

The University of Chicago Law School Roundtable

Volume 9 | Issue 1

Article 6

1-1-2002

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Adam Mossoff

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Recommended Citation

Mossoff, Adam (2002) "Locke's Labor Lost," *The University of Chicago Law School Roundtable*: Vol. 9: Iss. 1, Article 6.
Available at: <http://chicagounbound.uchicago.edu/roundtable/vol9/iss1/6>

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LOCKE'S LABOR LOST

ADAM MOSSOFF†

Few philosophers are as ubiquitous within American politics and law as John Locke. A mere listing of the primary and secondary sources—from the Founding Fathers to today—that explicitly refer to Locke or implicitly invoke his ideas would rival the *Encyclopaedia Britannica* in length. His labor argument for property, in particular, has been especially influential. The *Second Treatise* bears the distinction of being the only philosophy text cited on this subject as authoritative precedent by the contemporary Supreme Court.¹ As exemplified by the repeated references to and quotations from the *Second Treatise* in the first chapter of the most popular property casebook,² the imprint of Lockean ideas upon American conceptions of property is striking.

Yet all is not well for Locke's theory of property. Despite its omnipresence in the lawyer's understanding of property rights, his theory of property has fallen prey to modern academic critiques. Scholars across the ideological spectrum—from Jeremy Waldron to Robert Nozick—have dissected the core sections in the *Second Treatise* and have found them wanting. They declare, in short, that Locke's labor argument for property is a lousy justification for property rights.

It is my purpose to rebut the charges against Locke's property theory. In so doing, I have divided this Article into two parts: first, I will survey the contemporary critiques of Locke's theory of property and second, I will discuss Locke's arguments within the context of his own premises and ideas. Accordingly, I hope to offer an interpretation of Locke's property theory that explains what he

† John M. Olin Fellow in Law, Northwestern University School of Law; J.D., University of Chicago Law School; M.A. (philosophy), Columbia University; B.A. (philosophy), University of Michigan. He is clerking for the Honorable Jacques L. Wiener, Jr., on the Fifth Circuit for the 2002–2003 term. He would like to thank Jeremy Bates, Jeremiah Goulka, Philip Hamburger and Jim Lindgren for their comments on earlier drafts. He also occasionally enjoys a ham sandwich and a glass of tomato juice for lunch.

1. *Ruckelshaus v Monsanto Co.*, 467 US 986, 1003 (1984) (citing Locke's *Second Treatise* for the proposition that property arises from "labour and invention").

2. Jesse Dukeminier & Kames E. Krier, *Property* 3, 15–19, 24 (Aspen, 5th ed 2002).

is doing, and what he is trying to achieve, on his own terms.

More importantly, my analysis of Locke's property theory has some notable implications—both theoretical and practical. First, it reestablishes a valid theoretical basis for the myriad property doctrines built upon Lockean foundations. Second, it rescues Locke's theory of property generally from the intellectual punching bag that it has become of late. Finally, it suggests that Locke's ideas remain relevant and interesting as we work to define evolving types of property in our technological age. A renaissance in understanding Locke's labor argument for property on its own terms does much for understanding whence our property doctrines arose and where they might be going tomorrow.

HAM SANDWICHES AND RADIOACTIVE TOMATO JUICE

How has Locke's labor argument for property been treated by prominent contemporary philosophers and legal scholars? Not very well. The source of the problem for Locke is in the oft-quoted passage in which Locke describes his basic argument for property. He writes:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joynd to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by this *Labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joynd to, at least where there is enough and as good left in common for others.³

It is the idea of "mixing labor" as the mechanism for creating property that has proven to be the Achilles heel exposed to contemporary commentators, who typically ask, "What can this possibly mean?" For instance, Karl Olivecrona, a respected political philosopher, writes that "[i]t would be absurd to contend that the 'labour' of killing a deer or picking an acorn from the ground is, in the exact sense of the expression, 'mixed' with the deer or the acorn respectively. Locke cannot have meant it so."⁴ Unfortunately, he finds no way to rescue Locke from this alleged absurdity, noting that it makes sense only if Locke was speaking of how "the spiritual ego was infused into the object" through the mixing arrangement.⁵ Only a philosopher might think that an infu-

3. John Locke, *Two Treatises of Government* § 27, at 287 (Peter Laslett ed, student ed, 1988) ("Locke, *Second Treatise*"). All spellings and italics are reproduced from the original unless otherwise noted.

