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DESERVING TO OWN INTELLECTUAL PROPERTY

LAWRENCE C. BECKER*

My project in this Article is to examine the notion that people might *deserve* to own the products of their intellectual labor in an especially strong way—stronger than any way in which they might deserve to own the products of non-intellectual labor. Such a project runs counter to standard philosophical analyses of property rights, which discuss desert-for-labor arguments in general terms and make little or nothing of the distinction between intellectual and non-intellectual labor.[1]

This Article will show that focusing on desert arguments for intellectual property raises a disturbing issue that standard philosophical analyses overlook. The issue is this: Suppose, as seems highly likely, that there are multiple, equally powerful lines of argument that are relevant to the justification of a system of private property. Utility or aggregate welfare is one such line; entitlement to the fruits of one's labor is another; and matters of fairness, liberty and personality are also standardly raised. It would be very convenient if all these lines of argument were congruent, since then we would not have to choose among them to resolve conflicts at the very foundations of property theory. However, close attention to desert-for-*intellectual*-labor arguments has a disturbing pair of results: these arguments seem especially powerful for intellectual property, but they yield results that seem to be a bad fit with those reached, say, by economic or utilitarian reasoning.[2]

I. THE ISSUE

Imagine a world as close as can be to our own, except that questions about intellectual property are at the moment purely philosophical. Should we have a system of property rights in the products of intellectual

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1. For a counterexample, in jurisprudential literature, see Wendy J. Gordon, *A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L. J. 1533 (1993).

2. A warning label for lawyers: Though I have written extensively on the philosophical foundations of property rights in general, I am no authority on property law, intellectual or otherwise. The reflections to follow are thus offered as amendments to philosophical agendas I have been pursuing. For prompting me to embark on this rewarding detour, I thank (belatedly) Robert Nozick, and (less belatedly) Wendy J. Gordon, whose superb articles on intellectual property have greatly influenced my thinking.

labor? If so, what sorts of things should it cover? And what bundles of rights and other incidents of ownership should be included?

Given such a clean slate, several conclusions seem inescapable. For one, there is no reason to think, a priori, that the system of private property should *not* extend to ideas, patterns of thought, inventions, poems, or music. All the standard justifications for private property can obviously apply to intangibles, and at least two of the standard justifications (utility and labor-desert), *if they are sound at all*, clearly give prima facie support to treating intangible intellectual products as property. Certainly a system of intellectual property rights can in principle have a net positive effect on aggregate welfare; thus, we cannot brush aside utility arguments a priori.[3] Moreover, if it is the case that people can "deserve" property in the (unowned) *tangible* objects they improve with their labor, then surely the case is no weaker for their deserving property in the intellectual objects they create.[4]

Other justifications for property may also give prima facie support for a system of intellectual property. If, for example, Hegel was correct to suppose that there is a necessary connection between the full development of individual human personality and the act of appropriating things (successfully) as one's "own," and if he was correct to assert that this could be the basis for a right to property,[5] then it seems natural to suppose that this might be a particularly strong basis for intellectual property. Where, after all, could it be more important to secure the appropriative powers of a personality than for its unique intellectual products?[6]

Second, addressing the topic of intellectual property *de novo* elevates to prominence an issue generally neglected in property theory in general: are the products of "solitary and creative" labor one's "own" in a special way that connects to justifications for private property? There is, of

3. Among the classic sources, see JEREMY BENTHAM, *Principles of the Civil Code*, *in* THE WORKS OF JEREMY BENTHAM 297, chs. VI-IX at 304-9 (Russell & Russell 1962) (1843); DAVID HUME, *An Enquiry Concerning the Principles of Morals*, *in* ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 191, 192-95, app. at 308-11 (P.H. Nidditch ed., 1975) (1771); JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 199-235 (Sir William Ashley ed., 1987) (1848).

4. For the classic statement of the labor-desert argument for tangible goods, see JOHN LOCKE, TWO TREATISES OF GOVERNMENT 285-302 (Peter Laslett ed., 1988).

5. GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF RIGHT (T.M. Knox trans., 1980). And for a developed contemporary account of this line of thought, see JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 343-89 (1988).

6. Jeremy Waldron, *supra* note 5, has done the most, among recent writers, to revive interest in this sort of argument. But it should be noted that he is skeptical about its ability to give justification for any particular sort of property. Rather, he thinks it may ground a "general" right to acquire property, where, perhaps, various sorts may do.

course, a puzzle about the extent to which individual labor must be discounted by social factors in calculating merit.[7] We know that intelligence, industriousness, health, motivation and opportunity are all crucial determinants of what we produce, and are arguably not the sorts of things that contribute to the claim that we are entitled to (or deserve) the things we produce. Yet the thought that people do *sometimes* deserve reward (or blame) for their achievements is unshakable.[8] How are we to solve this puzzle in the case of property rights?

Standard property arguments, especially when confined to the "standard" cases of tangible and fungible goods, tend to finesse the puzzle rather than confront it. Utility arguments focus on consequences and consider antecedents (motives, efforts, merit of the parties involved) only insofar as they affect consequences. So the facts about desert that matter are merely the ones related to incentives: do people *believe* they deserve property rights in the products of their labor? If so, what would happen to their motives if they did not get those property rights? Lockean labor arguments, on the other hand, do consider antecedents, but under duress[9] they tend to retreat to the no-harm-no-foul rule. (That is, if no one is made worse off by awarding property rights to producers, then there can be no reasonable objection to such awards.) Thus, again the puzzle about desert is evaded.

