

TOWARD AN ANALOGY IN CYBER HISTORY:
JUDEO-CHRISTIAN TRADITIONS OF TRANSGRESSION IN MATERIAL PROPERTY

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EARLY DRAFT

This volume marks—and surpasses—the ten-year milestone in the Information Society Project's role as a leading intellectual center in the founding and promoting of the study of new information technologies, society, and law. This essay, in turn, makes three contributions to the future of the larger interdisciplinary field the Information Society Project occupies (a field we might call *information society scholarship*): one, it calls for and coins *cyber history* as an emerging interdisciplinary topic devoted to informing contemporary questions with insight from the past; two, it notes a method for using analogies to frame historical arguments; and three, it suggests one side of such an analogy—namely, that the present-day challenges strict intellectual property regimes are facing in the mounting trends toward digital cultural economies to function outside of those bounds can be understood, by analogy, with the longer tradition of unrest possessing Judeo-Christian thought on material property.

I hasten to add: this is not an argument that intellectual property and material property themselves are commensurate. In the most significant ways, they are near opposites. However, in terms of shedding light on the motivations and thought driving extra-legal behavior in modern digital economies, a longer tradition of transgression surrounding material property may not be a poor place to begin. This essay is only a beginning; much work is left undone. No effort is made to complete the analogy or to conclude decisively as to the structural similarity or dissimilarity between material and intellectual property. Rather, it is assumed that most readers will already be familiar with the literature outlining reasons to suspect, if not outright rebel against, strict intellectual property rights: to this end, part three focuses on often overlooked evidence of the restless and varying sense of materiality early thinkers like Moses (the presumed author of Genesis), Locke, and Marx assigned to property. The reader is invited to fill in the other side of the analogy: what happens then when immaterial property is built on a shifting foundation of material property? The answers will have to wait the conversation this essay is meant to provoke.

Part I: A Call for Cyber History

Cyber history should be conceived of as much more than the history of the Internet, computing, digital communications, or even questions of the information age and society itself—all though it may be all that as well. Instead, the modern experience with information technologies is only one reservoir of evidence from which to construct historical analogies between our age and the many that came before. Cyber history should then include any attempt to clarify and enrich the contemporary study of digital technology and information society with connections, sometimes directly substantiated by evidence and sometimes by inference only, to the past. The past makes the present thinkable, and there is as much work to be done between the two as one likes.

Consider four brief reflections on how history can improve and correct the sometimes unreflective forward-looking orientation of much information society scholarship: One, historical work involves potentially productive self-reflection and cautions. It is not, as George Santayana said, that those who forget the past are condemned to repeat it. Rather those who do history well must admit its ambiguity. A craft of drafts rewritten every generation, history gives no assurances about avoiding past mistakes. Its uncertainties do, however, serve as a check on the rash of prognostication. The past, too, enjoys the pleasures of prognostication but it, unlike the future, also enjoys ample data. Judging by the present balance of forward-looking studies to historically-minded ones, we should admit that, for the moment, the future of cyber scholarship appears much longer than its past. This is a common imbalance—one that can be remedied by a surge of cautious thinkers, writers, philosophers, actors, and activists that pursue historical work because—and not despite—it functions as a constant gauge of how little we know about ourselves. The future of cyber scholarship lies in the past.

Two, revisiting ignored and untold elements of our contingent social genealogy can shake long-held assumptions, contextualize change, and challenge complacency. Since Plato we can assert that knowing what we do not know is strength, a weapon against sides too convinced of primogeniture and a precedent right to being right. For students of fledgling information environments like the Internet, there may be no richer streambed of insight for challenging centuries of accepted convention than that of new media history. Consider for a moment how all media, obviously, were once new; moreover, since each medium was new before it was old, the history of new media actually predates the history of old media. A fuller spread of thinkable arguments for change awaits those who will critically examine the conjectural and constitutive moments in the novel past.

Three, history—and cyber history in particular—occupies a rare kind of intellectual commons, a concern for what came before, shared among otherwise isolated fields. As all academic disciplines must make some claim to identify change or affirm continuity, even the most forward-looking scholarship gestures in form with literature reviews, panel data, or precedent toward satisfying the human curiosity for change. Not only do most fields employ remnants of historical study, many fields—including our own union of studies—rest on interdisciplinary soil of art history, legal history, media history, science history, and similar. In its capacity to seek order not only in but across interdisciplinary data streams, history also helps respond to the moving-target problem puzzling students of the Internet. History is the study of change that rests upon the simultaneous search for continuous units of study. Cautious reformers interested in communication problems, broadly understood, have much to make of it.

Four, history lets us tell stories that set the tone and trajectory for thinking about such subjects in the future. By this I mean not so much that history lets us peer into the future but that it lets us influence the way others in the future will think about us. The stories we tell about others will narrate those told about us. History must exist for its own sake.

