. Replacing the overly metaphorical mixing-labor language with language involving the creation of new value seems plausibly to fall within the area of morality defining standards of fairness and desert. If I take an object in its natural state from the commons and improve it to create new value in the world, it seems only fair, other things being equal, that I receive the bundle of protections that constitute a property right. Indeed, on the assumption that the relevant Lockean proviso is satisfied with respect to that particular object,³⁸ it would seem intuitively *unfair* to deny the person who created the new value. If I have created new value through my labor on an unowned object and leave as much and as good for everyone else, it is very hard to see how anyone might have even a weak *prima facie* moral claim that I should not have a property right in the object. I created the new value

38. An assumption that will be considered below.

without depleting the amount of the relevant object that can be improved or used by others.

Although some would reject this line of reasoning on the strength of the now-familiar claim that no one person is fully responsible for the content they create, this objection has little force. It might be true that no author is solely responsible for the value introduced into the world by a novel piece of content *C* because her ability to create *C* was shaped by the efforts of others from whom she developed her skills and ideas, but this claim cannot bear the weight of delegitimizing intellectual property protection of the author's interest. At most, it supports the conclusion that the contributions of these other persons should be appropriately compensated. It does not imply the stronger claim that every person should have free access to content. This argument provides no reason to think that someone who contributed nothing to the author's ability to create the relevant piece of content *C* should be able to access *C* without compensating someone or that the author should not be able to exclude such a person from appropriating *C* without paying the author a fee. The fact that others contributed value to *C* does not imply that, for example, *I* should get that content for free.

Moreover, this response concedes too much. As Adam Moore points out, one can argue that the contributions of those who have contributed to the author's ability to create *C* have been fairly compensated through a variety of social mechanisms.³⁹ Education, after all, is not free. It requires the payment by someone, possibly taxpayers, of tuition and teacher salaries, as well as the purchase of books and textbooks. It seems reasonable to think that such payments represent fair compensation for the contributions made by such persons to the author's ability to create *C*. As Moore puts this important point, "When a parent pays, through fees or taxation, for a child's education it would seem that the information—part of society's common pool of knowledge—has been fairly purchased."⁴⁰ Accordingly, if the argument that it is only fair that authors be granted a legal right to exclusive control of the contents they create is flawed, it is not because such a right would be inconsistent with any rights of people who made indirect contributions to those contents through other works that influenced the authors.

But beyond this, one can argue that the state's legitimizing purpose of promoting the public good might simply require the state to treat new content as though *the entire value* of the content were created by the author. It bears reiterating that there are likely multiple legitimizing

39. See ADAM D. MOORE, *INTELLECTUAL PROPERTY AND INFORMATION CONTROL: PHILOSOPHIC FOUNDATIONS AND CONTEMPORARY ISSUES* 172–73 (2001).

40. *Id.*

purposes of the state that might conflict, and sometimes the legitimizing purpose of promoting the public good will outweigh the legitimizing purpose of protecting moral rights.

Another way of avoiding reliance on some sort of labor-mixing idea is to focus exclusively on the author's effort. Michael McFarland, for example, argues as follows:

It takes much thought, time and effort to create a book, a musical composition, or a computer program. Those who worked to create it have the strongest claim to the benefits of its use, over anyone else who contributed nothing to the project.⁴¹

It is important to note here that McFarland's argument does not rely, either explicitly or implicitly, on the premise that authors create content by mixing their labor with some preexisting object. The claim is simply one of justice: someone who invests significant effort has a superior claim than anyone else to the content.

This particular modification of the Lockean argument is helpful but less so than the first because it falsely assumes that authors necessarily invest a great deal of something, whether thought, time, or effort, into their creations. Although it is presumably true that one must invest "much" thought, time, and effort into making a film like *Pearl Harbor*, this is not true of all content creation. With proper inspiration, a poem or a song might be created in a matter of minutes with little thought or effort. If one must exert oneself to some threshold extent to gain a claim in the product of one's exertion, then this will have to be determined on a case-by-case basis with the outcome being that not every author will gain an intellectual property right. This, of course, might in the end turn out to be correct, but McFarland's version of the argument, like the other investment arguments, is intended to justify a *general* right to intellectual property. Still, how much work one expends in creating a novel piece of creative content is a variable that helps to determine the value of the investment—if not the value of the content, which is determined, and rightly so, by a free market.

Accordingly, it is crucial to note that McFarland's argument does succeed at a more general level insofar as it adds another morally relevant consideration to the mix—that the author must invest something of value

41. Michael C. McFarland, *Intellectual Property, Information, and the Common Good*, B.C. INTELL. PROP. & TECH. F. (June 4–5, 1999), http://www.bc.edu/bc_org/avp/law/st_org/iptf/commentary/content/1999060503.html.

in order to create new value in the object. Although McFarland does not take into account the other features adduced above, it is instructive to see how they function together to strengthen the case for original acquisition. Notice that it is not just that the laborer created new value in an unowned object that explains the claim of the laborer to a protected property right to the object. It is rather that the laborer has invested something of value in order to create this new value. Insofar as the Lockean proviso is satisfied, it seems quite reasonable, from the standpoint of widely accepted moral intuitions, to think that it would be unfair not to recognize and protect the laborer's property interest in the new value he creates. There are, for example, many serious moral problems with slavery, but one of those problems is that the valuable fruits of slave labor were stolen from persons regarded as slaves. Indeed, the very point of reparations would be to correct this grave injustice.

The question then arises as to why such factors would plausibly support a claim of fairness that warrants recognizing and protecting the property rights in the object. Adam Moore offers the following possibility, arguing that intellectual property protection is presumptively justified in virtue of protecting the author's sovereignty: "[L]abor, intellectual effort, and creation are generally voluntary activities that can be unpleasant, exhilarating, and everything in-between. That we voluntarily do these things as sovereign moral agents may be enough to warrant noninterference claims against others."⁴² Moral principles protecting the sovereignty of a rational agent, on this view, will protect the agent's investment of something that requires an exertion of sorts. As long as no one is made worse by the author's ability to exclude others from the content she creates, intellectual property protection is justified; this condition is known as *Pareto superiority*. Thus, as long as the acquisition, so to speak, of intellectual property is Pareto superior, legal protection of that acquisition is, as a matter of political morality, justified.

Here it is worth noting that Moore makes two important moves. First, rather than grounding his argument in Locke's claim that people have property rights in their bodies and labor, Moore grounds his argument for intellectual property rights in the status of a person as a sovereign moral agent. This avoids the problems of begging the question and misconceiving the moral relationship between oneself and one's body and labor, including intellectual labor, to which Locke's argument gives rise, and replaces it with the much more plausible claim, presupposed by the very idea that people are accountable for their behavior and have moral claims against other people, that people have the special moral

42. MOORE, *supra* note 39, at 108.

status of sovereign moral agent (or, preferably, persons with autonomy rights)—a status that requires moral respect from other beings that have this same status. Second, he assumes a somewhat weaker limiting condition on original acquisition than the Lockean proviso requiring that enough and as good be left for others. Moore takes the position that the acquisition is justified if Pareto superior. Both of these features will be discussed below.

*D. Status Justifications of Rights vs. Instrumental
Justifications of Rights*

As mentioned above, Moore presupposes that it is the status of a human being as a sovereign moral agent that justifies protecting certain rights. This amounts to what is called a status justification for the existence of a moral right that ought to be protected by law. In the case of an act-consequentialist or “instrumentalist” justification, however, there are no moral rights. Legal rights are justified by their effects on the promotion of the relevant consequences; as Mill puts it, the effects of recognizing a legal right are so important that Mill seems to conceptualize rights in terms of what society ought to protect:

When we call anything a person’s right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion. . . . To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of.⁴³

Moreover, Mill’s justification is clearly act-consequentialist: “those possessive relations [that is, which constitute rights] that are *valuable enough* that it is worthwhile for society to institute sanctions to protect them.”⁴⁴ Here, “value” is best understood in terms of the effects on social utility so as to cohere with Mill’s act-consequentialism.

One problem with an act-consequentialist approach to justifying legal protection of rights, as we have seen, is that it seems to presuppose a conception of rights that lacks the most important moral feature of rights: the ability to trump the effects of the protection on the desired state of affairs. Legal rights will always be qualified by the utility of

43. JOHN STUART MILL, *UTILITARIANISM* 78–79 (Electric Book Co. 2001) (1863).

44. Leif Wenar, *Rights*, STAN. ENCYCLOPEDIA PHIL. (July 2, 2011), <http://plato.stanford.edu/entries/rights/> (emphasis added) (quoting unidentified passage from Mill).

protecting them and thus have no real teeth, as the transplant example discussed above shows.⁴⁵

The problem here is that the only morally salient factor in evaluating an act is its tendency to promote the favored consequences. When an agent decides how to act, no one's interests or utility counts for more than another person's. As Bernard Williams puts it by way of criticism, the moral status of people is defined entirely by being receptacles, so to speak, of pleasure, utility, happiness, et cetera. It has nothing to do with people being rational, moral agents, or free agents.⁴⁶ Indeed, as Peter Singer approvingly points out, it implies that animal pleasure and pain is morally on par with equal amounts of human pleasure and pain and hence supports moral vegetarianism.⁴⁷ Even if one is sympathetic to moral vegetarianism because animals have a morally protected interest in being free of unnecessary suffering, as I am, act-consequentialism seems utterly unacceptable because it ignores the qualities that seem intuitively to account for a special moral status as *persons* with rights to autonomy, et cetera.

The views of Williams and Singer help to shed light on the deeper problem with act-utilitarianism. Although act-consequentialist justifications are considered instrumentalist in character, the basic assumption that dictates the fleshed out contours of the theory is a status-based assumption that assigns no special moral status to human beings apart from their capacity to experience pleasure, happiness, well-being, et cetera—capacities they seem to share with animals. This (1) seems intuitively implausible and is certainly incompatible with many ordinary moral judgments involving people and involving animals; and (2) results in a moral calculus that entails unacceptable answers to many moral issues because the

45. See *supra* note 19 and accompanying text.

46. J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 116–17 (1973). As Williams famously puts it:

The point is that [the agent] is identified with his actions as flowing from projects or attitudes which . . . he takes seriously at the deepest level, as what his life is about It is absurd to demand of such a man, when the sums come in from the utility network which the projects of others have in part determined, that he should just step aside from his own project and decision and acknowledge the decision which utilitarian calculation requires. It is to alienate him in a real sense from his actions and the source of his action in his own convictions. It is to make him into a channel between the input of everyone's projects, including his own, and an output of optimific decision; but this is to neglect the extent to which *his* actions and *his* decisions have to be seen as the actions and decisions which flow from the projects and attitudes with which he is most closely identified. It is thus, in the most literal sense, an attack on his integrity.

Id.