But we do typically understand the matter of individual versus social contribution to be one of degree; moreover, we standardly identify some forms of individual contribution as especially "original" or creative—in the sense that they can be traced solely to an individual human "author." The products of intellectual labor appear to be prime cases of such solitary and originative work. Focusing on intellectual labor forces us to confront the issue of desert directly.

Third, a *de novo* discussion reveals the importance of a taxonomy of candidates for intellectual property. It is striking how comparatively little philosophical labor has been devoted to making an inventory of the types of things that might be owned. In a book on "property theory," it is commonplace to find a whole chapter devoted to the incidents of ownership in general, and then (most of) the remainder of the book devoted

7. JOHN RAWLS, A THEORY OF JUSTICE 310-15 (1971). For a useful discussion built in part upon reaction to Rawls, see GEORGE SHER, DESERT (1987).

8. I have argued elsewhere that the notion of desert is a fundamental one in moral discourse. *See* LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 45-51 (1977)

9. This is summed up nicely in what I call Proudhon's Challenge: Why should I reward you, in the form of recognizing a right to property, for labor I did not ask you to perform? *See* PIERRE JOSEPH PROUDHON, WHAT IS PROPERTY?: AN ENQUIRY INTO THE PRINCIPLE OF RIGHT AND GOVERNMENT 84 (Benjiman R. Tucker trans., 1966).

to a discussion of general justifications for private ownership of unspecified things.[10] Comparatively little attention is given to the question "Ownership of what?" There may be discussions of problem cases and extremes (non-renewable resources, the atmosphere); seldom are there systematic inventories. This pattern seems to be duplicated in general discussions of intellectual property: the variety of intellectual products is mentioned, lists are sometimes given, but then the discussion turns to some thesis about intellectual property *per se*.

At the most abstract level, for property in general, this may be harmless. But when we have moved from questions of the general justification of property *per se* to questions about a specific category of property—a category defined by the sort of "thing" to be owned (intellectual products)—we are well advised to pay attention to the sorts of things included in that category. What else, if anything, beyond belonging to the category of intellectual products, do they have in common? In what ways are they strikingly different from one another? Should they be grouped into sub-categories for the purposes of property rights theory?

II. Reflections on the Nature of Intellectual Products

It is notorious that lists designed to serve one purpose may seem bizarre for another.[11] The list offered in this section is framed by an inquiry into whether intellectual products have *special* claim to property rights protection in terms of desert—something that distinguishes them from other sorts of things we might make.[12] In what ways are intellectual products different from natural objects, or things produced by machines, or by "mechanical" human labor? And in what relevant ways do intellectual products differ among themselves?

A. Authorship

All human labor, insofar as it is intentional conduct, has a "mental element" that plays a causal role in producing the labor's output. Thus, in a uselessly broad sense, all the products of human labor—even the wild strawberries we find and pick—are intellectual products. For present purposes, however, we need a narrower conception of such prod-

10. A.M. Honoré, *Ownership*, *in* Oxford Essays in Jurisprudence 107, 147 (A.G. Guest ed., 1961).

11. *See* Jorge Luis Borges, *The Analytical Language of John Wilkins*, *in* Other Inquisitions 1937-1952, at 101, 103 (Ruth L.C. Simms trans., 1964), telling a tale of an ancient taxonomy of animals whose organizing principles elude modern understanding. (I thank R.H.W. Dillard for promptly supplying the citation.)

12. Both sheets of music and sheets of steel may have high instrumental value, so sorting products by degrees of instrumental value will not do.

ucts—one that will include inventions and works of art, but exclude natural objects that we merely appropriate (wild strawberries), or the results of happy accidents that we merely discover after the fact (the pleasing taste of some "blackened" food), or a byproduct we might expect but do not intend (an unplanned child). And for this task we need a narrower conception of the specifically mental element involved in the labor.

I suggest we confine ourselves to the sort of labor that constitutes "authorship"—where a thing may be said to have an author when it satisfies three conditions:

(1) its causal history is traceable to (or through) the intentional states of an agent or agents;
(2) those agents, in the process of making their causal contribution to producing the thing, are also creating or realizing their mental representations of it;
(3) those representations either constitute the artifact itself (as when the "thing" is an idea), or play a substantial causal role in its production.

Condition 1 rules out natural objects; 2 and 3 rule out happy accidents and mere physical labor. Cobblers as well as designers are authors of handmade shoes under this definition. Assembly line workers engaged in the mass production of shoes are probably not, since whatever mental representations they may have of the whole shoe are unlikely to play a substantial causal role in its production. The designers of the assembly line, however, as well as the designers of the shoes, are authors in the requisite sense. By definition, then, every product of intellectual labor has at least one author. Many (like shoes) are collaborative efforts.

B. Author-identification

Some intellectual products are identified in part by reference to their authors. Paintings by the masters, for example, are so identified, and most of their value (both aesthetically and monetarily) depends on this identification.[13] It *matters* whether a puzzling drawing, with stick figures, was done by a four-year-old at play or a mature artist at work; the connection to authorship here is necessary for answering the questions "What *is* this?" and "What is it *worth*?" Other things (e.g., mass produced shoes) are not typically identified in this way, and no such

13. "What's that one, near the window?"