4. Karl Olivecrona, *Locke's Theory of Appropriation*, 24 *Phil Q* 220, 226 (1974).

5. *Id.*

sion of a "spiritual ego" is more edifying than an act of "mixing labor" in the creation of property!⁶

George Mavrodes, a philosopher of religion and social philosophy, has also criticized labor arguments for property as essentially meaningless. Mavrodes contends that there is no "metaphysical criterion" for property theories predicated upon labor.⁷ Mavrodes explains further that labor theories of property leave unanswered fundamental questions about how "labor mixing" actually works in creating property rights. He writes:

To develop the notion of ownership along these lines requires that we decide how much work is to be "mixed" in a product in order to confer original ownership. But the principle of causality cannot help us with this [i.e., the laborer causally creates the finished product]. Nor does any more suitable principle come to mind.⁸

The proposition that property arises from laboring upon things in the world—mixing one's pre-owned labor with unowned things, according to Locke—is ridiculed as "absurd" and as essentially meaningless. But this is just the warm-up—it gets better.

Robert Nozick, the late philosopher who defended limited government and property rights, raises similar criticisms of the Lockean argument that "mixing" one's labor creates property. Nozick makes his point with an example of tomato juice:

[W]hy isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?⁹

The question is largely rhetorical of course. It is indeed foolish to waste

6. On a more serious note, there is a philosophical basis for Olivecrona's belief that an object can be infused with the laborer's "spiritual ego." This idea is the fulcrum in Hegel's justification for property, which is sometimes superimposed upon Locke because both philosophers focus upon "labor" as the mechanism for creating property. Yet Locke and Hegel impute different meanings to the word "labor." For Locke, labor is the means to produce new valuable items in the world, items that are owned by those who create them. For Hegel, labor is the means to "place the will in any thing." G.W.F. Hegel, *Elements of the Philosophy of Right* 75 (Allen W. Wood ed, B. Nisbet trans, 1991). It is through labor or first possession, according to Hegel, that a "thing thereby becomes *mine* and acquires my will as its substantial end . . . , its determination, and its soul." Id. Nonetheless, the critical comment remains valid: the same charge of incoherence can be made of Hegel's argument that property represents the "will" or "spiritual ego" of the laborer.

7. George Mavrodes, *Property*, 53 *Personalist* 245, 255 (1972). Mavrodes is actually critiquing a modern version of the labor theory of property offered by Ayn Rand, but his arguments equally apply to John Locke, which Mavrodes recognizes in his article.

8. Id.

9. Robert Nozick, *Anarchy, State and Utopia* 174–75 (1974).

one's tomato juice by dumping it into the ocean (without even getting into the EPA regulations on the disposal of radioactive materials). Nozick then asks whether the property entitlement derives from "the *added value* one's labor has produced."¹⁰ Yet the unanswered questions remain: How much added value is necessary to create a property right? Why does one gain a right to the entire object instead of only to that portion to which value has been added? Reaching a conclusion similar to that of Mavrodes, Nozick alleges that "[n]o workable or coherent value-added property scheme has yet been devised."¹¹

Jeremy Waldron, a legal scholar and philosopher writing from largely the opposite side of the political spectrum as Nozick, states outright he agrees that "the idea of mixing labour is fundamentally incoherent,"¹² but he also tests this judgment with hard-core logical analysis. Waldron contends that the proposition

(P) Individual A mixes his labour with object Q, seems to involve some sort of category mistake. Surely the only things that can be *mixed* with objects are other objects. But labour consists of *actions*, not objects. How can a series of actions be mixed with a physical object?¹³

In other words, Waldron believes that Locke was essentially confused in his argument for property. Everyone can tell the difference between objects and actions, right? It's self-evident. In philosophical jargon, Locke has made a "category mistake"—the philosopher's way of saying that Locke has blundered big time.