In sum, the stakes of history are many: a sharpened capacity for criticizing certainties, uncovering lost contingencies, pressing change, and telling stories will help cyber students and scholars address contemporary information problems. The information society scholarship at hand is as urgent as cyber history is long and understudied:

thankfully, the two are not mutually exclusive. Modern societies simply must do a better job caring for the rich stores and shares of mental work—and history may be among the most abundant resources available. Whether or not we do so consciously, our lives and work carry forward its generous work. The historical instinct simply prompts us to do so consciously.

As philosopher and pragmatist William James once jested, a scholar has two primary responsibilities—one, to search for truth and, two, to dispense bibliographic information. This think piece contents itself for the most part with the first. A fuller bibliography of cyber history will have to wait for another day. However, for the time being, readers interested in a sense of the wider world of available bibliographical material may turn to Siva Vaidhyanathan's (2006) bibliographic manifesto on critical information studies and the author's recent case for new media history (Peters, 2009).

Part II: A Note on the Method of Analogy in (Cyber) History

Material property and intellectual property are importantly different things. One is governed by rules meant to minimize the effects of rivalry over naturally scarce material, the other is constructed by rules meant to artificially replicate that scarcity in intellectual goods—and as the cost of digital copying and distribution asymptotically approaches zero, the assertion that digital communication technologies pose a huge challenge to the latter will surprise few. Much scholarship, especially in recent cyber law and legal history, has made clear the differences between the benefits of material, private property rights and the liabilities of intellectual property rights. They should not be confused.

Nevertheless, there may be a useful analogy between the two traditions of unrest occupying material and intellectual property. They may be analogous not only in the surface similarity of their names but in structurally similar terms of the social practices, discourses, and thought that mark their tumultuous pasts full of revolution, intelligent disobedience, and deliberate transgression. For centuries before the nineteenth and twentieth, thinkers have not taken modern-day material private property as a given, and telling moments and modes of what I call intelligent impropriety—or conscientious, self-conscious civil disobedience—have flourished. Intelligent impropriety may also refer to an umbrella tradition of productive actions that exist necessarily outside the law, such as civil disobedience, nonviolent resistance, and religious notions of redemption, even exaltation, that rely on transgression.

It should first be noted, as promised above, that the use of analogy in history can be deeply problematic. For the historian, there may be no more pernicious or common mistake than the lightly drawn comparison between two only tenuously related objects. The attack on Pearl Harbor is more unlike than like the start of the Ossetian war. The computer is in many important ways unlike a typewriter. As C.S. Lewis noted, the raven has almost nothing in common with a desk (except that Poe wrote on both). What makes analogies strong is the choosing of two cases (one of which is well known and the other which makes up the object of study) whose histories can be considered structurally similar series of events. Thus can the gaps in the case under investigation be illuminated by the links in the first case. The method of analogy in history is similar to the scientist who uses a control experiment in the laboratory: and the key toward making strong analogies is obviously the relating of strongly interrelated objects. “The best model of a

cat is a cat.” That the two objects are bound not to be the same is also obvious. Material property is not intellectual property; nevertheless, even a negation is a relation. Contrast is a subset of comparisons; we cannot separate concepts without first drawing them together.

While all analogies are incomplete, we should note begin by noting that strong analogies relate comparable properties between objects to a single sphere of thought. They engage objects in a common class, although the choice and formation of that class can sometimes be surprising and revealing. The analogy between the human and mammalian embryo, for instance, may be most useful while researching the evolution of organs and physiological systems. An analogy between human embryos and, say, yesterday's weather, however, is more likely to fail, unless some categorical similarity can be made between the series of events that maps equally well onto both objects. How we categorize information about given objects constrains what we can think about them. The strength of historical analogy depends less on the similarity between the properties of the objects themselves than on the similarity between the organization of evidence about the two objects (Wiener).

Thus, the analogy between intellectual property and material property holds, I argue, as far as the comparison bears on a common class of questions concerning the human impulse to push back against external orders and organizations of cultural and economic power. In young childhood development, it is unclear which one comes first: the will to complain about the theft of a toy or the will not to share the toy in the first place. In either case, theft and an unwillingness to share private property are two sides of the same coin. As Proudhon's (1840) famous reversal, “property is theft” makes clear, the thief who believes private property is his to steal employs the very vocabulary of the private property regime that will punish his actions.

Again, this think piece does not begin to answer how the tradition of transgression in material property may bear on the same in intellectual property. It just begins to ask the question. Yet, in order to better understand the organization of evidence available to address whether it is private property or the trespassing of it that is improper, it is important to try to organize the evidence itself. Trusting that most readers will already be familiar with modern practices of transgression surrounding intellectual property, the bulk of the notes below focuses on the other half of the analogy in the often overlooked Judeo-Christian tradition of material property (from Genesis, to Locke, to Marx).