"We're not sure yet, but we should have authentication soon. It's either a Miro or a clever imitation. If it's a Miro you can have it for $8000. If it's not, well, you can just have it. It won't be hanging here."

identification is necessary for figuring out what they are, or are worth.[14]

Two intermediate types of cases are worth mentioning. Sometimes (as with a fad for a certain brand of running shoe) a certain vague notion of authenticity matters, even though it is irrelevant to assessing the nature and value of the shoes *qua* shoes. And other times (as when we legitimately appeal to an authority) knowing about the authorship of an object is a reliable indirect method of determining its nature and value.

C. *Originality*

We say that some intellectual labor is "creative" or "original," and some is not. The expression is ambiguous. It can mean that the labor-product is the first of its kind.[15] But more commonly (as here) it means simply that the product originates in the agent's labor—that its causal explanation is in some important sense traceable to the agent but not beyond. It is notoriously difficult to define the difference even in paradigm cases, let alone borderline ones, but perhaps this will suffice for present purposes:

Non-original labor. The paradigm case of *non*-creative intellectual labor is one in which that labor is merely an intermediate link in a transitive causal chain that begins outside the agent.[16] The "source" of the product lies elsewhere; the agent merely replicates or (dis)assembles something in order to make it. (Think of pure copyists, say of medieval manuscripts. Their intellectual labor is not creative, but it is productive.)

Original labor. The paradigm case of originality—of creative intellectual labor—on the other hand, is one in which the transitivity (if any) of prior causes fails to extend to the labor. The labor is the source, the beginning, of (a part of) the causal account of the product.[17] (Think of trying to give a complete, transitive causal account of the composition of Mozart's *Don Giovanni* that makes Mozart himself simply an intermediate link. Every note, voicing, key change, or tempo would have to be explained by events "outside" Mozart. We certainly cannot give such an explanation, and we commonly think none exists—while we can find evi-

14. It is pointless to collapse this distinction by incorporating into the description of every authored object an account of what making the object "meant" to its author (e.g., the first shoes made after the strike of '75).

15. *See infra* part II.F.

16. Thus, imagine a chain of causes and effects (A causes B, and B causes C, and C causes D) such that transitivity holds. That is, imagine that it is true for the chain that "*If* A causes B, and B causes C, and C causes D, *then* A causes D." Now if the intellectual labor is one of the intermediate links (B or C), it is not "creative."

17. Whether causation-without-transitivity is a fully intelligible notion is a nice metaphysical question. Clearly, deterministic explanatory projects in behavioral science assume that human behavior is all fully explicable (in principle), and hence the end-point of transitive causal chains.

dence of influences, tendencies, exigencies outside the composer that are part of a full explanation, another substantial part simply begins with Mozart's creative activity.) In that sense the worker's product has originality.

This obviously has implications for property rights. If my labor is simply an intermediate link in a transitive causal chain, then I have no special claim to its product—no claim at all, perhaps, since the causal explanation can drop all reference to intermediate points and still be accurate. This point tends to be obscured by general discussions of desert-for-labor arguments, and to make them look as strong across the board as they are for intellectual products.

D. *Scarcity*

The "mental element" of intellectual products adds some peculiarities to the notion of scarcity. Poems, compositions, mathematical proofs, philosophical arguments can be produced and *re*produced without any loss of originality. Not so for the physical manuscripts: T. E. Lawrence claimed to have more or less reproduced the text of *The Seven Pillars of Wisdom* after the only manuscript had been lost in Reading Station.[18] The book we have is arguably the same as the one that was lost, but the manuscript from which it was published is not the lost one.

Moreover, "the same" mental element can have several independent authors with an equal claim to originality.[19] Independent discoveries are a common enough occurrence in the natural sciences and mathematics to secure the point. And the same sort of multiplication of originals is possible for any intellectual labor. (The contingent fact that, though it is logically possible, this sort of independent creation does not happen for, say, symphonies and novels is interesting, and a source of some hilarity: recall the character in a Borges story who is devoting his life to writing *Don Quixote* from scratch, word for word, unassisted by Cervantes' text.[20])

18. T.E. LAWRENCE, SEVEN PILLARS OF WISDOM, A TRIUMPH 21-23 (1935).

19. I am indebted to Charlotte Becker for suggesting that multiple original authorship, as I will call it, should have a prominent place in the analysis of deserving to have intellectual property.

20. JORGE LUIS BORGES, *Pierre Menard, Author of the Quixote*, *in* LABYRINTHS 36-44 (1962). This will give the essence of the project. After giving a list of Menard's published work, the narrator says:

> I turn now to his other work: the subterranean, the interminably heroic, the peerless . . . . This work, perhaps the most significant of our time, consists of the ninth and thirty-eighth chapters of the first part of *Don Quixote* and a fragment of chapter twenty-two . . . .
>
> . . . .
>
> [Menard] did not want to compose another *Quixote*—which is easy—but *the Quixote itself*. Needless to say, he never contemplated a mechanical transcription of the original; he

The fact that the same intellectual product can have multiple authors has some interesting corollaries. The mental element in a given intellectual product can be possessed by an unlimited number of people, if it can be "known" by them in sufficient detail. Moreover, if it is known by anyone who can communicate it adequately to others who can in turn communicate it, then "natural" scarcity is not likely to be a long-lasting problem. Aside from the limits of the power to communicate, scarcity will be a function of artifice: withholding or restricting communication.

The implications for property theory are rather startling (though certainly familiar enough in intellectual property law). They show how much can be missed by not paying special attention to intellectual property. In *general* (philosophical) treatises on property, propositions about scarcity are introduced as part of the rationale for property rights. The thought is that we need such rights in order to manage the distribution of scarce resources efficiently, or fairly. Where resources are perfectly abundant (e.g., breathable air), there is no need for ownership arrangements.