47. See generally Peter Singer, *All Animals Are Equal*, in ANIMAL RIGHTS AND HUMAN OBLIGATIONS 148 (Tom Regan & Peter Singer eds., 1976).

status-based assumption not only provides no real protection of individuals in the form of rights, but seems logically inconsistent with them.

There are, in contrast, rule-consequentialist approaches that differ from act-consequentialist approaches in the following way: whereas the right thing to do on an act-consequentialist view is that which maximizes consequences, the right thing to do on a rule-consequentialist view is that which conforms to the set of rules that if always followed would maximize utility.⁴⁸ This would allow for the existence of rights defined by the rules. But, strictly speaking, this does not seem to incorporate a reductively consequentialist foundation; after all, there is no pure consequentialist justification for the favoring of a set of rules that maximizes utility in circumstances when departing from this set actually maximizes utility. Rule-utilitarianism seems like an ad hoc consequentialist device to avoid the problems of act-utilitarianism without changing the basis for moral status; but because of its implicit moral valuation of rules, it is not utterly implausible to characterize it as a weak form of deontological theory, which, again, entails nothing more than that something other than utility is sometimes relevant in determining the moral quality of an act.

The more common approach is the status-based approach that has its beginnings in Kant and is adopted by Locke, Nozick, John Rawls, Robert Merges, Moore, and many other property theorists and theorists concerned with economic justice. On this view, people have a certain status—moral “personhood”—that is grounded in certain morally salient characteristics, such as theoretical and practical rationality, free will, and the ability to form and execute plans that reflect agent ends that make life meaningful. As Warren Quinn described the justification for rights:

A person is constituted by his body and his mind. They are parts or aspects of him. For that very reason, it is fitting that he have primary say over what may be done to them—not because such an arrangement best promotes overall human welfare, but because any arrangement that denied him that say would be a grave indignity. In giving him this authority, morality recognizes his existence

48. Although Mill is commonly characterized as an act-utilitarian, I have argued elsewhere that he is neither an act-utilitarian nor rule-utilitarian. Rather he is something in between: a “tendency utilitarian.” According to this view, the source of the moral obligation to perform an act resides entirely in its tendency to promote utility; thus, conformity or failure-of-conformity to a rule is *not* any part of what makes an act right or wrong. Acts are right or wrong *because* they tend or do not tend to promote utility and *not* because they conform or fail to conform to an applicable moral rule. See generally Kenneth Einar Himma, *The Interpretation of Mill's Utilitarianism*, 15 HIST. PHIL. Q. 455 (1998).

as an individual with ends of his own—an independent *being*. Since that is what he is, he deserves this recognition.⁴⁹

The idea is that there is some attribute of the person—being “an individual with ends of his own”—that requires respect and recognition from other persons. But if the only relevant attribute is that the individual has ends of his own, the foundation for Quinn’s claims about human status arguably is not strong enough to do the work. The recognition that is due to each individual can be accorded to that individual by recognizing the moral rights that go along with this status and affording them legal protection, among which is a moral right to autonomy.

Thus, rights are not, as in a consequentialist or instrumentalist conception, justified in virtue of the consequences they promote. As Quinn describes the status approach:

It is not that we think it fitting to ascribe rights because we think it is a good thing that rights be respected. Rather we think respect for rights a good thing precisely because we think people actually have them—and . . . that they have them because it is fitting that they should.⁵⁰

On this view, the idea is that people have moral rights in virtue of moral status that should be recognized, respected, and protected by law. Indeed, as was noted above, the principal disagreement between the abortion-rights proponent and the abortion-rights opponent is that the latter believes, while the former generally does not, that the fetus has this special moral status that affords it a natural moral right to life that entails abortion is murder and must be criminalized by a legitimate state.

There is another important question regarding rights, and that question concerns the function of rights—a related but very distinct question from the justification of rights. There are two theories of the function of rights: will theory and interest theory. According to the will theory, the function of rights is to make the rights-holder sovereign over a particular duty owed by someone else.⁵¹ The important idea here is the status of a rights-holder as a sovereign agent exercising dominion over a particular claim to something. In contrast, an interest theory holds that the function of rights is to protect the interests of human beings.⁵²

Both theories are theories of the function of a right and not a theory of the justification of a right; as such, a theory of the function of a right

49. WARREN QUINN, *MORALITY AND ACTION* 170 (1993) (footnote omitted).

50. *Id.* at 173.

51. See generally H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* (1982).

52. For a contemporary formulation of the interest theory, see, for example, Matthew H. Kramer, *Getting Rights Right*, in *RIGHTS, WRONGS AND RESPONSIBILITIES* 28 (Matthew H. Kramer ed., 2001).

does not logically imply a theory of the justification of a right. So each theory of the function of rights is compatible with each theory of the justification of rights. Moore's theory does not necessarily presuppose a will theory but his emphasis on people being sovereign agents as the ground for a right suggests that he has something like this in mind, although he is clearly a status theorist when it comes to justification of rights.

In what follows, I take the position that moral rights are justified in virtue of the special moral status that human beings have as "persons," which is distinct from the status of being a human being, as the notion of a human being is a biological, empirical concept. But I will rely on the entire array of moral qualities that seem to contribute to this special moral status—including but not limited to those on which Moore relies in his contribution to this issue⁵³: capacity for autonomy, rationality, free agency, et cetera. In addition, I see no reason to reject either the will theory of rights or the interest theory of rights, although I think the latter is the most important function rights play and so assume something like a hybrid theory.

*E. Limiting Conditions on Original Acquisition:
The Lockean Proviso and Pareto Superiority*

Moore understands the importance of a limiting condition on original acquisition and hence understands the importance of the Lockean proviso that there be enough of similar quality for all others in supporting the claim that one acquires a property right in the products of one's intellectual labor. It is this premise that does much of the work in explaining why one does not simply lose one's labor in conditions of original acquisition. Instead of the Lockean proviso, Moore incorporates a somewhat more sophisticated limiting mechanism on original acquisition: the principle of Pareto superiority. The principle of Pareto superiority functions in the following way as a limiting condition of gaining property rights in original acquisition: investing one's labor in an unowned object gives the laborer a property right in the object provided that no one else is made worse off by the acquisition of the object.⁵⁴

This principle differs from the Lockean proviso in that it allows original acquisition in more circumstances than just the situation in

53. See generally Adam D. Moore, *A Lockean Theory of Intellectual Property Revisited*, 49 SAN DIEGO L. REV. 1069 (2012).

54. See MOORE, *supra* note 39, at 109–14.

which acquisition leaves as much and as good for everyone else. If the Lockean proviso is satisfied, then the principle of Pareto superiority is satisfied. As Locke put the point:

[H]e that leaves as much as another can make use of does as good as take nothing at all. Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst; and the case of land and water, where there is enough for both, is perfectly the same.⁵⁵

But the converse is not necessarily true. One might think that an acquisition under circumstances in which the Lockean proviso is not satisfied creates a condition of scarcity that must worsen the position of everyone else to some extent. But there can be circumstances in which a particular resource is of idiosyncratic interest to only a comparatively small class of individuals, the others being indifferent with respect to the resource. In such cases, the others might be made better off by the acquisition even though the Lockean proviso is thereby violated without anyone else being made worse off. Under these circumstances, the principle of Pareto superiority would allow the acquisition where the Lockean proviso would not. Thus, Moore's theory of justified original acquisition allows acquisition in more circumstances than a pure Lockean theory of justified original acquisition.

Both moves by Moore provide a promising beginning for a successful argument justifying legal protection of intellectual property. Although my argument is status based, assuming something like Moore's observation that people are sovereign moral agents deserving of a certain kind of moral respect, I will choose a somewhat different mechanism as a limiting condition for original acquisition of intellectual property. If the existence of moral rights depends on the moral status of persons and the underlying quality that grounds this status, and one of the functions of rights is to further the interests of persons, then it seems reasonable to think that one must consider the specific interests of all persons in a piece of content that will transcend the interest in not having one's position worsened, and weigh them according to what I take to be a more plausible moral scale.

55. LOCKE, *supra* note 4, at 20.

VI. A COMMON SHORTCOMING IN THE INVESTMENT ARGUMENTS FOR INTELLECTUAL PROPERTY PROTECTION

The discussion of the status theory of justification above—and the last paragraph of the last Part—suggests that many investment arguments for intellectual property seem to be vulnerable to a common objection. Whereas the arguments against intellectual property seem to give short shrift to the issue of whether authors have a morally protected interest in their creations, most of the investment arguments seem to give short shrift to the issue of whether people have a morally protected interest in the content created by others. Surely, if the interests of the authors are relevant, so are the interests of other persons.⁵⁶ Indeed, one might plausibly believe that there might be content so important to humanity that the interests of other people, taken together, defeat whatever interest the author has in that content, even if other persons are not harmed by allowing the acquisition.

To see the problem, consider again some of the investment arguments. Although a pure Lockean argument would be qualified by the proviso that there be enough of the resource left to others, the interests of others count only insofar as they are not harmed.⁵⁷ Likewise, Moore's theory justifies legal protection of intellectual property protection only to the extent that it is Pareto superior. On Moore's view, intellectual property protection is justified only insofar as it makes the author better off

56. It is worth noting here that McFarland never considers the extent to which the lives of others might be worsened by giving an author exclusive control over the content of her creation. All that matters to McFarland is the difficult work invested by the author in the content she creates. See McFarland, *supra* note 41.

57. Another species of argument from investment not considered above is what I will call the "personality argument," which originates with G.W.F. Hegel and takes a variety of forms. See, e.g., G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 67–103 (Allen W. Wood ed., Cambridge Univ. Press 1991) (1820). At the foundation of each such argument, however, is the idea that an individual enjoys an exclusive moral claim to the acts and content of his or her personality, personality being understood to include a variety of character traits, dispositions, preferences, experiences, and knowledge. This special claim to personality is sometimes understood as ownership or something closely analogous to ownership; thus understood, it would resemble the foundation of the classical Lockean justification for property, which relies upon the claim that we own our body and its activities. The idea here is that the claim of ownership over one's personality will extend to the products of, so to speak, one's expenditures of personality through acts that express it. As newly created content derives from the expenditure of the author's personality and in some sense instantiates the author's personality, the author owns the content. Personality arguments having this form do not consider the interests of other persons in content created by an author at all.

without worsening the position of other people, which I take to be a “harm” of sorts.⁵⁸ It seems clear that an adequate evaluation of the propriety of intellectual property protection must assess *all* the interests that people might have in some piece of intellectual content—and not just the interest in not being harmed.

Although some have argued that legal protection of intellectual property always worsens the position of other persons,⁵⁹ arguments from investment that include mechanisms like the Lockean proviso or principle of Pareto superiority presuppose that the only relevant interest that other persons have in content created by someone else is that they not be made worse off or harmed by a legal property right on the part of the author that permits the author to exclude other persons from content he has created.