Part III: A Tradition of Transgression: Intelligent Impropriety in Material Property

With a nod to Raymond William's *Keywords*, we may note that *property* is an old word dating back to the inception in the English language in the early fourteenth century when it referred to the legal right to the possession of an object. Only recently, as late as the eighteenth century, has the sense of property as the thing itself gained currency over the earlier sense: in contemporary usage, property means strictly the right to an object and loosely the tangible thing itself. The corrective to keep in mind around most contemporary usage would be, as legal scholar and property critic C.B. Macpherson (1964) stresses, that in law “property is a right, not a thing.” (Macpherson is importantly right to point out that all property is already immaterial, although I argue below against his classic interpretation of Locke as a possessive individualist.) One intention of this

paper is to begin tracing the changes of material nature of the things to which property applies.

Modified from the old French *propriété* which derived from the Latin *proprius* for “own” or “proper,” the term *property* has long connoted the proper use of objects and material (cf. propriety). As that which is one’s own, property appears in etymological opposition to what is “common,” or vulgar. The French *propre*, meaning “clean,” sets up the early sense of property as something private unsullied by interactions with common masses. The modern usages of the term evoke conflicting senses of public etiquette and of private dominion, domain, and domiciles (the opposite of community property); related to the term *character*, the term also invokes a confusion between the dry descriptive attributes of objects (i.e. the color blue is a property of the sky) and the lush colloquial of popular culture (i.e. Brad Pitt has become hot property since his last movie); and even in its stratification across disciplines: in logic, *property* is a “predicable,” or that which can be predicated and affirmed; in mathematics, *proper* refers to normal vibration or oscillation; or linguistics, *property* is an intrinsic aspect or function of language. Words like proper, character, predicated, normal, and intrinsic begin to hint at the scale at which social uses of property have changed in history or may yet change in the future.

Whatever the variations, the etymologies of the term suggest paired concepts such as private and public, individual and common, exclusive and inclusive apply to discussions of property in history. In an inclusive sense, property applies to a public right that is commonly shared among a public and, in an exclusive sense, a private property right is held only by an individual who wields the legal power to exclude others from use of a particular object. The first constitutes my right to be included in accessing or benefiting from a particular good, and the second grants me the right to exclude someone else from the same (Macpherson, 1964). Hence we have an original distinction between the rights contained in common and individual property.

Over the last few centuries, the first or inclusive right to a common or public property has lost huge ground to the exclusive right to private property. While private property looms large on the present horizon, Macpherson’s (1964) cast of pre-modern thinkers suggests a more full-bodied debate between common and private property:

[Private property] was attacked by Plato as incompatible with the good life for the ruling class; defended by Aristotle as essential for the full use of human faculties and as making for a more efficient use of resources; denigrated by earliest Christianity; defended by St Augustine as a punishment and partial remedy for original sin; attacked by some heretical movements in mediaeval (and Reformation) Europe; justified by St Thomas Aquinas as in accordance with natural law, and by later mediaeval and Reformation writers by the doctrine of stewardship. In all that early controversy, stretching down through the sixteenth century, what was chiefly in question was an exclusive, though a limited or conditional, individual right in land and goods.

Through the sixteenth century private property was struggling to keep up with common property in the race to win over contemporary philosophers. The extent of property was limited to land and goods. However sometime during the seventeenth and eighteenth

centuries, the common sense of property was subsumed by the reasonable and largely capitalist privileging of the private sphere as exclusive, alienable, absolute, and incommunicable.

However, as the right to objects became ever more clearly defined and integral to the material media of early capitalist exchange—e.g., parcels of land, factory goods, hard currency—it was no longer so important that property referred to a right to an object and not the thing itself. The dominant private sphere began to expand with a concomitant extension of property rights. Land was parceled into private lots, and everything on it—including the wives of landowning males—were considered chattel, or moveable, private property extensions of real estate. The rise of estate property in medieval Europe paved the way for the next dimension of extending the private rule of a property-owning individual over others: namely, the abstraction of property from the individual body to the corporation (c.f. *corpus*). This will be touched upon in the section on Locke.

It may also be worth noting that contemporary legal understanding has moved away from concepts of property as an intrinsic or natural right such as treated by Locke and Marx. Instead property is constituted by a bundle of transferable and distinct use rights such as the right to personal profit, sale, rental, donation, disposal, or other use of an owned thing. The bundle of sticks metaphor illustrates the degree to which property discussion has undergone since the earlier theories about natural rights to property explored below. (And there is no reason to assume it will not continue to change significantly over time.)

Genesis

In the sweat of thy face shalt thou eat bread, till thou return unto the ground; for out of it wast thou taken: for dust thou art, and unto dust shalt thou return. (KJV, Gen. 3:19)

The Western tradition has long instructed humanity on the circuitry of labor and life. Labor, in this quote, seems to be the means by which Adam should procure the most basic things needed to maintain life, or those essential things to which property rights can apply: food, dress, and land. Although no clear law on property is laid out in the Judeo-Christian tradition, the narrative has clearly influenced Locke and Marx, among others. I develop a few common themes below.