In the realm of intellectual property, however, it is clear that the tables are turned. Once created, intellectual products that are not necessarily author-identified can be replicated. In many cases (e.g., simple melodies or ideas) the cost of replication is negligible; scarcity could be eliminated. Property rights are introduced to sustain scarcity for the benefit of the owners, or perhaps (by providing incentives to others) for the long-run aggregate welfare. Thus, it is scarcity-by-artifice that needs justification, if property rights are to be justified. That is not a task that philosophers have often addressed.

E. Singularity

The safety pin is an elegantly simple and useful device, but its design (even a plan for its mass production) does not seem beyond the reach of

> did not propose to copy it. His admirable intention was to produce a few pages which would coincide—word for word and line for line—with those of Miguel de Cervantes . . . .
>
> . . . .
>
> The first method he conceived was relatively simple. Know Spanish well, recover the Catholic faith, fight against the Moors or the Turk, forget the history of Europe between 1602 and 1918, *be* Miguel de Cervantes. Pierre Menard studied this procedure . . . but discarded it as too easy. Rather as impossible! my reader will say. Granted, but the undertaking was impossible from the very beginning and of all the impossible ways of carrying it out, this was the least interesting. To be, in the twentieth century, a popular novelist of the seventeenth seemed to [Menard] a diminution. To be, in some way, Cervantes and reach the *Quixote* seemed less arduous to him—and, consequently, less interesting—than to go on being Pierre Menard and reach the *Quixote* through the experiences of Pierre Menard.

Id. at 39-40.

ordinary intelligence. It is easy to imagine that it might have had hundreds, even thousands of originating authors before it became ubiquitous. If springs, catches, and pins are well known, a spring-catch-pin in which the point of the pin is covered by the catch is not a great intellectual leap. It does not rise to the level of non-obviousness.[21] Most intellectual labor, sole-authored and original or not, is of this sort. However valuable it might be (in reforming the political process, developing a new medical treatment, selling wallpaper . . .), it does not spring from a "singular" intellectual effort.

By contrast, other intellectual products seem to be utterly singular. There seem to be two sorts:

> (1) One occurs when the work is not only beyond the reach of ordinary intelligence, but inexplicable even in terms of extraordinary intelligence and effort.[22] Such works are not explained but simply categorized as works of genius or inspiration.
>
> (2) The other sort occurs when
>
> (a) the work is defined in terms of its fine structure (note-for-note, word-for-word structure) rather than its coarse structure (themes, plot-line, general effects), *and*
>
> (b) the fine structure is either exceedingly intricate or singular in sense (1).[23]

What is preposterous about multiple original authorship for *Don Quixote* is that the work is singular in sense (2). Multiple original authorship of the cold-war containment strategy is not preposterous at all. That work is defined in broad terms that one can imagine originating independently with many deep strategic thinkers; it is not defined in terms of George Kennan's actual words.

This creates a problem of enormous subtlety for intellectual property theory: Which intellectual products should be defined in terms of their fine structure? How fine is fine? How coarse is coarse? Economic

21. For an explication of the doctrine of non-obviousness as a term of art in the law of patents, see Graham v. John Deere Co., 383 U.S. 1 (1966). (I thank my colleague Trotter Hardy for this reference.)

22. The mathematician Mark Kac has said that "there are two kinds of geniuses, the ordinary and the magicians. An ordinary genius is a fellow that you and I would be just as good as, if we were only many times better." But for the second kind, "even after we understand what they have done, the process by which they have done it is completely dark . . . ." Alan Lightman, *The One and Only*, 39 N.Y. REV. BOOKS 34-37 (Dec. 17, 1992) (quoted in a review of JAMES GLEICK, GENIUS: THE LIFE AND SCIENCE OF RICHARD FEYNMAN (1992)).

23. For Learned Hand's discussion of this issue, see Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931). (I thank my colleague Trotter Hardy for this reference.)

arguments for managing scarcity give answers, in the sense that the fine/coarse choice correlates rather directly to how effectively property rights can influence scarcity. (If my rights are only to the fine structure of my compositions, I can have no claim against people who perform my marches in 3/4 time, composers who quote my melodies but orchestrate them differently, etc. Property rights like that do little to create scarcity. If, however, my rights are to the coarse structure of my compositions—say, to any variation on its motifs—then they are very powerful indeed.) But what we need to know is what licenses a given level of scarcity. Desert-for-labor arguments give some guidance on this question, as we will see below.

F. (Temporal) Primacy

Being the first (the oldest known) instance of a given intellectual product is sometimes given unjustified weight. Either later instances were derived from older ones or not. If they were, then credit for originality belongs only with the oldest. If later instances were independent, however, then credit for originality goes to them as well. Temporal primacy should not be confused with originality.

Sometimes, however, the antiquity of a thing revises our estimate of its singularity. Suppose the history of the safety pin turns out to be something like this: First, someone invented it whole, meaning that the first known safety pin is also the first known pin, wire, spring, and catch. This invention was then lost for a time, during which the components were independently invented for other purposes (say, clocks). And at last, the safety pin was invented again from the components. We might in that case be willing to call the first invention (but not the second one) a singular occurrence.

In either case, however, temporal primacy alone seems a red herring. Originality and singularity are the relevant issues.