But there is no reason to suppose that this is the *only* interest people have in content created by others that is morally relevant in determining the extent to which legal protection of intellectual property is morally justified. People clearly have prudential interests in being benefitted: it always conduces to my best interests to be the recipient of what is properly characterized as a “benefit.”⁶⁰ It is surely true that not all prudential interests in being benefitted are protected by morality, but it is also true that some are. At the very least, it is presumptively morally *good* that a person’s acts result in benefits to others. But there are surely circumstances in which conferring benefits on others is morally *obligatory*

58. As Moore puts the point:

If no one is harmed by an acquisition and one person is bettered, then the acquisition ought to be permitted. In fact, it is precisely because no one is harmed that it seems unreasonable to object to [what is known as] a Pareto-superior move. Thus, the proviso can be understood as a version of a “no harm, no foul” principle.

MOORE, *supra* note 39, at 109.

59. Jeremy Waldron suggests that intellectual property rights always make others worse off than they would have been. If, for example, A discovers the only possible cure for cancer and perversely decides to withhold it from everyone with cancer, the cancer patients seem worse off in the following sense: they had a positive chance of survival prior to A’s exclusive appropriation because, after all, someone else might have discovered it and made it freely available; now this chance is denied them. Although such patients might achieve spontaneous remission, their chances of becoming cancer-free are significantly reduced by A’s exclusive appropriation of the cure. For this reason, on Waldron’s view, the patients are made worse off by this appropriation. Indeed, as any person could be stricken with cancer, one could argue that all persons are made worse off by A’s exclusive appropriation. See Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 866–68 (1993).

60. Someone might be mistaken in characterizing some effect of an act as a “benefit.” A heroin addict presumably regards a free dose of heroin as a benefit, but from an objective or even impersonal point of view, she would seem to be mistaken in this characterization, as the continued use of heroin is highly likely to result in harm to the addict.

and in which what one may permissibly do is limited, from the standpoint of morality, by others' interests in being benefitted.

Consider the following example from Peter Singer.⁶¹ An adult notices an infant face down at the edge of a nearby pond in some very shallow water and can see the infant is flailing. Instead of simply bending over and removing the infant from the water, a gesture that would cost no more than a few seconds and some wet hands, he walks by without doing anything and allows the infant to drown. It seems clear that the adult has done something grievously wrong, which entails, at the very least, that we have a moral obligation to help those in need when it can be done without significantly worsening one's own position. If so, then morality sometimes requires that we confer benefits on others and hence, that we must weigh our interests against the interests of others in our deliberations about what we should do.

The important point here is not the conclusion Singer draws from the example, as that inference is problematic. He believes he can infer the much stronger principle that we have a moral obligation to confer benefits on people so long as it does not cost us something of proportional value.⁶² On Singer's view, I would have to risk my arm to save a life. The reason that he cannot derive that principle from the example is that in the example, the adult is not risking anything remotely close to being disproportionate; the moral benefits so exceed the moral costs that it would be heinous not to help. The point here is simply to point out that the vast majority of people believe there are some circumstances in which we have to take into account the benefits to others in moral deliberations about what to do. If the reader accepts this point, then he or she is committed to the methodology I describe in the next paragraph or must counter it with an argument—and that is all I need to accomplish with this example.

Accordingly, if the two interpretations of the Lockean justification of material property rights fail to show that the expenditure of labor is sufficient to create property rights in intellectual or material objects, they are suggestive of a plausible approach for determining whether someone should be afforded a limited legal right to exclude others from appropriation of an object. To determine whether the law should allow someone to

61. Peter Singer, *Famine, Affluence, and Morality*, in INTERNATIONAL ETHICS 247, 249–51 (Charles R. Beitz et al. eds., 1985).

62. *Id.* at 249.

exclude others from appropriating some material or intellectual object, we must weigh all the competing interests. If my interests in *X* outweigh the interests of all other parties, then that proposition is a pretty good reason, although not necessarily a conclusive one, to think that my interests in *X* are justifiably protected by the law.

At this point, an important objection suggests itself. One might think that weighing of interests to determine what interests should be protected by law is a consequentialist justification. It is not. Deontological theories are compatible with taking consequences into account in a variety of ways. For example, one might take consequences into account in determining whether one should go beyond the call of duty, as in a case where someone rescues others from a burning building. In contrast, the idea of an act's being beyond the call of duty is incompatible with act-consequentialist theories because one's only duty is to maximize utility; there is no other good that could be pursued only by going beyond the call of duty. Similarly, there is no reason to think that the limits of the *content* of a right cannot be explained by considerations having to do with consequences. Once the content of the right is fixed, it trumps consequences. But consequences might rightly, and commonly do, figure into determining the content of a right.⁶³

Most importantly, however, is that weighing the moral importance of an interest does not necessarily involve aggregating and assessing the consequences for the community of infringing it. The moral importance of the interest in life is not at all diminished by the fact that one's life might be so painful that one might wish to end one's life. No matter what the conditions of a person's life are, standard views hold that he has a moral right to life. What he can permissibly do about the painful quality of his life is a separate moral matter.

This point can be seen in another issue involving the moral right to life. The right to life is generally thought qualified by a moral principle that allows one to use deadly force if it reasonably appears necessary to save one's life from a culpable attack. The question is whether the conditions under which use of deadly force is morally permissible extend to imminent threats to a person's life that do not involve a culpable attack, as when someone who is known to be insane attempts to kill a person. Some theorists argue that moral principles of self-defense allow deadly force in such cases,⁶⁴ while others deny this.⁶⁵ In resolving such issues,

63. Ideally, a theory is needed to justify this claim, but as most people would accept these claims and my methodology is one of reflective equilibrium, this need not be done here.

64. See, for example, Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283 (1991), for an interesting discussion of various difficult cases.

one has to take into account a number of factors that might qualify the right to life and weigh them—for example, culpability, considerations of fairness, and the circumstances of the threat to life. But this does not involve deciding the issue simply on the basis of which has the most desirable consequences. Even when consequences figure into the weighing calculus, they will be weighed against factors other than consequences.

The mistake, then, that most theorists make in their attempts to justify original acquisition of intellectual property rights that should be protected by law is to limit the relevant interests of other people in content to simply not being harmed or made worse off. It seems clear from most other intuitive moral contexts that we must take into account the interests that other people have in being benefitted. This, I believe, is something that must be done in an argument justifying intellectual property if for no other reason than the opponents of intellectual property rights claim that they are being deprived of something that confers important benefits on them.

Of course, I do not pretend to have some sort of algorithm for assessing the various interests.⁶⁶ Weighing competing interests is a messy, imprecise business that relies much more heavily on gut level reactions and feelings than other ethical arguments. Still, it is fair to say that all ethical theorizing, applied, general, and metaethical, is, at the end of the day, grounded in such gut-level intuitions. The imprecise character of such reasoning surely diminishes the level of confidence we can have in any conclusions it supports.

Even so, there are easy cases. One reason that most people agree that it would be wrong for me to shoot someone in the back as he flees with my stolen property is that our interests in life are much more weighty than our interests in property; in just about every case, a thief's interest in his life is much more important than my interest in the property he

65. Michael Otsuka argues that there is no morally significant difference between innocent attackers and innocent bystanders. Both are immunized from infringement of their rights by persons defending against culpable attack by the fact that they bear no moral responsibility for the attack. See Michael Otsuka, *Killing the Innocent in Self-Defense*, 23 PHIL. & PUB. AFF. 74 (1994).

66. For a very plausible nonalgorithmic device for balancing competing claims, see MOORE, *supra* note 39, at 103–17, 147–74. Moore argues for something he calls the weak Pareto proviso: If the acquisition of an intangible object makes no one else worse off in terms of her level of well-being—including opportunity costs—compared to how she was immediately before the acquisition, then the taking is permitted. *Id.* at 109–12. As is readily evident, the weak Pareto proviso attempts to balance all the competing interests.

steals from me.⁶⁷ Life, after all, is “sacred,” and property is not. For this reason, most people—and the criminal law in every Western nation—agree that property may not be defended with deadly force—although some states like New York allow deadly force to prevent arson.⁶⁸

I think there are some fairly easy assessments in the case of intellectual objects. As I will argue below, content creators have a stronger interest in the time and effort they expend in creating content not needed to survive or thrive than the interests that other persons have in that content. Because I lack an algorithm for assessing these interests, my argument will rely on what I believe are widely-shared intuitive reactions to certain cases. But although I do not have an argument for thinking that my reactions to these cases are the correct ones, I think most readers will share my reactions to these cases and are hence committed to the conclusions I defend in this Article.

A comprehensive evaluation of the range of legitimate legal protection of intellectual property must consider all morally relevant interests of persons in the content created by others, and this goes beyond merely considering their interests in not being harmed. Morally protected interests in being benefitted must also be considered. As will be seen below, this requires identifying and weighing the interests of all persons in a particular kind of content.

VII. ASSESSING THE INTERESTS OF AUTHORS AND OTHERS

At this point, it seems clear that a fully adequate evaluation of intellectual property rights will have to consider *all* the interests that people might have in intellectual content. If the investment arguments fail to show that the expenditure of labor is sufficient to create property rights in intellectual or material objects, they do have the virtue of considering the issue of whether authors have a morally protected interest in their creations. As such, the investment arguments are suggestive of a plausible approach for determining whether someone should be afforded a limited legal right to exclude others from appropriation of an object. To determine whether the law should allow someone to exclude others from appropriating some material or intellectual object, we must weigh all the competing interests. If my interests in *X* are sufficiently strong and outweigh the interests of all other parties, then that fact is a pretty good reason, though not necessarily a conclusive one, to think that my interests in *X* are justifiably protected by the law.

67. In a case where the thief steals something from me that is necessary for my survival, the calculus seems different to me.

68. See N.Y. PENAL LAW § 35.20(1) (McKinney 2009).

A. *Intrinsic and Instrumental Value*

In determining what morally protected interests a particular kind of thing might have, philosophers frequently distinguish two kinds of value. An entity has “instrumental value” if and only if it has value as a means to some other valuable end. In contrast, an entity has “intrinsic value” if and only if it has value as an end-in-itself. Money is an example of something with only instrumental value; while money clearly has value as a means to other ends like nutrition and recreation, it does not seem to have any value as an end-in-itself. In contrast, one’s own happiness is an example of something with intrinsic value. While it might make sense to value some other person’s happiness as a means to some other end, it makes little sense to think of one’s own happiness as primarily a means to some other end.