Material property is ever-present, even in the beginning. In the Garden of Eden, Adam and Eve seem to have all things in common possession. In Gen. 1: 26 God makes them veritable lords over all the earth with the command to “be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.” Their stewardship (the euphemism for dominion plus responsibility) was almost universal. The entire garden—save only one exception, the tree of knowledge—was theirs to possess and use. Eden was common property, shared by two people. The only private property law was not to eat the fruit of the tree of knowledge of good and evil (Gen. 2:17). Of course, so the story goes, they ate the fruit, transgressed, knew good and evil, and fell from paradise into our present postlapsarian wilderness, where, as God said to Adam, “in the sweat of thy face shalt thou eat bread” (Gen. 3:19). Before the fall, God spoke to you

plural. After the fall, He spoke to thee singular. In this transition from plural beings to private means, we see an early prefiguring of the seventeenth-century shift toward the domination of private property. In short, Genesis contains the creation story of private property through transgression.

Yet the garden—and the sphere of their stewardship—was complete, it was also limited. A curiously large amount, five of twenty-five verses in the second chapter of Genesis, are devoted to circumscribing the Garden of Eden within four rivers, as if somehow the division of land—not to mention the implicit invitation to transgress those boundaries—intrinsically predated even the paradisaical, prelapsarian world. In addition, the moment they eat of the fruit, their sphere of private consumption expands from food to dress as they “made themselves aprons” for “they knew that they were naked” (Gen. 3:7). The fashion of fig leaves has been with us since. Also in an interesting irony, Adam replies to God’s question “Hast thou eaten of the tree, whereof I commanded thee that thou shouldest not eat?” by shifting responsibility from the possessor, Adam, to the giver, God, and the direct object, Eve, with his reply, “The woman whom thou gavest to be with me, she gave me of the tree, and I did eat” (Gen 3:11-12). Property owners charged with liability before the judgment bars of modern courtrooms continue to find inspiration in that quote. For the first time responsibility could be shifted from self to other, a separation inherent to atomized possessors of private property. The story of Cain and Abel—“Abel was a keeper of sheep, but Cain was a tiller of the ground”—is famously about the division of land, and the murder of a nomadic economy by its agrarian sibling (Gen 4:2). Even a sense of common property intrudes upon the territory of national identity, when Abram (soon to be renamed Abraham) is given a “land wherein thou art a stranger” as “an everlasting possession” (Gen. 17:8). In the first few stories of Genesis, we see the means to life, food, dress, and land established, transgressed, and transformed.

Lastly, Genesis 2:5, the central verse introducing land management in the Judeo-Christian tradition, brims with a froth of contradicting ingredients. It reads: “And [the Lord God made] every plant of the field before it was in the earth, and every herb of the field before it grew: for the Lord God had not caused it to rain upon the earth, and there was not a man to till the ground.” Here we have a proclamation supposing that when humans appear, so does agriculture; man, it seems, was supposed to till the ground. Yet, in the above quoted Gen. 1: 26, God makes no instruction to Adam and Eve to engage in agriculture while in Eden. They were, instead, “to be fruitful, and multiply, . . . and to have dominion . . . over every living thing that moveth upon the earth.” As a rule, plants do not move. As feminist scholars point out, the only fruit-bearing thing that Adam was to possess was Eve. Here their discussion complicates things further as in the original Hebrew, the verb to till carries several connotations including to dig, to embrace, and to rape. No man meant no agriculture, no love-making, and no virtue-taking. Gen. 2:5 suggests man is supposed to till the ground but in Gen. 1:26 God endows Adam as the possessor of everything but land. This is just not fair, Marx would point out. The initial demands placed on Adam are inconsistent—he was bound to fail. I would add that there may be good reason that God did not command Adam to till the ground: the act of agriculture in all its soiled shades, it seems, was to be humanity’s, not God’s, liability. An independent responsibility for the Earth could only come after original sin, after the inevitable transgression of a property paradox.

The resolution between these two verses comes to my mind with the consideration that Adam was meant to overstep the landed constraints put on him—or at least, that his transgression of property was inevitable and productive for the narrative. And, in certain situations, that same may remain true to date. Before Adam and Eve left the Garden, they were in line with a tradition of property law-makers: they possessed nearly everything in common. Upon consuming the one fruit that was not theirs to eat, they began to participate in a tradition of property law-breakers. Upon forced exit from the private property borders of the Garden of Eden, the paradox of being simultaneously a property possessor—the inheritor of a title to all natural bounty (cf. Locke)—and a property transgressor—the iconoclast of the same inherited and unjust paradoxes (cf. Marx)—became the common lot of humanity. (Paradox, it seems, is at least one irreducible element of a common human property.) Property and its problems predate even Eden in the origin story of the Judeo-Christian tradition, and they continue to permeate the world at hand.