III. Desert

A. Social practices[24]

Ethnography demonstrates that a strong, possessory disposition of some sort is a very general feature of human personality across a wide range of cultures. This disposition is everywhere channeled through social norms that help to create, sustain, and restrict it—usually by ar-

24. This section brutally condenses material I explored at length in Lawrence C. Becker, *The Moral Basis of Property Rights*, *in* PROPERTY: NOMOS XXII 187-220 (J. Roland Pennock & John W. Chapman eds., 1980). References to the social scientific literature may be found there.

rangements equivalent to what we would call (limited) private property rights.[25] Private property rights may well be universal;[26] they are certainly not tied to economically developed societies.[27]

There is wide variety, however, both within and across cultures, about the specific possessory "interests" people have and the priority those interests are given. Here property rights do seem to mirror economic organization to some extent. The rights to transfer, transmit, modify, consume, or destroy are necessarily included in ownership of a wide array of things in capitalist economies, for example. By contrast, in Stone Age economies, feudal systems, and socialist arrangements, the "right to the capital" is frequently restricted, as is inheritance.[28] (Think of the restrictions on transfer and transmittal of real property under feudalism.[29])

In all this variety, there is at least one constant that is especially relevant here: the special strength of possessory claims to "personal" things—where that means either things created by one's own effort out of one's own (or unowned) materials, and/or things held for personal use, especially when they are "identified" with (among the distinguishing marks of) the person. This is so even in cultures with stringent redistributive rules (the Roman paterfamilias; so-called primitive "communism").

Of course it does not follow, from the fact that such possessory interests exist, that they ought to be recognized as morally compelling, or be protected by law. But a general, sustained social practice, robust enough to be cross-culturally important, puts the burden of proof on anyone who wishes to ignore its normative importance. Let us say, then, that there is a rebuttable presumption in favor of social norms that sup-

25. By limited I mean less-than-the-full-set of the incidents of full "liberal" ownership described by Honoré, *supra* note 10. Honoré lists these eleven incidents: rights to possess, to use, to manage, to derive income from, to get at the "capital" (to alienate, modify or consume it), to transmit by will or bequest, to have "security" (immunity from expropriation), combined with the absence of term, the prohibition of harmful use, liability to execution for debt, and rules governing residuals.

26. This generalization excludes small-scale "intentional" communities, religious and secular. Even there, however, one usually finds that people are entitled to significant forms of personal property.

27. Nineteenth century debates about primitive communism operated with rather all-or-nothing concepts of ownership and law. A South Sea Islander in a coastal tribe, for example, might not likely have full liberal ownership of what he identified as "his" canoe, in the sense that he was forbidden to destroy it, or to deny its use to others when he himself could not take it out to fish. But using Honoré's analysis, it is easy to find modern analogs of such restricted ownership, e.g., in the law of trusts.

28. *See* Becker, *supra* note 24.

29. *See* THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS (1966).

port possessory interests in "personal" things—however that class may be culturally defined.

B. Deserving to own

Suppose, for the sake of argument, that some of the products of intellectual labor are paradigm cases of "personal" things. Original authorship, for example, when any raw materials involved are either one's own or unowned, is one such case. And when a product is author-identified, it can certainly become a part of the author's distinguishing marks as a person. Singular products are especially likely to be author-identified.

Even if there is a rebuttable presumption in favor of norms that support possessory interests in such personal things, we still need argument(s) to show whether such norms should amount to a system of property rights. And we need argument(s) to show what incidents of a system of property rights properly attach to various intellectual products.

Economic arguments, and more generally, arguments about aggregate utility, are attractive here because they promise to give guidance on the details. We can use such arguments to address property rights questions at any level of specificity: whether in general some sort of system of private property is likely to be a good idea; whether certain species of private ownership rights (say use and consumption) of a certain species of thing (say river water) would be justifiable under certain conditions; whether Jones in particular ought to have the right to use the portion of the Platte River that runs through his farm in any way he wants (damming, dumping, taking water for irrigation . . .). Not every classic argument for private property has this sort of applicability "all the way down."[30]

The notion that laborers *deserve* a fitting and proportional return for their work is an ancient one,[31] however, and it too promises to be applicable all the way down. (There may be a general connection between desert and property rights; there may be a special connection between desert and certain forms of property rights; and if such arguments work at all, at any level, they will have to apply to particular people in particular cases.) Moreover, in our culture the labor-desert idea is now virtually irrepressible. It informs one strand of Locke's famous labor theory of (the original acquisition of) property rights.[32] And if such an argument

30. *See* BECKER, *supra* note 8, at ch. 3.
31. "[F]or the labourer is worthy of his hire." *Luke* 10:7.
32. LOCKE, *supra* note 4, reformulated in BECKER,, *supra* note 8, at 53-56.

is sound for the products of intellectual labor, it will constrain utility arguments at every level of specificity. It thus needs to be given independent scrutiny.[33]

To own something is to have one or more of the following rights to the thing (along with other incidents of ownership, such as absence of term):[34] the right to possess, to manage, to use, to derive income from, to transfer by sale or gift, to modify, to destroy or consume, to transmit by will. To have such rights is to be entitled to exclude others in some way(s) from the thing. If I am entitled to exclude you, I have the power to alter your liberties and duties with respect to the thing. That is, when I exercise my entitlement to possess or manage the thing, you lose the liberty to do so, and you acquire various duties with respect to me (returning the thing to me, not trespassing, etc.).