The distinction between intrinsic and instrumental value has been thought by many to provide the foundation for at least two important questions in ethics. As the *Stanford Encyclopedia of Philosophy* puts it, “[i]ntrinsic value has traditionally been thought to lie at the heart of ethics . . . [and] to be crucial to a variety of moral judgments.”⁶⁹

For our purposes, there are two judgments of particular importance. First, whether a thing *T* has intrinsic value contributes to determining whether moral agents owe *T* any moral obligations; that is to say, it contributes to determining whether and what kind of “moral standing” *T* has. Entities or beings with intrinsic value in this sense are moral patients *entitled* to some level of moral respect. Unlike something with only instrumental value, an entity with intrinsic value in this sense may not be used by an agent without some thought to its interests. Whereas the appropriate manner for thinking about things with only instrumental value is cost-benefit analysis, intrinsically valuable things have a right to some consideration in a moral agent’s deliberations. For example, proponents of moral vegetarianism argue that any being capable of suffering has moral standing that implies a right to be free from unnecessary pain. Similarly, human beings are thought to have a special kind of moral standing that affords moral rights to life, liberty, and property in virtue of being alive, sentient, and rational. Accordingly, intrinsic value confers upon a being a moral status that entails that moral

69. Michael J. Zimmerman, *Intrinsic vs. Extrinsic Value*, STAN. ENCYCLOPEDIA PHIL. (Dec. 17, 2010), <http://plato.stanford.edu/entries/value-intrinsic-extrinsic/>.

agents owe that being at least one moral obligation—if only to consider its interests in deciding what to do from the standpoint of morality.

Second, the concept of intrinsic value can be used to identify which interests of a being with moral standing are morally protected interests. For example, act-utilitarianism is grounded in the idea that the only intrinsically valuable interests are the interests in achieving pleasure and avoiding pain. It is for this reason that act-utilitarianism requires that persons attempt to promote pleasure and decrease pain with their actions.

There are two concepts of intrinsic value that potentially figure into determining which interests are morally protected—one primarily normative and the other primarily descriptive. The normative concept is concerned with what rational moral agents *ought* to value as deserving of respect as ends-in-themselves. An entity that is intrinsically valuable in this sense has value as an end-in-itself regardless of whether any rational agents actually value it this way. Thus, attributions of this kind of value are normative in the sense that they are independent of the actual valuations of rational agents: if every rational agent failed to value an entity *E* with intrinsic value in this sense, each would be making a moral mistake. Attributions of intrinsic value in this normative sense are disconnected from what we actually value as an empirical matter.

In contrast, the descriptive concept is concerned with identifying the sort of ends we *characteristically* pursue. The issue here is what as an empirical matter we typically regard worth pursuing for its own sake. An entity has intrinsic value in this sense if and only if, as an empirical matter, an appreciable number of us actually value it as an end-in-itself; a thing has instrumental value if and only if an appreciable number of us value it as a means.

The moral significance of being regarded as an end-in-itself by moral persons—of having intrinsic value in the descriptive sense—is different from that of being owed an obligation of respect—of having intrinsic value in the normative sense. As *persons*, we have a morally protected interest in what we typically intrinsically value that is fundamental in not deriving from some other more basic interest. Persons have a special moral status in the world in virtue of being, or potentially being, both moral agents with obligations and moral patients with rights—including the moral right to autonomy. Respect for beings with this status entails some measure of respect for their characteristic ultimate ends.

This helps to explain why we have—assuming we do have such rights—moral rights to life, liberty, and physical safety. As an empirical matter, we typically view continued conscious existence, liberty, and physical safety as vitally important ends-in-themselves; we care passionately about these things for their own sakes—and not merely because they are useful for other purposes. Given the vital intrinsic

importance of these ends, it is not surprising that they are the objects of fundamental rights.

Beings with intrinsic value are owed a duty of moral respect for their legitimate interests. How much respect is owed regarding an interest depends, in part, on what kind of value the interest has. The strongest forms of respect such as moral rights are normally but not necessarily accorded to those interests that are intrinsically valuable to the being owed a duty of respect in virtue of its being intrinsically valuable. Human beings are persons who are the beneficiaries of the strongest forms of moral respect, which typically apply to those interests that are characteristically valued as ends-in-themselves—and should be valued as such. In what follows, I will attempt to ground a justification for intellectual property rights in interests that are intrinsically valuable to persons.

B. Interests of Authors in Their Time and Labor

This much should be clear at the outset: content creators have a *prudential* interest—an interest from the standpoint of objective or perceived self-interest—in controlling use and dissemination of their creations. To devote time and energy to creating intellectual content, time and energy must be diverted from other activities. This means that any particular deployment of time and energy involves costs that are significant from the standpoint of prudential rationality, including opportunity costs involved when one forgoes other opportunities to devote resources to a particular activity.⁷⁰

It is important to emphasize that the prudential interest is of profound significance. My time and energy matter a great deal to me because I know that I have a limited supply of both. Like everyone else, I am a finite being with an all-too-limited life span. Every moment I devote to a particular task spends one of a limited supply of moments I have in life to do all the things that make life worth living.

Indeed, my prudential interest in not wasting or squandering my time and energy go this far. Even if I do not feel like working, my time could

70. Some of the analysis in this Part appears in Kenneth Einar Himma, *Justifying Intellectual Property Protection: Why the Interests of Content Creators Usually Win over Everyone Else's*, in *INFORMATION TECHNOLOGY AND SOCIAL JUSTICE* 47 (Emma Rooksby & John Weckert eds., 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=840584.

be spent doing something that has value to me. Though we tend (incorrectly, on my view) to think of play and rest as counterproductive, I think it is clear that sometimes time invested in rest and recreation is well spent. As paradoxical as this may sound, I would rather not waste time that can be spent watching or playing basketball when I have that time available for those purposes.

And, as I grow progressively older, my time and energy become increasingly precious to me. There are three reasons for this: one biological and the others psychological. First, and most obviously, our available supplies of time and energy get smaller as we get nearer to the end of our lifespans. Second, we tend to become more sensitive to our own mortality as we grow older. It is a well-known fact that older people have a far more acute sense of their own mortality than younger people and that this sense becomes more acute over time. Third, a person's experience of time tends to change as she grows older: the passage of a year is experienced as having occurred much more quickly by an older person than by a younger person.

As a general matter, these elements lead people to assign more value to expenditures of time and energy as they grow older because all draw attention to the unhappy fact that their supply of moments is limited. It seems clear, then, that as a descriptive empirical matter, people generally regard their time and their energy as prudentially valuable.

It is true, of course, that the mere fact that people generally have a *prudential* interest in something tells us little about whether they have a *morally protected* interest in it. By itself, the claim that *X* wants or values something does not imply that *X* has a morally protected interest in it. People commonly want and value things, like prestige and power over others, to which morality affords no significant protection.

But the point here is not just the descriptive point that people generally value their time and energy: it should also be clear that as a normative matter of practical rationality, people *should* regard their time and energy as prudentially valuable. Someone who cares nothing about how she spends her time and energy is fairly characterized as doing a disservice to herself—and perhaps to the community in general. Indeed, such an attitude may signal some psychological disease; people who are severely depressed, for example, frequently lose interest in what they formerly viewed as important. It is probably too strong to think that someone who cares nothing about how his time and energy are spent is always severely depressed; such an attitude may signal some other

psychological disorder.⁷¹ But it is clearly irrational from the standpoint of prudential interest to care so little about what is, in essence, the central resource for pursuing the goods that make life worth living.

The reason for this has to do with what qualities contribute to our standing as persons with natural moral rights. Many people plausibly believe that animals have a moral claim against us not to cause them unnecessary suffering. What gives rise to the limited claim is the fact that higher animals are sentient and capable of suffering. If a cow feels the same pain that a human does upon being burned alive, what moral difference could it possibly make that people can add but cows cannot? Pain is pain wherever instantiated.

Intriguingly, the capacity to suffer cannot give rise to a right to life; it simply gives rise to a right not to be caused unnecessary suffering by human beings. If human beings raise cattle in humane circumstances and slaughter them painlessly, then no obligations have been breached. But human beings have a greater range of rights because of their capacity for rationality, which makes possible the capacity of autonomy—the capacity to frame plans and execute them without coercive interference. People have goals and devote time to them, and this also contributes to the value of their interests in continuing life. Goals are always the reason for work, and goals cannot be realized except by living to see it; as such it seems reasonable to suppose that human beings, unlike animals, have a right to life.

In any event, the normative import of such interests from the standpoint of rationality, then, provides some reason to think that the prudential interests we have in our time and energy receive some protection from morality. Human beings have the special moral status of personhood that confers fundamental moral rights to respect and autonomy, and it is hard to see how one could adequately respect a person without respecting those interests that are central to her flourishing in all the ways that she should. This is why, for example, the moral obligation to respect persons demands that we respect their lives and their autonomy.

It is reasonable to think, then, that others should respect those interests that have the importance to beings like us that time and energy have. Again, the point is not just that some of us do care about our time and energy, or even that we *all* do care about these resources; rather, the point is

71. *See generally* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000). I am grateful to Sam Rickless for pointing this out to me.

that we all *should* care about how we spend our time and energy because they are so central to ensuring that we flourish in all the ways that we should. This distinguishes our interests in such matters from interests that are more trivial from a moral point of view, such as our interests in even more affluent standards of living that allow us, say, to buy bigger and more expensive cars. Moral respect for persons surely requires respect for those interests that are utterly central to ensuring that persons flourish in all the ways that they, morally speaking, *should* flourish. Without time and energy, none of us can flourish in any of the ways we should; these resources are utterly central to our well-being and flourishing. If this is so, then it is reasonable to think that our interests in our own time and energy receive significant protection from morality.

Of course, morality and prudential rationality sometimes diverge. It might be that not everything that is reasonable in my interest is of moral value or receives moral protection. Perhaps it is rational from the narrow standpoint of self-interest to prefer having power over other people to not having power over other people. I am not entirely sure about even this, but it seems clear to me that such an interest has no value from the standpoint of morality and hence does not receive any moral protection—at least none specific to this particular interest.

But the idea that morality assigns no value to what is absolutely necessary to pursue any of the things that human beings ought as a moral matter to have seems paradoxical. We cannot pursue anything of moral value without having time and energy. If we have any interests at all that receive significant moral protection—as is true if we have any moral standing at all and especially true if we have the special status of moral personhood—because they are morally valuable, then the limited supply of time and energy available to each of us must be valuable from the standpoint of morality because these are the resources that must be spent to pursue any other interests at all. Having time and energy is a precondition for achieving any other interests. This makes our time and energy very important.

At the very least, this means that as a moral matter, we should care enough about the expenditure of our time and energy not to waste them. I think it also means that we should care enough about the time and energy of other people not to waste them. A person's time and energy are precious not only from a purely prudential point of view, but also from a morally normative point of view. We should care about our and other people's time and energy because they are so central to ensuring that human beings flourish in all the ways that human beings should flourish.