Waldron later makes an analogy similar to Nozick's example of wasted radioactive tomato juice. Waldron postulates that he drops his sandwich into a block of wet cement, which promptly hardens around it. He then asks: "Can I now claim the concrete block in order to protect my entitlement to the sandwich?"¹⁴ His answer: "Surely that would be regarded as some sort of joke."¹⁵

The philosophy professors' analyses leave no doubt as to their view of Locke's labor argument for property. Locke's argument that property arises from mixing one's pre-owned labor with unowned things is "absurd" (Olivecrona), meaningless (Mavrodes), unworkable (Nozick), "incoherent" (Waldron), and a "joke" (Waldron). It appears that Locke cannot explain why Nozick has (or has not) foolishly wasted his tomato juice and why Waldron cannot extend his entitlement to the cement block that now surrounds his lunchtime sandwich. The case against Locke seems strong: we may all enjoy some loud and boisterous guffaws at the joke.

10. *Id.* at 175 (original emphasis).

11. *Id.*

12. Jeremy Waldron, *Two Worries About Mixing One's Labour*, 33 *Phil Q* 37, 37 (1984).

13. *Id.* at 40.

14. *Id.* at 43.

15. *Id.*

PRODUCING PROPERTY

The joke, however, is not Locke's argument, but rather the conclusions reached by contemporary scholars schooled in the twentieth-century methodology of linguistic analysis. Such an approach often entails the literal analysis of individual words without reference to the broader historical and intellectual context in which such words may be used. This is arguably what is being done by those scholars today who adopt a literal definition of "labor" and then proceed to analyze the alleged incoherence of Locke's argument that one "mixes labor" to create property.

The truth is that Locke did not view the world, human relations, or even the purpose of philosophy in the same way as contemporary scholars, some of whom arguably splice words as finely as did the Medieval Scholastics. Analytical methods are enlightening when used to clarify and explain, but such techniques should not be applied without respecting intellectual context. To dismiss a past philosopher's theories as "absurd" and as a "joke" without acknowledging or respecting the underlying premises of the work is anachronistic, and by the standards of philosophy violates the principle of charity (the ivory tower's equivalent of "innocent until proven guilty").¹⁶

Luckily, Locke is not without some advocates in academe today. Stephen Buckle has developed an elegant analysis of Locke's argument for property, which respects the context in which Locke developed his principles and moral values. Buckle explains that "[t]he doctrine of the origin of property through labor will not be properly understood if it is not recognized that Locke thinks of labour as a rational (or purposeful), value-creating activity."¹⁷

A "value-creating activity" in plain English means *production*. In fact, when Locke gives content to his argument for the creation of property, "mixing labor" repeatedly exemplifies productive activities. For instance, "mixing labor" represents the acts of gathering nuts, growing vegetables and fruits, mining ore, drawing water, killing a deer, catching fish, hunting a hare, cultivating land for farming, sewing clothes, baking bread, felling timber, and perhaps the most important, fermenting wine.¹⁸ "Nature and the Earth furnished only the almost

16. *Oxford Dictionary of Philosophy* 62 (1996). In interpreting the works of other philosophers, the principle of charity "constrains the interpreter to maximize the truth or rationality in the subject's sayings." Id. The principle of charity is intended to prevent philosophers from engaging in strawman attacks, i.e., mischaracterizing the nature of their opponent's arguments.

17. Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* 151 (1991). Buckle makes some of the observations highlighted in this Article, but unfortunately his text does not seem to have a wide readership and it is rarely, if ever, cited as an authority on Locke's theory of property. Also, while I found inspiration in Buckle's work, the specific argument that follows is my own.

18. See Locke, *Second Treatise* §§ 26, 28, 29, 30, 32, 37, 38, 40, 42, 43, 46, at 286–91, 294–300 (cited in note 3).

worthless Materials,” writes Locke, and it is these that “Industry made use of” in creating all manner of items used by people.¹⁹ In other words, the phrase “mixing labor” is a term of art for Locke. It is his metaphor for *productive activities*.

The significance of this observation is that, in several ways, it situates Locke’s labor argument for property within the *philosophical context* of his overall natural law philosophy.