Under what conditions can I *deserve* to have such powers over you *by virtue of my labor*?[35] That question is equivalent to asking under what conditions my labor can justify your becoming liable, or vulnerable, to my manipulation of your liberties and duties. What sort of labor could do that? There seem to be three possibilities: 1) that property-rights-for-labor is a justifiable public response to special excellence; 2) that it is a justifiable reciprocal exchange; 3) that it is a justifiable public response to special human needs.[36]

1. Excellence

Suppose we argue as follows:

(a) Some intellectual labor exemplifies human excellence. It exceeds ordinary human achievements—perhaps by being exceedingly original, or difficult, or brave, or beautiful.

(b) Some human excellence is worthy of admiration.[37] Beyond being morally permissible, it is especially valuable or well-motivated, for example, and presents a model we should emulate.

(c) If something is worthy of admiration, we should admire it. That is, our reaction should not be indifference or envy

33. The following paragraphs on desert extensively rework BECKER,, *supra* note 8, at 49-56.

34. Using a revised version of Honoré, *supra* note 10, I once calculated (not altogether seriously) that there were 4,080 logically possible varieties of ownership. *See* Becker, *supra* note 24, at 216 n.12.

35. I leave aside (as quaint) issues of whether status can justify such powers—that is, whether they rightly accrue to people who have certain talents, or who are especially beautiful, brave, intelligent, or moral. The desert-for-excellence argument, however, comes perilously close to being quaint.

36. *See* Gordon, *supra* note 1.

37. Only some. Think of an excellent torturer.

or malice or (merely) disappointment in ourselves. Rather, if we are emulating human excellence as we should, we will give things what they are due; in this case we will admire whatever is worthy of admiration.

(d) If we should admire some piece of intellectual labor, then, absent countervailing evidence,[38] we should express our admiration to the laborer(s). Such expressions help sustain the people we admire; and if we are emulating human excellence as we should, we will try to sustain admirable people. (As we say, they deserve it.)

(e) If a piece of intellectual labor has general public significance, then an expression of admiration from the public through its social institutions, a public expression, is appropriate, absent countervailing evidence.

(f) If giving people property rights in the products of their admirable intellectual labor helps to sustain them as admirable people,[39] then, absent countervailing evidence, it is an appropriate public expression of admiration. It will be something they deserve.

Now suppose that such an argument is sound. It thus supports the general proposition that (under vaguely specified conditions) it is appropriate to award unspecified sorts of property rights to people whose excellent labor warrants it. But how strong is that support? Does it entail anything about what sorts of property rights intellectual labor might justify? The answers are that it provides only equivocal support, and that support is limited to a curious form of non-preclusive property rights.

Alternatives. The argument from excellence gives only equivocal support because there are plausible alternatives to property rights as a public expression of admiration. The British have their "Honours List;" we have Medals of Freedom, the Kennedy Center Honors, and so forth. In short, there are many ways in which we can make public expressions of admiration, and it is not easy to see why a resort to property rights would ever be necessary, as opposed to merely appropriate, on this desert-basis alone. We can, for example, publicly express admiration by ensuring author-identification: intellectual products can be named for

38. That is, absent evidence to the effect that such expression would be a net harm to the recipient—as in cases where it would be tactless or embarrassing to the people involved to "make an issue" of it.

39. Whether awarding property rights actually helps to sustain admirable intellectual labor is a vexing empirical issue. In this it is like the question of incentives faced by economic arguments.

their inventors, and the author-identification can be kept alive by convention, without resorting to property rights.

In short, as long as there are alternatives to property rights, the argument from excellence will give only equivocal support to them. That means other lines of argument (e.g., economic ones) will have the decisive voice about whether property rights are appropriate. It does *not* mean, however, that such arguments will have the decisive voice in what *sort* of property rights are appropriate. To wit:

Principle of non-preclusion. If the desert-for-excellence argument gives only equivocal support for property rights in a given sort of case, but the equivocation is resolved (say, by utility) in favor of awarding property rights, will just any sort of property rights be suitable? No. The property arrangements will often have to be of a curious form. Since multiple original authors are often possible for intellectual products, property arrangements congruent with *desert* will have to be able to accommodate unanticipated discoveries about who deserves ownership. When products are defined very narrowly (in terms of their fine structure), this will rarely be a problem. But what about people who imagine, say, novel electronic devices well enough to get a patent, but write their ideas into novels or movies instead? If the devices are then independently invented and patented by others, *and* if we have resolved the equivocation in desert-for-excellence arguments by saying excellence will be rewarded with property rights, then surely *both* have a desert-claim to title. Thus, these intellectual property rights would be vulnerable to revision to joint ownership arrangements whenever another original author is found. Surely it would be odd to accept a desert basis for one person that precluded other equally deserving people from getting a similar reward. We will find that the same limitation is imposed by other versions of the desert argument.

2. Reciprocal benefits

A second sort of desert-for-labor argument is based on the value of the product, not the excellence of the producer's activity. This is a version of Locke's labor theory of property, rooted in the notion that (under some conditions) laborers are entitled to property rights in the value they create through their work. But this is a notoriously difficult idea. Property rights are rights *in rem*—rights against the world. Awarding them to one person involves imposing at least liabilities on the rest of us. Proudhon's challenge to this notion is captured by a rhetorical question: Why should we pay you (in the form of property rights) for "value" we did not

ask you to create?[40]

Proudhon's challenge can be met, but only if the desert-for-value argument is highly qualified. Think first about the sorts of labor that will not meet the challenge:

(a) If your labor produces a net *loss* for others, it does not on that account support imposing a *further* loss on them—in the form of the liabilities entailed by awarding you property rights. Insults do not justify the addition of injuries.