A stronger argument is available with respect to the moral significance of our interests in our expenditures of *time*. It is reasonable to think that we do value, and *should* value, our time as an end-in-itself, and not merely

as a means. Although it might be true that energy is only instrumentally valuable—valuable as a means to some other end—because it enables us to achieve other ends by doing things, time is both instrumentally and intrinsically valuable.⁷² Time is, of course, of considerable instrumental value because having some time is a necessary condition to being able to achieve *any* end; we can be and do nothing if we do not have an available supply of time. But if continued sentient life is, as seems reasonable, of considerable intrinsic value—valuable for its own sake as an end-in-itself—then it follows that having a supply of time is also of considerable intrinsic value to a sentient being: someone who has no available time is no longer alive. Indeed, on ordinary intuitions, the right to life is the most important right. Since a life is constituted by a series of moments of life, those moments also have significant intrinsic value.

To give a sense for how important these interests can be, consider two people who live in a house built from the foundations up by one of the two. If the building burns down, both residents sustain significant losses. Both lose their place to live. Both lose their belongings. But one of them loses the time and energy spent in building the house—and, as a descriptive matter, this might be the most devastating loss of all. It should be evident that one's interests in one's time and energy are hardly trivial from a prudential point of view.

In any event, there are two points here—one descriptive and one normative. The descriptive point is that people generally regard the moments of their lives as ends-in-themselves and hence as valuable for their own sakes. The normative point is that we *ought to* regard the moments of our lives as ends-in-themselves and hence as valuable for their own sakes. If we should regard our lives as intrinsically valuable, then we should regard each moment as intrinsically valuable because, again, a sentient life consists of the moments that a being remains sentient.

Moreover, it seems clear that people should also regard *other people's* time as intrinsically valuable as ends-in-themselves, precisely because every other person's time is and should be so intrinsically valuable to him. If, as seems reasonable, we should value the *lives* of others as

72. For a discussion of the significance of the distinction between intrinsic and instrumental value in ethical theorizing, see generally Kenneth Einar Himma, *The Moral Significance of the Internet in Information: Reflections on a Fundamental Moral Right to Information*, 2 J. INFO. COMM. & ETHICS SOC'Y 191 (2004); and Kenneth Einar Himma, *There's Something About Mary: The Moral Value of Things Qua Information Objects*, 6 ETHICS & INFO. TECH. 145 (2004).

intrinsically valuable, then it follows that we should value the moments that constitute those lives as intrinsically valuable.

The foregoing analysis suggests therefore that our prudential interests in time are afforded significant protection by morality. Although the claim that some resource *r* is, or ought to be, regarded as *instrumentally* valuable does not imply that morality protects persons' interests in *r*, the claim that *r* is, and *ought to be*, regarded as *intrinsically valuable* does seem to imply that morality protects the interest in *r*. As a matter of substantive moral theory, what is, and ought to be, regarded as intrinsically valuable to beings like us with the special moral status of personhood is deserving of moral respect because these values constitute our ultimate ends, and it is very difficult to make sense of the idea that we deserve respect qua persons if what we ought to regard as our ultimate ends do not deserve respect from others.

The question of what is owed by way of respect to another person for her intrinsically valuable time is a complicated one because a conflict can arise between the prudential interests of persons in many different ways. Being significantly late to an appointment, other things being equal, is disrespectful because it involves wasting another person's time, which can be used to do something else.

As regards intellectual property, what respect is owed to a person's expenditure of time and energy will be determined in part by other morally relevant considerations. It is probably not true that the intrinsic value of one person's time spent in creating new content, by itself, requires respect in the form of allowing him control of the uses to which the content is put. The reason for this is that use of content is nonrivalrous and does not involve its destruction. If, in contrast, I have expended my time and energy into a making a table, then it would be wrong for another person to take the table to keep or destroy. Or if I have written a book and I have the only copy, then it would be wrong for another person to take it from my possession to keep or destroy. In all such cases, morally significant expenditures of my time and energy have wrongly been wasted.

In the case of content, however, it is not clear that simply consuming the content of another person wrongfully wastes her time and energy, precisely because the content remains intact for the author.⁷³ But there are other morally relevant considerations that, together with the value of an author's expenditure of time and energy, seem to provide at least a *prima facie* case for allowing, within limits, a content creator to control the use of what she has expended her time to create. First, the content creator has created new value that would not have been available to others

73. I am indebted to Sam Rickless for this concern.

without the creator's efforts. Second, content creators create content for many reasons but one of them is frequently to produce something that can be sold; allowing them limited control over the content they create is perfectly tailored to respect the content creators' moral autonomy rights. It seems only fair, if there are no countervailing moral interests of others in that content,⁷⁴ that the author has a prima facie morally protective interest in control over the new value she has brought into the world not just by virtue of the expenditure of morally-protected interests in her time and energy but also by virtue of respect for her moral autonomy rights.⁷⁵

Again, it is important to emphasize the moral significance of the right to autonomy. As noted above, it is the very fact that coercive enforcement mechanisms infringe a person's right to autonomy that creates the problem of legitimate state authority to begin with. It should not be surprising that a person's autonomy rights, together with her morally important interests in her time and energy, should create in the author a morally protected interest in excluding others from the content she creates.

There are many motives for creating content, of course: self-expression and amusement being two of them. But in most cases an author's plan is to sell the content so as to permit her to continue creating content. I enjoy teaching, for example, but one of the most important reasons I teach is that it affords me the time to continue to create content. This is part of the plan that I choose for my life, and my right to autonomy presumably protects my ability to execute that plan, other things being equal, such as the availability of a teaching job.

74. Whether other people have morally protected interests that outweigh the author's interests in her time and energy will be considered in the next subparts.

75. One could argue, of course, that authors who do not wish to give away their creations should refrain from expending time in creating content, but one needs an argument in support of this counterintuitive claim that goes beyond pointing out that other people want those creations. As we have seen, the mere fact that someone wants something does not entail that he has a morally protected interest in it.

C. *The Interests of Other Persons in Content*

Authors are clearly not the only persons who care about intellectual content; other persons also care a great deal about content. After all, there would not be much of a dispute, as an empirical matter, about intellectual property rights if people had no significant interests in content created or discovered by others. This, of course, is not to say that there would not be an issue, but only to suggest that people would not care so much about it if they had no interests in such content. The intellectual property dispute is contentious precisely because people care so much about the content they create and the content created by others.

As before, many of these valuations are at least partly prudential in character. I value intellectual content for both instrumental and intrinsic reasons, but all these reasons are largely prudential. This is particularly clear in the case of content I value instrumentally as a means to some other end. I might value the content provided by an education because it enables me to earn a better living and achieve a better quality of material living than I could otherwise achieve. I might value a piece of music because it gives me great pleasure when I listen to it. I might value a film because it entertains me for a couple of hours and fills up the time.

This also seems to be true of some intellectual content we value intrinsically. I value information about the existence and nature of God for its own sake (as well, of course, as for instrumental reasons), but the interests that I am looking to satisfy by my pursuit of such information *as an end* are largely my own. I might value knowledge as an end-in-itself and hence pursue intellectual content for its value, but my pursuits are still being motivated by my interests and priorities, which presumably reflect some sort of view about my well-being. The value is an end-in-itself, but the motivation for pursuing it is at least partly because I have an interest in it, and that content fulfills the interest *and me*.

If the above sounds a little odd, it might help to note that the claim that my interest in some content is prudential does not imply that my interest is selfish or self-centered. The notions of selfishness and self-centeredness seem to connote the violation of some moral obligation to consider the interests of others. I do not mean to suggest either of those things by characterizing these interests as “prudential.” I merely mean to suggest that these interests are motivated by desires that are explicitly self-regarding: I want this content because I find it valuable and hence have an interest in obtaining this content.

The strength of the prudential interest varies from one piece of content to the next. It is reasonable to think that there is some intellectual content that one needs to survive independently, without direct assistance from others, in a particular cultural context. For example, although it is possible

to survive in a society like ours without being able to read or add, one will require considerable assistance from other people in order to feed, clothe, and shelter oneself. In most situations in a society like that of the United States with an inadequate safety net, a person will not be able to take care of basic needs by herself without knowing how to read and do simple arithmetic. Obviously, a person will have a strong prudential interest in such content.

I think it is fair to say that people have a similarly strong prudential interest in intellectual content having to do with the existence and nature of God. Regardless of whether one believes or does not believe that a personal God exists, it should be clear that the various issues are of tremendous prudential significance. Not surprisingly, people care a great deal about being able to access intellectual content that will help them to reach an informed opinion about whether God exists and if so, what God requires of us. To put it brusquely, atheism and agnosticism are certainly rational and reasonable positions, but if you do not care at all whether you might go to hell, then something is seriously wrong with you.

Not all content, however, has such importance from the standpoint of self-interest. Some intellectual content is fairly characterized as needed for individuals to thrive in all the ways that human beings ought to thrive. Artistic and philosophical content might very well be necessary for a person to lead a meaningful human life. Without such content, our lives would be very different—and probably would not be much different from that of some nonhuman animals. Although theorists disagree on what sorts of goods are needed to live a genuinely human life and hence to “thrive,” I would be surprised if anyone denied the claim that some access to certain kinds of content is needed for people to thrive in the appropriate ways.

But the vast majority of the intellectual content desired by people is essential neither to survive nor to thrive. We seek much intellectual content in order to entertain or amuse ourselves. Most of the time I spend watching films, for example, is intended to achieve nothing more noble than to make me laugh or entertain me in some other way. Most of the time I spend listening to music is intended to create a mood (perhaps one that is appropriately intense during a workout) or to produce aesthetic pleasure. The same is true of a fair bit of the time I spend reading; while much of it is intended to enlighten me, much of it is done for amusement.

Again, the claim here is not purely descriptive. It is not just that people tend to care about surviving, knowing about God, thriving, or being entertained; rather, it is that from the standpoint of prudential rationality, people ought to care about these things, though not to the same degree. As noted above, someone who cares nothing about his own survival is, other things being equal, probably in need of immediate inpatient psychiatric care, as is probably true of someone who does not care at all about whether or not a personal God exists who punishes wrongdoing with everlasting suffering. Likewise someone who does not care at all about her own amusement or entertainment is, at the very least, mildly depressed.

As before, these prudential interests seem to have some moral significance, but how much significance they have from the standpoint of morality depends on how strong these interests are. It is always a morally relevant fact about some piece of content that somebody wants it, but this does not tell us much about how much protection it might receive from morality. It seems reasonable to think that morality would afford much more protection to a person's interest in information necessary to survive in a self-sufficient way than to his interest in information necessary to thrive; food, water, shelter, and the truth about God are much more important than art and philosophy. Likewise, it seems reasonable to think that morality would afford more protection to a person's interest in information necessary to thrive than to a person's interest in being entertained or amused, although, again, it is always a morally relevant fact that some piece of content would amuse a person.