First, it shows why “mixing labor” is a moral activity, according to Locke, and as such creates the moral right to property. In the *Second Treatise*, Locke explains that the fundamental natural law is that man “is bound to preserve himself, and not to quit his Station willfully.”²⁰ The basic moral obligation of all men is self-preservation (and, once this condition is met, to preserve the rest of mankind as well). Locke repeats this fundamental moral injunction again and again; for instance, men should ensure that “the Law of Nature be observed, which willeth the Peace and Preservation of all Mankind.”²¹ If it is a moral obligation for people to preserve themselves, then it follows as a corollary that the *means* of this preservation is a moral virtue. For mankind, the means of survival are produced goods, such as shelter, clothing and food. Production therefore is the moral action by which a man fulfills his fundamental moral duty: preservation of his life.

This is why Locke argues that the world was given “to Men . . . to make use of it to the best advantage of Life.”²² But Locke makes the moral connection between life and production even more explicit about midway through his chapter on property: “God and his Reason commanded him to subdue the Earth, i.e. improve it for the benefit of Life, and therein lay out something upon it that was his own, his labour.”²³ Labor is the means by which each individual fulfills his fundamental moral obligation because it is “labor”—production—that creates the products necessary for him to live.

Second, acknowledging the basis of property in Locke’s natural law morality elucidates his labor theory of value and thus explains *why* Locke is so interested in making the case “that of the *Products* of the Earth useful to the Life of Man 9/10 are the *effects of labour*.”²⁴ Locke believes that labor creates value because “labor” means production, i.e., the creation of new materials for maintaining human life and happiness. He illustrates this value-laden meaning of “labor” in his famous reference to natives of North America, “whom Nature having furnished as liberally as any other people, with the materials of Plenty, . . . a King of a large and fruitful Territory there feeds, lodges and is clad worse than a day

19. Locke, *Second Treatise* § 43, at 298.

20. Locke, *Second Treatise* § 6, at 271.

21. Locke, *Second Treatise* § 7, at 271.

22. Locke, *Second Treatise* § 26, at 286

23. Locke, *Second Treatise* § 32, at 291.

24. Locke, *Second Treatise* § 40, at 296.

labourer in *England*.”²⁵ The moral significance of this comparison is that men find “the Support and Comfort of their being”²⁶ easier to sustain in an advanced industrial society that has unleashed the productive energy of the division of labor and of commerce. Labor creates value because “labor” is a term of art for Locke—referring to the *productive activities* that mankind performs in order to survive and succeed.

Locke’s discussion of land further demonstrates both the meaning of his concept of “labor” and its logical connection to the labor theory of value. He notes that the products of a successful farm, such as “Straw, Bran, [and] Bread,” are worth more than the same acre of good land which may lie fallow.²⁷ The difference in value between these products and the land “is all the effect of Labour.”²⁸ “Tis *Labour* then which *puts the greatest part of Value upon Land*, without which it would scarcely be worth any thing: ‘tis to that we owe the greatest part of all its useful Products.”²⁹ Labor creates valuable products—and turns worthless land into valuable real estate—because “labor” in this context means *production*.³⁰

Given these premises, it is no wonder that Locke believes that money is a natural and logical development of “mixing one’s labor” with things in the world. It is in fact the adoption of money that further stimulates an advanced level of trade and commerce, which directly affects the value of land as property. (Locke acknowledges that money per se is useless and that it is only a medium of exchange, which “has its *value* only from the consent of Men, whereof Labour yet makes, *the measure*”³¹) In recognizing this value-enhancing effect of money-based commerce, Locke has the prescience to foresee the immense cattle ranches of the American West:

For I ask, What would a Man value Ten Thousand, or an Hundred Thousand Acres of excellent *Land*, ready cultivated, and well stocked too with Cattle, in the middle of the in-land Parts of *America*, where he had no hopes of Commerce with other Parts of the World, to draw *Money* to him by the Sale of the Product? It would not be worth the in-

25. Locke, *Second Treatise* § 41, at 297. Earlier in chapter five, Locke implies that American Indians are still in the state of nature: “The Fruit, or Venison, which nourishes the wild *Indian*, who knows no Inclosure, and is still a Tenant in common, must be his, and so is his, i.e. a part of him, that another can no longer have any right to it, before it can do him any good for the support of his life.” Id. § 26, at 287.