The Intervening Millennia

Allow me to mention in passing a few of the many other texts resonant to the early Western tradition. The overall theme to be noticed here is the development and strengthening of private property. The Old Testament makes reference in many places to the unjust taking of property (Isaiah 1:23, Ezekiel 22:18-22). The New Testament also makes robust references to property in Timothy's sermon about the importance of maintaining a private family unit (1 Timothy 1:3) and in Jesus' still controversial parable about poverty and perfection (Luke 18:18-30, Mark 10:17-31, Matthew 19:16-30). St. Augustine of Hippo (1951, AD 354-430) rebutted the ascetic claim that unless a rich man sells all he has, he cannot enter heaven, favoring instead a richness of internal wealth as critical over the degree of external poverty.

St. Thomas Aquinas (AD 1225-1274), foremost among the Scholastic writers and late medieval scholars, wrote in his *Summa Theologica* that private property was necessary for human life for three reasons: one, people take better care of private property than of common property; two, delegation of responsibilities is more efficient administratively than “if everyone cared for everything”; and three, “because men live together in greater peace where everyone is content with his task [re sua contentus est].” Recent translators have suggested this phrase could better be rendered “everyone is content with his things” (Liggio, 2004). (Whether the retranslation of task as thing reflects a truer meaning in the Latin or a modern primacy for things, I cannot say.) Here we see in Aquinas a precursor to the divine justice attributed to John Locke's labor theory of property: private property is God's gift of natural dominion to individuals, and what we do with it through labor regulates both private and public goods. Joseph Schumpeter (1954) would comment on Aquinas's work that “the individualist and utilitarian streak and the emphasis upon a rationally perceived Public Good run through the whole sociology of St. Thomas. One example will suffice: the most important one, the theory of property.” The Scholastics, following in Aquinas' wake, would make a five pronged argument in favor of private property, as summarized in Liggio: one, private property ensures justice against sinners and slackers; two, private property preserves harmony, as common goods imply conflict; three, private goods are more productively used, hence the

medieval proverb, “A donkey owned by many wolves is soon eaten”; four, private property enforces social order, as it compels even the most unpleasant jobs to be performed; and five, as origin sin brought the problem of scarcity (i.e., unlimited wants and limited resources), private property entails an inevitable attachment to temporal goods (Liggio, 2004). (Locke waged combat against the idea that a world with sin means a world of scarcity: Marx embraced it.) Even in their emulation of original innocence through denying private property, scholastic monks still had to rely upon privately procured food, dress, and shelter.

Scholasticism (1100-1500) would wield the Old and New Testaments’ concern with property into a clearly defined armament in the battle for the primacy of private property with much more subtlety than space here allows. On the whole, early mediaeval scholars and scholastics would come to favor and focus on elements of private property at the expense of common property in the Judeo-Christian tradition.⁵ These ideas would find champions among ostensibly more lay audience and authors in the seventeenth through nineteenth centuries.

Thomas Hobbes (1588-1679) would write that the “giving to every man his own,” a phrase from Cicero, could be sustained only in the presence of a single, incontrovertibly strong power that recognizes and enforces private property rights. James Harrington would reverse Hobbes’ causal arrows by proposing that state control was the natural consequence, and not cause, of property distribution. Other major thinkers on property might include Rousseau, Bentham, J.S. Mill, Thomas Green, Veblen; utopian socialists like St Simon, Fourier, Owen; young Hegelians like Feuerbach and Hess; the philosophers and anarchists like Proudhon and Bakunin; Christian socialists like F.D. Maurice and Charles Kingsley; romantic pre-industrialists like Carlyle; or Francis Hutcheson and David Hume. Of many other authors who continued this line of support for private property within a Christian perspective, such as Adam Smith, Sir William Blackstone (who asserted property as an absolute right but not an absolute private right), Abbe Etienne Bonnot de Condillac, or Anne Robert Jacques Turgot, I will focus on the most influential, John Locke.

Locke

He that is nourished by the Acorns he pickt up under an Oak, or the Apples he gathered from the Trees in the Wood, has certainly appropriated them to himself.... And ‘tis plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and common.... The labour that was mine, removing them out of that common state they were in, hath fixed my Property in them (Locke, 1690, 1964).⁷

John Locke (1632-1704) was undeniably the most formative thinker in popularizing a modern conception of private property. In the paragraph above from the fifth chapter of his *Second Treatise of Government*, Locke articulates a labor theory of property so spicy that its seductive though often clichéd aroma still lingers: individual labor converts common goods into private property; by mixing one’s labor with common goods one’s right to private property is natural and unlimited. (Marx (1844) would later challenge universal private property as an irreducible paradox, and I cannot help but consider how later interpreters of Locke reconcile the two adjectives universal and private into an economy of more than one person.) At first glance, Locke’s vision rings

with an egalitarian persuasiveness since all laborers are placed on equal footing: the baseline of Locke's labor theory seems neutral—all can work, a simple equation for social egalitarians. The economic return on labor seems fair too (see Galatians 6:7, “for whatsoever a man soweth, that shall he also reap”).