(b) If your labor produces neither a loss nor a benefit for others, it likewise gives no grounds for their reciprocation in the form of awarding property rights. Why should we impose a general liability on the public as a reciprocal response to labor that produces nothing of general significance?

(c) If your labor does produce a net benefit for others, then it *may* call for a reciprocal benefit from the public (see below), but only if making the reciprocal return does not itself replace the benefit with a loss. (If it does, then we are back to (a) above.)

(d) And there is a further wrinkle: Suppose your labor was mandated? Suppose you were bound by antecedent obligations to produce these benefits, and you produced no more than required? Surely that is the *end* of a reciprocal exchange, not the beginning of a new one.

(e) We should probably note explicitly, as well, that the labor involved here must be morally/legally permissible. Malice does not deserve a reward, even if it produces accidental benefits.

(f) And we should note that reciprocity is based on the notion of making a return that is "fitting and proportional." That notion is double-edged: benefits deserve proportional benefits in return; burdens deserve burdens.

Thus, a desert-for-labor argument based on public reciprocation for value produced begins with this highly qualified principle:

> A person who produces a public benefit,[41] by way of morally permissible (but not required) actions, deserves to receive a fitting and proportional benefit from the public for doing so. Similarly, if a person's unrequired actions produce a public burden,

40. *See* PROUDHON, *supra* note 9.

41. This need not be directly a public good in the technical sense (i.e., of a non-partitionable good, equally available to everyone). It may instead be a good (like a piece of fiction) that is offered indiscriminately to the public and is enjoyed by a few thousand. Or it may be a privately held good (like a painting) that is a product of activity that contributes to the general welfare.

that person deserves to bear a fitting and proportional burden for doing so.

As I have argued at length in *Reciprocity*,[42] what counts as a "fitting" return in such cases should be determined by what constitutes a genuine benefit (or burden) for the one receiving it. (I have not reciprocated properly for a delicious meal when I have offered in return food that is religiously or morally offensive to my benefactor. A fitting return must be something that my benefactor can accept as good.) And what counts as a "proportional" return is limited by an equal sacrifice principle: the sacrifice we make in satisfying your desert-claim should not exceed your level of sacrifice in producing (our part of) the good. (Suppose a middle-class adult, with little sacrifice, gives a child a bicycle—one that is of enormous benefit to the child. Does the child have to reciprocate with something of enormous benefit to the adult? A luxury car, for example? Surely not. If proportionality were tied to the size of the benefit to the recipient, it would be an instrument of oppression.)

To use the desert-for-value principle to justify property rights, then, we have to show that an agent gratuitously and permissibly produced a net public benefit, and that property rights are the most fitting and proportional return for that benefit. Can we do this in the case of the products of intellectual labor? The answer is again equivocal, and limited by the non-preclusion principle.

Alternatives. Laborers determine what counts as a *fitting* reward for the value they have created: we must reciprocate with things *they*, not we, regard as good. Whether the award of a given sort of property rights is the only possible award that is fitting, then, is not quite the open question here that it was for the desert-for-excellence argument. A sincere insistence, on the part of the laborer, that only full ownership rights will do is a prima facie reason for concluding that there are no fitting alternatives.

Leaving it at that is unsatisfactory, of course, for two closely related reasons. One is that a laborer can be ignorant (or dismissive) of alternatives which she would have preferred, had she but considered them fairly. Thus, it makes sense to insist on a full information standard here. The result is a hypothetical account of fittingness: X is fitting if it is what laborers would prefer if they fully appreciated all the options.

The other closely related issue is proportionality. What counts as appropriate reciprocation is determined not only by fit but by proportion, and proportionality is determined by what counts as equal sacrifice. We

42. Lawrence C. Becker, Reciprocity ch. 3 (1986).

must not be obligated to reciprocate in a way that represents a greater sacrifice than that made by the laborer. Thus, if the fittingness conditions set by the laborer entail a disproportionate sacrifice, reciprocation cannot be made.

Given these limitations on the fittingness condition, the desert-for-value argument will only support the award of property rights unequivocally if (i) property rights are the only alternative a fully informed laborer would accept as fitting, and (ii) such an award is not a disproportionate sacrifice for others. In other cases its support for property rights will either be equivocal (because there are alternatives to property rights that count as appropriate reciprocation), or it will be stalled by the conflict between fittingness and proportionality.[43]

Non-preclusion. Fittingness and proportionality entail yet another important limit on the award of intellectual property rights: if reciprocity requires such awards in one case, it will require them in all similar cases. And whenever multiple original authorship is possible, the rights awarded will have to remain vulnerable to revision to joint ownership arrangements whenever another original author is found.

3. Need as the basis for desert

A third version of the desert-for-labor argument has to do with the way in which the laborer can come to have special needs that can appropriately be met by the award of property rights. Suppose we argue as follows:

> (a) Laborers sometimes become dependent on their products in a way connected to their identity as persons, so that the welfare of the product is related directly to their (psychological) integrity or welfare as persons.[44] Let us call this relation identity-dependence.

43. We can, of course, finesse the impasse by constructing a "reasonability" standard that includes not only a full information condition but also requires the alternatives to be limited to "reasonable" ones—that is, ones that do not demand disproportionate sacrifice.