None of this should be taken, of course, to deny that intellectual content might be protected by morality for some other reason than just that it has prudential value. For example, intellectual content that people need to compete in a society like ours might be protected by something like a principle of equal opportunity. Other things being equal, it is better from the standpoint of morality that all persons have free access to such content because a society that does not make it equally available to all will afford some persons an unfair advantage in the marketplace. Here the motivation is not to protect the interests of persons, but to ensure that the distribution of opportunities is fair to all; although we might have a prudential interest in things being fair, fairness is about something other than prudential interests. There is nothing in the analysis of this Article that should be construed as inconsistent with the fact that prudential considerations might form one part of the explanation as to why some content gets protection from morality but need not exhaust the explanation.

D. Weighing the Interests

As is evident from the foregoing discussion, content creators and other persons have conflicting interests that must be weighed. Content creators must expend valuable resources in the form of their time, energy, and labor in order to bring new value into the world in the form of intellectual content to which people did not previously have access. Content creators, as we have seen, have a morally protected interest in their time, energy, and labor, in part because our supply of those resources is limited. Autonomy rights suggest that they have some claim to control the disposition of the content they create. Other things being equal, this suggests that content creators have a limited morally protected interest in controlling for some reasonable period of time the disposition and distribution of the value they bring into the world in the form of new intellectual content.

Of course, other things are not always equal. It is quite reasonable to think, as noted above, that third parties have a special interest in intellectual content needed for survival that outweighs whatever interest its author might have in the value she brings into the world, although this should not be taken to mean that the author is owed no compensation. It is also reasonable to think that we owe it to individuals and nations to ensure that they have sufficient information to compete in a global economy; this seems to be required by the principle of equal opportunity.⁷⁶

The distinction between factual intellectual objects and nonfactual objects is relevant here. It is not unreasonable to think that third parties have a special interest in important factual information that outweighs such interests on the part of the author. Facts, after all, are not likely to lay undiscovered forever, at least not in a culture like ours that is sufficiently affluent to permit such intellectual endeavors; obviously, if everyone must spend all their time hunting for food and shelter, they will not have time to study the world. But in a culture like ours where it is economically feasible for many persons to engage in academic pursuits, if one person does not discover some fact, someone else probably will. This is just not true of nonfactual intellectual objects like novels and songs. If Dickens does not write *A Tale of Two Cities*, then it will never be written; in contrast, if Andrew Wiles does not prove Fermat's Last

76. I am indebted to Herman Tavani for this point.

Theorem, someone else eventually will, though it might take many additional years.

Two considerations converge here to support the idea that people have some sort of special interest in factual content discovered or created by others. First, it is not unreasonable to think that we have some sort of special interest in knowledge of our world. Second, it is not true that if one content creator does not produce a particular piece of factual content, then that piece of content is not likely to be produced; factual content, again, is different from nonfactual content in that respect. Accordingly, if it is true that people have some special interest in factual information, say, because we have some special interest in knowledge about our world, this would support the altogether plausible claim that, for example, it is wrong to assign property rights in genetic sequences.

Still, it is not clear that the interests of other persons always outweigh the interests of a content creator in factual content he creates so as to preclude any legal protection of the creator's interest in controlling disposition of that information. At an intuitive level, there is a world of difference between factual information needed for survival and factual information not needed for survival, as well as between factual information that is readily discovered and factual information that requires some special talent and effort to discover. Although this should not be taken to imply that factual content should ever be afforded intellectual property protection, it is to assert that the issues are different with respect to nonessential factual content and factual content not easily discovered.

It also seems reasonable to think that the interests of other persons in content needed to thrive sometimes outweigh the interests of the creator of that content, but the issues here are just not very clear because the nature of our interest is just not clear. The fact that we need access to some artistic content to thrive does not imply that we need access to *all* artistic content to thrive.

Indeed, the idea that we need access to *all* artistic content to thrive is simply too strong to be plausible. It seems ridiculous, for example, to assert that I need access to the latest Yelowolf tracks in order to thrive. Although it might be fun, depending on one's taste in music, to listen to Yelowolf's hillbilly hip-hop, it is simply implausible to think that any person cannot thrive without free access to it. What this means is that the interests of other persons in thriving will defeat the interests of content creators in some but not all cases of artistic content.

Exactly which cases is a difficult issue that would require a much more detailed analysis than I can pretend to give here, but I would like to hazard the following observation. It seems plausible to me that what is currently in the public domain by way of artistic expression is sufficient to ensure that people thrive in all the ways they ought to thrive. We do

not need immediately to provide free access to new artistic content to ensure that all have an adequate opportunity to thrive in the ways that artistic content enables one to thrive. If this is correct, then the interests of content creators outweigh the interests of other persons in such content, at least in cases of content that is of comparatively recent vintage.

But with respect to content that is merely *desired*, it is not even a close call. Although it is, as I noted above, always a morally relevant fact that some agent *A* wants some thing *p*, the mere fact that *A* wants *p* is not strong enough to give rise to any significant protection of that interest. Other things being equal, if (1) *A* wants *p*, (2) I can satisfy *A*'s desire for *p*, and (3) *A*'s desire for *p* is not illicit, it would be a good thing from the standpoint of morality for me to provide *A* with *p*. But the claim that *A* wants *p*, by itself, does not imply that it would be wrong for me not to provide *A* with *p* if I can do so. Indeed, failure to provide someone with something they want is not even a property that makes an act wrong; although it would be good, other things being equal, to provide *A* with *p*, the claim that *A* wants *p* does not provide any reason whatsoever for thinking not providing *A* with *p* is even *prima facie* wrong. Our desires just cannot do that kind of heavy moral lifting. Indeed, if the desire is illicit, then there is a significant probability that it would be morally wrong to satisfy that desire. In contrast, if *A* needs *p*, then that fact is at least a *prima facie* reason to provide *A* with *p* if one can without undue sacrifice.

In cases where content is merely wanted, then, it seems clear that the interests of the content creators in limited control over the content they create outweigh the interests of other persons. On the one hand, the content creator expends precious resources in the form of a limited supply of life and energy in order to bring value into the world. On the other hand, other persons want merely to pass the time or enjoy themselves with such content.

Of course, there might be many people who want the content and just one content creator whose interests are at stake, but this is not enough to defeat the content creator's interest. The content creator interest is significant enough to receive moral protection: insofar as my behavior wastes another person's life or energy, it is morally problematic simply in virtue of her wanting it. In contrast, the fact that someone wants content is not significant enough, by itself, to warrant any moral protection: although it might be good for me to give someone something she wants, my failure to do so is not even presumptively problematic. An interest that receives moral protection, like the content creator's, cannot be

defeated by aggregating interests that do not; the difference between the two interests, from a moral point of view, is *qualitative* and not *quantitative*.

Ironically, most of the content that critics of intellectual property want for free is noninformative content that is merely desired. It is reasonable to think that the vast majority of contemporary music, film, and novels are wanted primarily for entertainment and amusement. Those people who are illegally sharing music files online are violating the law for no better reason than they want to be entertained and to experience the pleasure of listening to the newest music, as though this desire is so much more important than the significant investments of the content creators.

Here it is worth noting that at least with respect to artistic content, content creators create not only a piece of content, *but also the demand for it*. There would be no demand, for example, for *A Tale of Two Cities* had Dickens never written that novel. There can be no demand for a song that has never been written. Although it is true that people want artistic content and might want content from a particular artist, this desire has no particular focus until a content creator sharpens it by making available a suitable piece of content. Artists satisfy wants that they bring into existence through the creation of value that other people come to desire. Yet many people believe that these desires, which they would not have if not for people who create, take precedence over any interests that an artist has to control the distribution of his creations and the value that the artist brought into the world. As far as content that is merely wanted is concerned, this should seem implausible, to put it mildly, as a matter of morality.⁷⁷

77. Although I am not prepared to argue the point here, I am inclined to think that the content creator's interest rises to the level of a right. The interest we have in the ideas, time, energy, and intellectual labor we invest in creating new content—and hence bringing new value into the world—are sufficiently important, it seems to me, to give rise, irrespective of effects on utility, to a right that binds any third parties who lack any greater interest in the products of those expenditures than a *desire* for those products. Of course, the suggestion that content creators have a right over their products is not to say anything about the content of that right. In particular, it is not to endorse the conception of that right that is incorporated into or expressed by copyright law in the United States.

VIII. WHY LEGAL PROTECTION OF INTELLECTUAL PROPERTY
IS WARRANTED AS A MATTER OF POLITICAL
MORALITY

A. *The Relationship Between the Moral Right to Forceful
Defense of Morally Protected Interests and the
Legitimacy of Laws Protecting Such Interests*

As noted at the outset of this Article, it is not enough to show that individuals have a morally protected interest in something to justify legal protection of that interest. Legal protection of an interest involves the coercive force of the law to prevent others from violating that interest, and that requires an argument grounded in political morality.

Locke combined his theory of moral property rights with a social contract theory of state legitimacy to justify the stronger claim that the coercive force of the law should be used to protect moral property rights, but fortunately, a general theory of legitimacy will not be needed to justify the claim that law should provide limited protection of intellectual property.

It is enough to note that one of the functions of a legitimate state is to claim and exercise a limited, morally justified monopoly on the use of force. People are permitted by morality and by law to resort to force to defend important moral interests from being violated. But the law does not permit people to punish violations of these interests after they have occurred. For example, I may, as a matter of law, use reasonable force to defend against an assault, but once the assault has occurred, I am legally prohibited from tracking down the offender and inflicting even proportionate force after the violation in order to retaliate or punish the offender. This is the exclusive province of a legitimate state.

Now the issue of what a state may legitimately punish is an issue that arises in the normative theory of criminal law: what criteria must be satisfied for the state to criminalize an act given that criminalization and punishment have such serious consequences on the well-being of the offender? As noted above, there are different theories that call attention to different properties of acts that might legitimize criminalization. For example, John Stuart Mill believes that only acts that harm other people

may be criminalized.⁷⁸ It is, however, simply not necessary to ground the view in any particular theory of criminal law.

It suffices to notice a moral relationship between the moral right to forcibly defend an interest and the right to punish violations of that interest. Any interest that rises to the level of such moral importance that an individual has a moral right to defend against attacks on it by reasonable force is not only legitimately protected by law but *should*, as a matter of political morality, be protected by the law. For example, it is a commonplace notion that the moral right to life should be protected by the state, and part of the reason for this is that a person is morally permitted to use deadly force if necessary to defend her life against a culpable attack on it. Likewise, it is generally uncontroversial—even if we do not yet have a successful theory of state legitimacy that would justify this claim—that the law should protect the moral right to *material* property, and in part for the same reason: if people have a morally protected interest in *material* property that rises to the level of such moral importance that people may use reasonable force to protect it, then that interest should be protected by law. Thus, it would appear that any morally protected interest important enough to be legitimately defended by a person through reasonable force should be protected by the law and its coercive mechanisms, which include punitive and compensatory remedies.