First, Locke asserts that civil society was created to protect private property, which in turn benefited individuals. Since a person owns, as a minimum, their body, hands make up the first natural right to labor. Locke's theory also presumes that nature's supply of common goods is overflowing with abundance and bounty. Thus, a man (and yes, invariably it is a man) may take as much from the common storehouse of nature as one can use without detracting from another's right to the same: he (1694) writes, “at the beginning, Cain might take as much Ground as he could till, and make it his own Land, and yet leave enough to Abel's Sheep to feed on.” Taking and not using or allowing common goods to spoil is unjust. In other words, private property is only as good as it does not infringe upon common property. In this often overlooked formulation, Locke assumes a because the natural state of the world first is common to all people, can all individuals use common goods for private gain. Private property can work standing on the shoulders of common property. This middle ground between a bountiful world available for the use of man and the legal world that supports the right to inclusion and common property is best situated to my mind in casting Locke not as a secular thinker, as he commonly is, but as a religious thinker rehabilitating Genesis in the wake of the previous thinkers blind to the subtleties of social justice. In short, Locke knows his Genesis and its presumption of original common property.

Along these lines, the assumption that the natural state of the world does not suffer from scarcity is central to the paradisaical narrative of the Garden of Eden. The balance between replenishing and subduing common goods comes straight from Gen. 1: 26, although God does not make clear whether nature is infinitely renewable and productive in a post-Edenic world. Locke, at least, seems to think it is. Individual consumption is justified, even encouraged, so far as it does not impede natural production. Also the blank slate into which man enters Locke's world of individual property reminds one of Adam and Eve's entrance into the lone and dreary world armed only with their bodies. The parallels with the Genesis text are too obvious to ignore, especially as they may be important to explaining the scale of influence his theory enjoyed in the ethical battles over property to come.

The problem with Locke's case is that in a world of money, inheritance, and agriculture, his labor theory of property simply does not work. Money preserves the value of goods from spoiling; inheritance passes accumulated value to hands that may not know labor; and farms produce and demand appropriate remuneration for supplying food for the masses. Locke (1694) mentions money's ability to accrue value but sees no problem in it: “Gold and Silver...may be hoarded up without injury to any one, these metals not spoiling or decaying in the hands of the possessor.” In money, inheritance, and agriculture, the key question is one of scarcity: is nature plentiful or scarce? Locke sides with the latter. For him, scarcity is consequence of bad economics, not the cause of it. In Marx we see the causal arrows reversed. The problem with Locke for later Marxist interpreters is that industrial capitalism and its narcissism of private property created hugely unequal relationships between producers and consumers, corporations and individuals (Peters, 1999). To the credit of these interpreters, such unequal relations

continue to cross post-industrial societies. Historically, there appears to be merit to the claim that industrial societies produce greater social wealth at the disproportionate cost of those near the bottom end of wealth stratification.

What value, if any, remains of Locke's theory of property? The key, I argue, lies in a modern misinterpretation of his use of property. By property Locke (1694) meant "life, liberty, and estate." This, not surprisingly, is much more limited than the modern definition of property, which has expanded to include infinitely amassable individual and corporate assets. In fact, in Locke's three-word formulation in the late seventeenth century, the only word that could suggest to modern readers more than a person can possess—"estate"—in fact had none of the modern sense of landed property and meant instead the "general state" or "status" of an individual. Life, liberty, and estate—for Locke these comprised the irreducible rights of a person as well as the limits to their property. The two were wedded together: person and possession, body and domain, man and mastery. For Locke, the sphere of property is tightly contained within that of the individual.

To return to the central question, the material nature of Locke's property could not extend beyond that which can be directly touched and transformed, manipulated and managed by the human body. In some sense, then, the medium to Locke's property is man himself. In this Edenic vision the primary vehicle of value extends no farther than one's flesh. Therefore the value of material objects held in property rights cannot extend beyond an individual's mortal life or labor: "Every Man has a Property in his own Person; this no Body has any Right to but himself" (Locke, 1694). Both person and property are material, physical, and limited to each other.

We see in Locke the key modern justificatory theory of an individual property, a property as determined by the limits of a body. The critical difference, however, between what individual meant for Locke and what private means modern property is in the preservation value through media other than the body. Locke wrote, "the greatest part of things really useful to the Life of Man...are generally things of short duration." Thus, except for an allowance of money's supernatural immortality and immunity to decay, the rest of the material objects that apply to Locke's labor theory of property are limited by mortality.