44. Many metaphors allude to such dependence. We say that people internalize, incorporate, or become personally invested in things; that a thing can become an extension of one's personality; that one can project oneself into a thing. For the purposes of this argument, such metaphors are not necessary. All that this and subsequent premises require is (a) the commonsense observation that a person's psychological well-being can be causally linked to the well-being of a "thing" in such a way that the thing's faring well contributes positively (and its faring badly contributes negatively) to the person's well-being, (b) the obvious fact that such things may be the products of the person's intellectual labor, and (c) the obvious fact that the linkage may be (psychologically) profound—such that when the object fares badly, the person's very sense of self, self-worth, or "wholeness" may be diminished. For an illuminating account of such dependence, see John Seabrook, *The Flash of Genius*, THE NEW YORKER, Jan. 11, 1993, 38-52. It is an account of Robert Kearns's effort to establish rights to his invention of the intermittent windshield wiper.

(b) Identity-dependence on the products of one's labor constitutes having a basic personal need for the welfare of those products.
(c) If a basic personal need is generated and sustained by social norms,[45] and if one's meeting that personal need requires the help of additional social norms, then either i) the help should be given, or ii) the need-sustaining norms should be changed.
(d) Identity-dependence on the products of one's intellectual labor is generated and sustained by social norms that identify human excellence with authorship, originality, and singularity, and which encourage the author-identification of products.
(e) Ownership norms sometimes help meet the basic personal needs of identity-dependence on the products of one's intellectual labor.

The most contestable step in the argument is probably (c). I cannot give a thorough-going philosophical defense of it here, but perhaps that can be forgiven. Step (c) is, after all, only the extension of the familiar legal/moral principle that the one who creates the unjustifiable peril has a special duty of care to the people put at risk. The idea here is simply that the very social norms that create the incentive for productive intellectual labor may also unjustifiably imperil those laborers. The peril is that laborers may become identity-dependent on the products of their labor and thereafter be unable, by themselves, to preserve their (psychological) integrity as persons. When that is so (and is due to social norms identifying human excellence with authorship, originality, and singularity, and encouraging the author-identification of products), an ameliorative social response is in order. Producers deserve that much.

Now suppose that such an argument is sound. It thus supports the general proposition that it may sometimes be appropriate to award unspecified sorts of property rights to laborers whose special need warrants it. But as with the other versions of desert-for-labor arguments, we must ask how strong that support is. Does it entail anything about what sorts of property rights intellectual labor might justify? And the answers, once again, are that it provides only equivocal support (if there are alternative ways of meeting the need), and that support is limited to non-preclusive forms of property rights (since there may be multiple, equally needy authors).

Notice further that, although in this version of desert-for-labor need

45. Norms other than those for imposing justifiable burdens (e.g., those for assigning blame, administering punishment, enforcing fair play and reciprocity).

is the ostensible basis for deserving to own, the argument is not available to *anyone* who may develop such a need. Premises (c) and (d) do a good deal of the heavy lifting, and effectively restrict its use to laborers whose need for property rights was in large part generated by social norms which function to create such needs quite generally. Idiosyncratic or pathological needs are thus not going to get this argument going.

There remains, however, a troublesome question about subjectivity. It looks as though the profundity of the need, and whether *only* the award of property rights will meet it, will be highly variable individual matters even among deserving laborers. If so, then laborers who are relatively tough-minded, psychologically secure, and dispassionate about or detached from their products are at a disadvantage. They simply will not "need" property rights, whereas tender-minded, insecure, possessive people with passionate attachments to their labor-products will have the requisite need.

As far as I can tell, the only fair response to that worry is simply to concede that such variance will exist. Some laborers just will not be able to avail themselves of the need argument. But that is not really surprising. After all, not everyone who needs property in this sense will deserve it on the basis of excellence or reciprocity, either. Some individual cases will be supported by all three versions of the desert argument; others by only one or two.

IV. Results and Remainders

Suppose these desert-for-labor arguments are sound, and that we can establish, in particular cases, whether or not they "support" the award of property rights. What follows from this for jurisprudence? Let me merely outline, rather than argue for, a multi-part answer.

(1) Nothing about what property law ought to be follows *immediately* from the desert arguments. There are many other relevant factors to consider, notably aggregate welfare. Rational policy recommendations have to be based on all the relevant considerations.

(2) If the desert arguments are not factored into the final policy, however (whether it is for or against the award of property rights), then we will have abandoned important elements of fairness and justice in this corner of the legal system.

(3) It is hard to see how the desert arguments could be factored into the award of property rights without honoring the non-preclusion principle.

(4) Honoring the non-preclusion principle would introduce significant changes into intellectual property law. For example, far from being excluded from rewards for their work, authors who can show their intellectual independence from patented products would be entitled to share the property rights in them.[46]

It is also clear that at least two major tasks remain virtually untouched in the discussion so far:

(5) We need a careful classification of intellectual products—one designed to help apply the desert arguments. (For example, what sorts of products correlate best with certain sorts of property rights? Presumably a painter who sells her canvases does not need to possess or use or manage them. Does she need control over how the canvases are framed? Whether they are "cropped" or destroyed? Does she need royalties from future sales?)

(6) We need a careful analysis of how various products are to be defined—in terms of how fine or how coarse a structure is to be used.

These issues I happily leave to another time—or better still, to other, abler minds.

46. I gather that copyright law technically satisfies the non-preclusion principle in the sense that it recognizes (as a defense to the charge of copyright infringement) the possibility of genuinely independent creations. It is, however, difficult to succeed with that defense, especially given the so-called doctrine of unconscious copying. *See* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom.*, ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988 (2d Cir. 1983). (My thanks to Wendy Gordon for this point.) Poor Pierre Menard's project, *supra* note 20, is thus legally doomed.