Indeed, for what it is worth, Locke believes that life in the state of nature is governed by natural objective moral principles that define the “natural moral rights” of individuals.⁷⁹ These rights include rights to life, liberty, and property.⁸⁰ Moreover, they include not only a right on the part of the individual to use proportional force to defend against culpable attacks on such interests but also a right on the part of the individual to punish violations of those rights.⁸¹ Although Locke’s social contract theory holds further that citizens deal their natural right to punish to the state in return for state protection of these rights,⁸² this is not a claim that is needed here. All that is needed are the very plausible claims that (1) from the standpoint of individual morality, a right to defend against culpable attacks on an interest entails that the act is rightly punished by someone; and (2) from the standpoint of political

78. See JOHN STUART MILL, *ON LIBERTY AND OTHER WRITINGS* 13 (Stefan Collini ed., Cambridge Univ. Press 1989) (1860).

79. See *supra* note 4 and accompanying text.

80. LOCKE, *supra* note 4, at 5.

81. *Id.* at 6–7.

82. *Id.* at 54–56.

morality, a legitimate state should exercise a monopoly on coercive punishment with respect to every act that is rightly punished by someone.

There are a couple of reasons for (2) that have nothing to do with the idea that people have entered into a social contract assigning this authority to the state; although these reasons would also make it rational to consent to such a provision in a social contract, it is the reasons themselves that are doing the work here. First, the point of a legitimate state is to keep the peace. Allowing individuals to punish wrongdoing outside an institutional structure like that provided by the state does not conduce to the purpose of keeping the peace. Second, a legitimate state is better equipped to get to the truth of the matter by implementing fair institutional procedures for trying criminal offenses and thus reduces the probability of unjustly punishing innocent persons.

Here it is especially helpful to note that it is frequently permissible for people to withhold content they have created from other people. Suppose I come up with a delicious new recipe that I want to keep to myself—as a secret family recipe. I cook the dish for you, and you love it. When you inevitably ask me whether I would give you a copy of the recipe, it is hard to see how I could have possibly wronged you by declining your request. All the usual facts about intellectual property obtain, but I am under no obligation to share this recipe with you.

Should you try to obtain it without my consent, either by violent measures or nonviolent, underhanded measures, you seem to be committing a wrong. Indeed, in cases where you try to coerce me to give you the recipe, it seems clear that I am justified in taking whatever minimal measures I can to withhold the recipe from you. Comparatively speaking, this is a trivial problem as concerns the legitimacy of certain acts regarding intellectual property. As the content becomes more valuable, so is the wrong committed by someone who tries to obtain it without my consent. Again, I have a moral permission to defend myself to prevent the expropriation precisely because it is wrong. And because the expropriation is wrong and results in harm to me, it should be punished by the state in at least some circumstances.

One might argue that this is true of ideas that have not been disclosed but not true of ideas that have been disclosed, but it is difficult to see why this would be so. Suppose I share the recipe with just my best friend. How would that act give *another* person some kind of right to the recipe? I frame this as a question precisely because I cannot see how this would make a moral difference. My giving the recipe to my best

friend does not change whatever interests other people have in that recipe. The interest other people have in the recipe is nothing more than that it might lead to a tasty or nutritious meal. Giving the recipe to someone else does not seem to give rise to some new interest. I may share my *material* things with other people, but that does not give anyone else a new protected interest in my sharing that thing with her.

Now the relevant question is whether an author's morally protected interest in content he creates rises to a level of such moral importance that he may use force to protect against violations of this interest. This is clearly true of material property. A person may legitimately use force to defend against having one's *material* property stolen precisely because the interest in material property rises to the level of a right that should be protected by law. One might think in the case of armed robbery, for example, that the relevant interest being defended is the right to be free of coercive threats of harm to the body. This, of course, is surely part of it but it does not exhaust the whole of it. If a thief is walking out of my apartment with my television, then I may clearly use defensive measures to prevent the theft. One of the interests being protected here is clearly the interest in property; it is not just an interest in personal security.

Likewise, a more complicated variety of examples seem to confirm that one is morally justified in defending against violations of a morally protected interest in content one creates in cases where the author's interests outweigh the interests of others. For example, an individual may use reasonable force to prevent someone from using coercive measures to force the disclosure of, say, a novel the author is writing or has written—regardless of whether this novel is properly characterized as property. This applies not only to novels that remain undisclosed, so to speak, in some form accessible to others but also to novels that have been memorialized in some form.

Here, it is not just the interest in the material on which the content has been recorded that affords a right to self-defense; it is also the content itself. I am not only morally permitted to use reasonable force to defend against another person's theft of the material media containing the content but of the content itself. If I have the score to an original piece of music scratched in the sand, then I may resort to reasonable measures to prevent another person simply from looking at the music and walking away with knowledge of the contents.

Notice, moreover, that if the above is true, then I might waive my right to defend against unauthorized viewings of the material in exchange for a payment of a fee. This is exactly the same result that one would get in thought experiments involving the unauthorized appropriation of material property. I can defend against trespass onto my home, but my control over my home also includes the ability to waive my right to defend against

trespass by giving permission to enter upon the premises. These bundles of powers and liberties seem clearly to suggest a right to both material and intellectual “property” that ought to be protected by law. It seems clear that it is a necessary, if not sufficient, condition of moral legitimacy that the state, as Locke suggests, protect the natural rights to life, liberty, and property. No state could be legitimate without protecting the rights to life, liberty, and property—assuming property is a natural right, as seems clear, given the right to defend against violations of property interests.

Accordingly, the state seems justified in affording limited legal protection of intellectual property to content that is merely desired by others for entertainment purposes. Therefore, I can defend the expenditure of my *life* as expressed in content I create with reasonable force. If this is the case, then it would seem clear that violations of my interest in such content should receive the coercive protection of the law.

B. The Relationship Between the Content of Property Rights and Principles of Distributive Justice

Of course, it should not be thought that the individual has an *absolute* or utterly unlimited moral right to property or that the state should recognize and protect an absolute legal right to property. This might be the case, but it also might not be the case. If people have a positive moral right to some share of a society’s material resources as a matter of distributive justice, then the right to property might be outweighed by the right to some minimum share of the material resources. If this is true, which is not only intuitively plausible but presupposed by the many forms of redistributive mechanisms incorporated into U.S. law, then the principles governing property rights are, in some cases, subordinate to principles of distributive justice that permit coercive taxation for the purpose of redistributing property to ensure that these principles are satisfied.

Indeed, it is important to note that the distribution of material resources in the United States seems to violate the Lockean proviso constraining legitimate original acquisition to situations in which there is enough of the same quality of the resources left for others. For example, this Lockean proviso is inconsistent with the fact that there is no land within the borders of the United States that remains in the commons. Every acre of land in the United States is owned by either a private individual or by the state. The state might make the land publicly accessible through the establishment of national parks, but this does not amount to keeping

such land in a protected commons. After all, the uses to which parkland may be put is governed by federal rules of law.

Although Locke foresees this situation and argues that people have agreed to such a state of affairs, there are two problems with this move. First, this agreement is not part of the social contract that justifies the coercive authority of the state. Under the terms of this social contract, property is a natural moral right that must be respected by even the state. It is for this reason that, on Locke's view, the legitimacy of the state is subject to the requirement that the law protect the natural rights to life, liberty, and property. The moral right to property, however, is clearly constrained by the Lockean proviso. Whatever agreement Locke believes has been reached by people to justify a state of affairs in which the commons is utterly depleted, it is not part of the social contract that legitimizes state authority. The claim that people have reached such an agreement is purely ad hoc. Indeed, such an agreement creates an artificial scarcity of material resources; Locke clearly believed that God provided enough material resources to provide for everyone—which would only be fair given the Biblical command to be fruitful and multiply. The idea that it is rational to agree to an economic arrangement that creates material scarcity that might prevent one from satisfying basic needs seems quite implausible.

Second, the idea that everyone has given meaningful consent to the depletion of the material commons is utterly implausible. Every child born in the United States has been born, without her consent, into a nation in which there is no material property left in the commons available for original acquisition. The problem here is not just that children cannot give meaningful consent. It is also that many adults reject the legitimacy of a depleted commons. Marxists, for example, would reject the legitimacy of such a state of affairs.

Locke might respond with a claim that he makes about the original social contract that provides a general justification of the state authority. He argues that everyone actually consents, whether expressly or impliedly. Obviously, not everyone has expressly consented; naturalized citizens, lawyers, and public officials take an oath, but most adults do not take such an oath, and the requirement that children recite the Pledge of Allegiance in school does not constitute meaningful express consent because minors are limited in their capacity to give meaningful consent.

Locke realizes this and argues that by accepting any benefits of the law one has impliedly consented. The problem with this view is that it is impossible not to accept the benefits of the law in the United States, or any other nation, for that matter. If one breathes, one is benefitted by laws protecting clean air; it is practically impossible, if not logically so, for anyone to live in a particular country without deriving some benefit

from the law. If so, then deriving benefits from the law is not a voluntary choice. This is problematic in deriving consent from acceptance of the benefits. For consent to be meaningful, it must be informed and voluntary. But if one cannot avoid accepting a benefit of law, then doing so is not voluntary.

One might respond that one can always leave a nation—reminiscent of an “America: Love it or leave it” worldview—but this is simply false. People do not have the option to simply leave the country and live somewhere else, as should be evident from the current debates on immigration law. Every nation limits immigration by law. Because one cannot freely avoid accepting the benefits of the law, accepting the benefits of the law is not voluntary and hence cannot form the foundation for meaningful consent. It is not only doubtful that all people have expressly or impliedly accepted state authority as part of the general social contract; it is equally dubious that people have expressly or impliedly accepted the idea that land may be accumulated to such an extent that it violates the Lockean proviso.

Indeed, one reason for thinking redistributive mechanisms would be justified from a Lockean point of view is precisely that the commons have been wrongly depleted, and corrective measures must be taken in the form of coercive redistributive mechanisms; in other words, the remedy for the depletion of the commons is to try to make reparations, so to speak, in the form of taxes earmarked for purposes of redistributing wealth. The point of such measures would not, on a Lockean view, be to take a legitimate holding of one person who has more property and transfer it to someone who has less property. It would be to correct the injustice of one person possessing property to which someone else is entitled, such as occurs when stolen property is returned to its rightful owner.

Principles of distributive justice that allow or require such redistribution should not be thought as inherent in moral property rights or other similar rights. They are distinct moral principles that limit the amount of material resources that may legitimately be accumulated by one person. In a world where everyone is sufficiently affluent, principles of distributive justice need not require coercive redistributive mechanisms. The right to property, in such cases, would not be subject to principles of distributive justice that might otherwise trump property rights. The issue, then, of whether the law should provide intellectual property is a distinct issue

from the issue of how much value an individual should be allowed to accumulate for himself.