26. Locke, *Second Treatise* § 26, at 286.

27. Locke, *Second Treatise* § 43, at 298.

28. Id.

29. Id.

30. This also suggests that labor creates the conditions by which men can rise above subsistence-level living in the state of nature and thereby transcend the “enough and as good” proviso on original acquisition. See, for example, Locke, *Second Treatise* § 37, at 294 (noting that “he who appropriates land to himself by his labour, does not lessen but increase the common stock of mankind”).

31. Locke, *Second Treatise* § 50, at 301–02.

closing . . .³²

People should never forget that the Texas Black Angus porterhouse or filet they enjoy in restaurants today was made possible by Locke's "labor"—and the property, money, and commerce created thereby.

Finally, a proper understanding of Locke's natural law ethics and his concept of "labor" makes it clear why he believes that "God gave the world . . . to the use of the Industrious and Rational, . . . not to the Fancy or Covetousness of the Quarrelsome and Contentious."³³ Contrary to the actions of the quarrelsome and contentious, individuals whom Locke identifies earlier in the *Second Treatise* as "dangerous and noxious Creatures" who are "not under the ties of the Common Law of Reason,"³⁴ industrious and rational men are those who produce and create the products that are in fact necessary to live. In producing these goods and creating an advanced industrial society, the industrious and rational are those people who fulfill their basic moral obligation: self-preservation and the preservation of mankind. They live in accord with the fundamental moral duty of natural law.³⁵ In this respect, Locke's "labor" is not recreation, it is not purposeless action, and, most important, it is *never* an action that destroys or wastes goods.

Given this understanding, the response to the critics is obvious (to use Waldron's term for his own assessment of Locke's labor argument). In response to Olivecrona and Mavrodes, Locke would say: "Of course I meant what I said, and it does have meaning for us in the real world." Locke intends his metaphor of "mixing labor" to be understood by his readers for what it is—a metaphor. This metaphor refers to the moral action of production required by the natural law, and Locke's use of this metaphor is not absurd in this context. Moreover, contrary to Mavrodes's allegation of lack of "metaphysical" clarity, Locke's explanation was quite meaningful for the real-world actors of England and America. The proof is in the Yorkshire pudding, or at least it's in the great beef produced by the vast cattle ranches "in the middle of the in-land parts of America" that Locke hypothesizes from the premises of his property theory.³⁶

With respect to Nozick's and Waldron's counter-examples, Locke would simply point out to them that it is unfortunate that they have chosen foolishly to waste their tomato juice and sandwich. In accordance with his natural law premises, he would remind them that waste is not a productive activity that is in accord with one's moral duty to maintain one's life. In fact, waste is arguably an *immoral* activity that violates the natural law.³⁷ In choosing *purposefully* to waste

32. Locke, *Second Treatise* § 48, at 301.

33. Locke, *Second Treatise* § 34, at 291.

34. Locke, *Second Treatise* § 16, at 279.

35. See above at notes 20–23 and accompanying text.

36. See above at note 32 and accompanying text.

37. Locke, *Second Treatise* § 31, at 290 (cited in note 3) ("Nothing was made by God for

their tomato juice and sandwich, Nozick and Waldron were not “laboring” in any sense used in Locke’s *Second Treatise*. In anachronistically applying their linguistic analyses, Nozick and Waldron have not critiqued Locke’s argument for property.

PROPERTY CLEARLY EXPLAINED

In a 1703 letter to his cousin, Richard King, Locke declared that “[p]roperty, I have found nowhere more clearly explained, than in a book entitled, *Two Treatises of Government*.”³⁸ Locke was apparently impressed by his theory of property.³⁹ In fact, Locke’s appraisal of his own work presages what subsequent philosophers and political scientists would recognize themselves—for good or for ill. “It was not long before it was universally recognized that Locke on *Government* did belong in the same class as Aristotle’s *Politics*,” writes Peter Laslett, “and we still think of it as a book about property, in recent years especially.”⁴⁰ Yet much of the attention given today to Locke’s labor argument for property is critical; at best, scholars accept his conclusions but find his reasoning troublesome,⁴¹ and at worst, they conclude that his argument is absurd or that it constitutes an obvious joke.