However much we aim to limit private property, it continues to surprise us with its slipperiness. Even Locke (1694) broke his own rule and extended his property beyond himself: "Thus the grass my horse has bit; the turfs my servant has cut; and the ore I have digged in any place...become my property" (my emphasis). I need not stress the potential for private property to subsume servants into slaves: Marx did a fine job of that. Locke's mistakes, however, only encourage further reinterpretation of his theory. In sum, by limiting private property within the bounds of an individual human body and a natural state of bounty and common property does much to complicate contemporary readings of Locke's labor theory of property.

Marx

Like Locke, Karl Marx (1818-1883) is also concerned with the long-term accruing of private property thanks to the new durability that money affords the value of material goods. Unlike Locke though, Marx adds a historical update of the Industrial Revolution

to Locke's romance with the Garden of Eden. He is clear to promote scarcity, not bounty, as the key to his industrial economic state. Born of material scarcity, private property is relational between classes—too much of it among the rich means too little of it among the poor (Peters, 1999). His answer to private property, the “material, sensuous form” of labor, along with the idolatry of inheritance and the cronyism of capitalism, is straightforward. On the first page of the Communist Manifesto, Marx (1848) writes, “The Theory of the Communists may be summed up in the single sentence: Abolition of private property.”

Marxist keywords to private property (e.g. alienation, commodification, disembodiment) need little belaboring here. In a near perfect reversal of Locke's corporal property, Marx asserts that in capitalism, by mixing individual labor with common goods, the laborer is alienated and disembodied from his work. The proletariat is captured a prisoner in the bourgeoisie Panopticon, the economics of abstract exchange value. As the good value is abstracted, so is the worker. The only winner in the Marxist theory of private property is the owner of the means of production, the one that gathers all the Mehrwert, or surplus value, of his laborers whose standard of living he keeps at a bare minimum. Marx expands feudalism's slavery of the body into capitalist captivity of the soul as both body and psyche suffers in the sweat of labor. The materialism of Marxist private property takes for granted a profit-calculating class of “cybourgeoisie”—heartless human machines callous to all but profit-maximizing.⁸ The proletariat in turn is reduced to a numbered body, the capitalist owner to a calculator, and the good to an exchange value in Marx's narrative of the zero-sum duel to the death between bourgeoisie and proletariat. “Estranged Labor,” the final section of his first 1844 manuscript, accuses private property of dividing society into classes, i.e. the propertied owners and the property-less workers. Like some strange strand of anti-materialist anemia, Marx's private property makes ghosts of Locke's bodies and material goods immaterial.

Instead of private property, the heart of Marx's economics pumps common property. However, perhaps as with any living organ in a thinking body, common property is not openly dissected or satisfactorily treated by Marx. To do so would kill it.⁹ Instead, common property is side-stepped in a vigorous, vituperative laying bare of private property. *Das Kapital* mentions common property once—in the 31st footnote of the first volume in which Marx touches upon historical precedent like that of the medieval Germanic *Genossenschaft*, the Russian *Mir*, the Chinese or Indian village, in support of common property. In “Private Property and Communism” of his second 1844 manuscript Marx treats common property by destroying private property. Just as “Communism is the position as the negation of the negation,” common property will be an operable topic for discussion only once private property has been decimated.¹⁰

By proposing creation through destruction, Marx's approach to religion is curiously similar to his approach to property. He proposes to right the injustices of present-day Christianity and capitalism (with its private property) with atheism and communism. Each solution is a negation or denial of an unreality of the material world, the first religious, the second economic. For Marx (1844), as humanity's adherence to Christianity to date has brought only destruction of society and despair of the soul, God and man cannot coexist, as atheism “postulates the existence of man through [the negation of God].” Similarly, private and common property cannot coexist, as communism postulates the existence of common property through the negation of private

property. Thus for Marx, I assert, the material nature of property rests on paradox and transgression: since the material nature of private property is anemic and strangely immaterial, by negation the material nature of common property will bring a fresh vitality to the human experience. Common property, we can only speculate for Marx, will come to touch all objects—goods, lands, and bodies.

Despite the elusive material nature of common property in Marx—given that it does not yet exist—it may be worth pointing out one last unexpected commonality in Locke and Marx’s approaches to property: both presume paradise, one past, one future. Locke’s labor theory of property depends on a lost Garden of Eden maintaining a natural state of bounty and plenty, and hopes for the eventual return of humanity to a similar paradise. Marx’s theory against private property depends on the hope of a better future, the hope of communism.

Even their diametrically opposed styles—one reverently positive, the other full of bitter negations—participate in a common tradition of transgression. Imagine for a moment a text that in less than 400 words repeatedly uses the verbs such as despised, rejected, stricken, smitten, afflicted, wounded, bruised, oppressed and nouns such as sorrows, grief, stripes, slaughter, prison, wicked, violence, deceit, bruise. Sound like Marx decrying the injustices of capitalism? It should. Except that the text in question is Isaiah 53, one among many quality source texts from which the inheritors of the Judeo-Christian tradition learned to write on redemption through revolution. Marx’s Jewish background seems to have afforded him access to the rhetorical as well as methodological richness of redemptive transgression.