IX. AN OBJECTION: LEGAL PROTECTION OF INTELLECTUAL PROPERTY RIGHTS DEPLETES THE INFORMATION COMMONS

A number of theorists have argued for the claim that there is a morally protected “information commons.” According to this line of argument, the class of information objects, or some specific subclass thereof, is a morally protected resource for all to use—an information commons to which all have a moral right. Any protection of intellectual property, then, that gives a right to some person to exclude others from the use of some informative proposition by requiring a fee has the effect of removing something from the information commons and thus has the effect of wrongly depleting it. Therefore, the “commons argument” concludes that information should be freely available and not subject to intellectual property protection.

The conception of an information commons that would putatively defeat the argument for legal protection of intellectual property rights ultimately derives from the Lockean proviso to his influential justification of property rights that limits original acquisition to those material objects for which there is enough and as good left for everyone else. Because there are limits in a world of scarcity to how much can be removed from the available resources while leaving enough for others, the effect of this proviso is to define a morally protected class of resources: a resource from this class cannot be permissibly appropriated by any one person in such a way as to exclude other persons from appropriation of that resource.⁸³ As a matter of moral principle, everyone has a moral right to use the resources available in the commons.

The justification for the Lockean claim that some class of resources is a morally protected commons that limits acquisition of that class of resources presupposes a number of claims. First, it presupposes that

83. It is worth noting that the Lockean proviso is not satisfied by distribution of material resources in any Western industrialized nation. It is, for example, false that there is enough unowned land left in any Western nation for everyone else to use because there is no unowned land and plenty of people who could use land; every acre of land, at least in the United States, is owned by some private or public entity or person. Ironically, the Lockean argument for property rights, commonly thought to vindicate the general structure of property relations in Western nations, seems to ground a radical critique of the existing distribution of land in these nations—because the ownership of all land is inconsistent with the Lockean proviso. Similar arguments can probably be made for other kinds of material resources. This, of course, does not imply that the critique is correct; it is, however, notable that what people take to be one of the classical justifications for existing property relations seems to go so far in the direction of vitiating the existing distribution of resources.

people have some sort of morally significant interest in the relevant class of resources; land, for example, is of great importance to human well-being. Second, it presupposes that the resource can be appropriated in such a way as to reduce its supply and cause its depletion. Third, it presupposes that the relevant resource can also be consumed by members of the group in another way that does not reduce its supply.⁸⁴ Fourth, it presupposes that the relevant resources can be readily appropriated in the protected way by anyone with access to them; the vistas of a park can be viewed, for example, by anyone who happens to be there. Finally, it presupposes that no one has a prior claim to exclude the others from appropriating the relevant resources in the protected way; the original humans, for example, had no claim whatsoever to any of the land that forms part of a land commons.

This version of the commons objection fails, however, because two conditions are not satisfied. To begin, the second presupposition is not true regarding information. The class of information resources, properly described, does not seem to be the kind of thing that can be depleted. The material resources to which we have access are finite, and any finite class can, in principle, be depleted. But this does not seem true of content. If Dickens had taken *A Tale of Two Cities* out of the commons by *writing it*, it is not true that Dickens would have made it unavailable for free consumption by others; there are, after all, libraries—and *A Tale of Two Cities* did not become directly available to people before Dickens wrote it. More importantly, however, there are an infinite number of novels that can be written. So by writing a novel and excluding others from reading it without payment, Dickens has left enough and probably as good for others. Just as there are an infinite number of novels that can be written, there are an infinite number of good novels that can be written.

Further, the fourth presupposition is not true of information. As far as Locke is concerned, picking an apple from a tree constitutes sufficient labor to create a property right in it. Land, of course, is so readily available that one simply cannot avoid land. Nothing like this is true of intellectual objects. It is not true that all propositional objects exist in a form that can be readily appropriated by anyone who happens to be exploring it. The proof of Fermat's Last Theorem, for example, did not

84. On Locke's view, the world is given to all people to *use* for their benefit. Original acquisition of property—acquiring property rights in an object—is different from use. Acquisition removes the holding from availability for public use, even if the owner does not put it to productive use.

become available for consumption, despite the intense labors of mathematicians for hundreds of years, until Andrew Wiles produced it in 1994.⁸⁵ *A Tale of Two Cities* did not become available for consumption until Charles Dickens produced it. Although it might be true that someone else would have eventually found a proof for Fermat's Last Theorem, it is not true that someone else would have written *A Tale of Two Cities* had Dickens not done so. The probability of someone else independently composing a perfect copy of what is *A Tale of Two Cities* is so low as to be morally negligible.

Of course, these propositional objects might have already existed as abstract objects in logical space prior to their creation or discovery, but the important, interesting, nonobvious propositional objects cannot be readily consumed by people until someone, through the expenditure of her labor, makes it available to other people. The intellectual commons, unlike the land commons, is not a resource already there waiting to be appropriated by anyone who happens to be there; it is stocked by and only by the activity of human beings. Although people can improve the value of land, they cannot *make* land; in contrast, people can and do make novels, music, proofs, theories, et cetera, and if someone does not make a particular novel, it is not available for human consumption, even if it exists, so to speak, somewhere in logical space.

X. A QUALIFICATION: POLITICAL MORALITY AND THE CONTENT OF A SPECIFIC BODY OF EXISTING INTELLECTUAL PROPERTY LAW

The claim that the interests of authors in their creations ought, as a matter of political morality, to be protected by law does not imply that the content of any specific body of intellectual property law is morally justified. There are many impermissible ways of trying to realize an end that is morally justified. The fact that someone has a legitimate moral interest in something does not give the state carte blanche to do anything it wants by way of protecting that interest. For this reason, the issue of whether intellectual property law as currently formulated is morally justified, then, is a different issue from the issue of whether states ought, as a matter of political morality, to protect these interests.

A number of elements of existing intellectual property law have been subjected to trenchant criticism by theorists who seem to accept the legitimacy of at least some intellectual property protection.⁸⁶ In *The*

85. See Andrew Wiles, *Modular Elliptic Curves and Fermat's Last Theorem*, 141 ANNALS MATHEMATICS 443 (1995).

86. See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001); JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001).

Future of Ideas, for example, Lawrence Lessig rejects the idea that intellectual property protection should afford an author “perfect control” over the content he has created.⁸⁷ On Lessig’s view, existing intellectual property law goes much too far in affording authors control over the disposition of their contents and has the effect of inhibiting innovation and thereby diminishing the well-being of other persons. For example, the Copyright Term Extension Act affords twenty years of additional copyright protection to individual and corporate authors without obvious justification;⁸⁸ the effect is to make it that much more difficult for innovators to utilize past innovations to create new technologies.

Another influential book, *Digital Copyright*, focuses more narrowly on particular flaws in U.S. copyright law.⁸⁹ In this work, Jessica Litman argues that many elements of U.S. copyright law are obscure, unjustified, controversial, and even arbitrary. For example, she rejects the legitimacy of the Digital Millennium Copyright Act, which prohibits efforts to circumvent technologies designed to prevent copyright infringement.⁹⁰ Litman recognizes the interests of content creators in preventing copyright infringement, but plausibly argues that the law illegitimately restricts morally fair uses and thereby violates the interests of third parties. Like Lessig, Litman believes that intellectual property protection should not afford an author absolute control over the contents she has created.⁹¹

There are other elements of intellectual property law in the United States that one might plausibly believe go too far, even on the assumption that the law should provide some protection of an author’s interest in content she has created. Here are just a couple of interesting examples from the world of sports. Pat Riley has copyright protection for the phrase *three-peat*,⁹² while Texas A&M University received a trademark in 1990 for *12th man*—a phrase that had been used for many years by other universities and professional football teams to refer to the role that

87. See LESSIG, *supra* note 86, *passim*.

88. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. § 302).

89. LITMAN, *supra* note 86.

90. *Id.* at 27–28.

91. See Richard A. Spinello, *The Future of Intellectual Property*, 5 ETHICS & INFO. TECH. 1 (2003), for an extended review of these two works.

92. *Any Three-Peat Pays Riley*, N.Y. TIMES, May 22, 1993, at L29, available at <http://www.nytimes.com/1993/05/22/sports/any-three-peat-pays-riley.html>.

spectators play in the outcome of a football game.⁹³ A complete overview of potentially problematic elements of U.S. law is not possible here; for our purposes, the most important point is that one can believe that authors have interests that deserve legal protection without thereby committing oneself to accepting the content of any existing body of intellectual property law. The general issue of whether intellectual property protection is morally justified is different from the more specific issue of whether some particular body of intellectual property law is morally justified.

Finally, if as seems reasonable assuming that there are intellectual property rights, there should, as a matter of individual and political morality, be temporal limits on how long someone can legitimately have intellectual property rights in some content. The idea that intellectual property rights should last even a lifetime is not obvious. Even less obvious is the idea that they should extend beyond the life of the content creator. Once the content creator dies, there is no rights holder; only persons have rights, and death extinguishes the existence of the person. Thus, many of the people who have contributed content that has influenced A's creation of a particular piece of content no longer have intellectual property rights in the content that influenced A. For this reason, there is no reason to think that the fact that content has been influenced entails that it is a social product incompatible with assigning intellectual property rights to A.

Here it is important to recall that there are multiple legitimizing purposes of the state that have to be balanced. Sometimes a morally protected interest will justifiably receive less legal protection than the moral protection because the state's purpose in promoting the public good wins over the state's purpose in giving legal protection to morally protected interests. Such cases might require the state to allow for fair use exceptions and other qualifications that might seem incompatible with a deontological justification for the idea that one has a morally protected interest in intellectual property. In reality, there is no incompatibility between such exceptions and a deontological justification for the idea that content creators have a morally protected interest in intellectual property.

XI. SUMMARY AND CONCLUSIONS

In this Article, I have surveyed and evaluated the various arguments for and against intellectual property protection, concluding that some intellectual property protection is morally legitimate. In particular, I have argued that the interests that content creators have in the content they

93. *Seahawks, A&M Resolve '12th Man' Dispute*, ESPN (May 8, 2006, 11:36 PM), <http://sports.espn.go.com/nfl/news/story?id=2437992>.

create or discover outweigh the interests of other persons in all cases not involving content that is necessary for human beings to survive, thrive, or flourish in certain important ways. It is true, of course, that the claim that an author's interest outweighs third-party interests in certain kinds of content does not clearly imply that the author has a moral *right* to intellectual property. Nevertheless, such a claim surely provides a strong reason for affording some stringent legal protection to the interests of content creators in the contents of their creations. One reasonable way to do so is to allow authors *limited* control over the disposition of their creations.