Something is troubling *prima facie* when ridiculous counter-examples of spilt radioactive tomato juice and sandwiches lost in concrete are considered unanswerable by a philosopher, particularly by a philosopher with the influence and standing of John Locke. Was the Supreme Court merely perpetuating a joke when it cited to Locke as authoritative precedent on the creation of property rights?⁴² Was the Massachusetts Supreme Judicial Court simply out to lunch the day it recognized trade secrets as a legally protectable property right on the basis that “[i]f a man establishes a business and makes it valuable by his skill and attention, the good will of that business is recognized by the law as property”?⁴³

Man to spoil or destroy.”). See also id. § 37, at 295 (Upon acquisition of land and chattels in the state of nature, “if they perished, in his Possession, without their due use; if the Fruits rotted, or the Venison putrified [sic], before he could spend it, he offended against the common Law of Nature, and was liable to be punished.”).

38. Letter to Richard King (August 25, 1703), quoted in James Tully, *A Discourse on Property: John Locke and his Adversaries* x (1980).

39. Notably, this was an anonymous recommendation, as the *Two Treatises* was published without attribution and Locke never publicly acknowledged his authorship of this work during his lifetime. See Peter Laslett, *Introduction*, in Locke, *Second Treatise* 4 (cited in note 3) (noting that if it were not for Locke’s alteration of his will two weeks before his death, adding an oblique reference to his authorship of the *Treatises*, “we should have no direct proof that he wrote the book at all”).

40. Id. at 3.

41. See, for example, Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 10–12 (1985).

42. See above at note 1 and accompanying text.

43. *Peabody v Norfolk*, 98 Mass 452, 457 (1868).

Was James Madison simply incoherent in his thinking when he argued that a person has property “in everything to which a man may attach a value and have a right”?⁴⁴ Was the New Hampshire legislature absurd in its conclusion that intellectual property should be legally protected because “there being no property more peculiarly a man’s own than that which is produced by the labour of his mind”?⁴⁵ As one legal scholar has noted, we are the “inheritors of the Lockean tradition” in the American property law regime.⁴⁶ Before summary judgment is passed on Locke’s labor argument for property, therefore, the principle of charity demands that Locke’s theory be examined in the best possible light.

Within his proper philosophical context, Locke’s labor argument for property is hardly absurd or confused. When contemporary philosophers apply a linguistic methodology that ignores Locke’s broader natural law philosophy, that adopts a literal, ahistorical meaning of “labor,” and then reduces the “mixing labor” metaphor to absurdity, they have not done Locke justice—nor the myriad legal doctrines defined and promulgated under this conception of property. Locke’s natural law premises and his view of production as a fundamentally moral act may be criticized and these ideas may be adjudged unsatisfactory, incomplete or even incoherent, but such conclusions should not be reached on the basis of analyses that mischaracterize the nature of Locke’s moral claim that “mixing labor” produces property.

In fact, in the *Second Treatise*, Locke speaks to his contemporary and future detractors on exactly this point. Locke writes at the conclusion of his Preface that “[i]f any one, concerned really for Truth, undertake the Confutation of my Hypothesis, I promise to recant my mistake, upon fair Conviction; or to answer his Difficulties.”⁴⁷ Yet, he cautions in these parting remarks to those already sharpening their pencils—or, today, booting up their computers—that he “shall not take railing for Arguments” and “[t]hat Cavilling here and there, at some Expression, or little incident of my Discourse, is not an answer to my Book.”⁴⁸

44. James Madison, *Property*, National Gazette, March 5, 1792, reprinted in James Madison, *The Mind of the Founder* 186 (Marvin Meyer ed, 1981).

45. John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U Chi L Rev 49, 80 (1996) (quoting Act for the Encouragement of Literature (1783)). This statute was superseded by the patent and copyright clause in the federal Constitution, US Const, Art I, § 8, cl 8.

46. Richard A. Epstein, *No New Property*, 56 Brook L Rev 747, 750 (1990).

47. Locke, *Second Treatise* at 138 (cited in note 3) (italics omitted).

48. *Id.*