Despite their near antithetical positions on property, Marx and Locke both participated in a Judeo-Christian tradition of transgression: Locke assumes that the end of Eden has not permanently damned humanity’s natural state to dismal scarcity and irredeemable sin. In other words, when Adam fell, he at least fell forward. At once similarly and conversely, by denying Locke’s beliefs in the unrealities of natural bounty and absolute beings, Marx presumes that this very act of negation can be creative, that the intelligent breaking of rules can produce a better life. In the Genesis narrative Locke sees a stumble toward redemption; Marx, an estrangement from original communism. In a sentence, both theories of property are preconditioned by a transgression of property.

Instead of a Conclusion

As suggested above, key thinkers in the Judeo-Christian tradition of property are important for their law-making as well as their creative and only sometimes civil law-breaking. Moses, Locke, and Marx are themselves too much aware of the paradoxical nature of material property to treat the topic as straight-forwardly as may be presented in contemporary debates. Not only is it true that intellectual property by definition of its differences in virtual and material cultures of copying, cannot rest solidly on a foundation of material property; it is also true that material property itself is restless. Rather, any useful analogy between the two will begin with resting their common narrative on an underlying imbalance of property in which they both leave room for the rehabilitation of common property. For Locke, common property preconditions private property; for Marx, common property is our ideal future. Several further over-arching themes may be worth considering in summary.

One, property is an ancient and an important issue that evades easy compartmentalization and begs for careful cross-historical and multidisciplinary analysis. Etymologies have proven surprisingly useful in illustrating the semantic slipperiness of meaning over time. We should keep in mind simple observations such as the changing meanings of property as well as the changing material nature of the things embraced by property. Where common property was once the philosophical point of departure for discussion, the private property of capitalism now rules sovereign. Where property strictly speaking has always referred to a right to a thing, sometime in the late eighteenth-century English vernacular, the material thing replaced the right to the thing as the common connotation of property. This meant the popularization of property as something decidedly material—an idea built into the mid-twentieth-century naming of and the present-day subconscious support of sometimes troubling intellectual property policy, among other things. With the rise of intellectual property online, that standard is coming increasingly in conflict with the potential virtualization of online goods. Material and private property may once again be put into check by a counter-movement of immaterial media and of common property.

Furthermore, the material limits to which private property applied has visibly morphed over time. While we have no record of Moses's theory on the materiality of propertied objects, he does offer in Genesis a compelling account of humanity's lot within and without the constraints of original real estate; Locke constrains a labor theory of unlimited property within the bounds of an individual human body; and Marx decries the absence of meaning in capitalist private property, calling instead for a redemption of material meaning through the rejection of industrial capitalism and apostate Christianity. From land, to body, to negation—each contributes his take on the limits of private property in a Judeo-Christian tradition of material property.

Two, property is ambidextrous in its generation of social meaning: private and public, individual and common, inclusive and exclusive. Consider three translations of the Greek word *hamartia*—which probably best translates missing the mark—in a line of the Lord's prayer: "forgive us our trespasses," "forgive us our debts," and "forgive us our sins." Each translation offers a unique accounting for how to recompense for the overstepping of property, economic, and moral boundaries. From here, the three coincide in a retelling of the making of modern property. The early Genesis text expresses the original moral boundaries of Eden in propertied terms, not in moral terms. Property predates even Adam's apple. Further on, the transition from Locke's reverence for the property of an individual mortal body to Marx's revolution against the immortal capitalist corporation showcases some of the drama in the modern conflation of private property and economics. Contemporary private property value is regulated largely in economic principles of fixed material value originally derived from seventeenth and eighteenth century notions of private property. In short, the plasticity of the word property over time and across fields has outrun itself. Until the economics of intellectual property catches up, the virtual value in digital cultural economics, or "excess capacity" in Yochai Benkler's term, may go underutilized.

Three, missing the mark of private property has long had a productive side. For Locke, trespassing Eden meant the fortuitous sharing of natural abundance with millennia of humans—private property is the happy child of a transgression rectified. For Marx, private property was the bastard child of transgression institutionalized. Each of the

seminal thinkers on property treated here appreciate the fact, even so far as to employ the method, that the human condition is enlivened by intelligent impropriety, broken rules and rulers, and property twined with transgression.

In short, this essay has meant to begin a conversation about the use an analogy in cyber history, a study that consciously draws on the past to bear on present problems besetting a world animated by digital and other forms of communication. Between the histories of private property and modern-day intellectual property lie huge gaps: yet this essay has suggested their histories may share analogous traditions of discontent and changing visions of the communication and control of material. In the completion—and thus deconstruction—of this analogy lies an opportunity for future work.

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