MORAL BARS TO INTELLECTUAL PROPERTY: Theory & Apologetics

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Abstract

Various intellectual creations are raising complex moral issues in intellectual property law. Videos of mass shootings made by perpetrators, statues of the Confederacy displayed openly, torture techniques used on criminal detainees, and devices for consuming illegal drugs are only a few examples. These expressive and inventive works pose the question of whether their apparent immoral nature should preclude intellectual property protection. Although courts and scholars have long debated moral values in intellectual property doctrines, the literature is largely silent on the effect of intellectual property theory. The question thus arises: Do the utilitarian, labor-desert, and autonomy theories of intellectual property imply that morality is relevant to whether a work should receive patent or copyright protection? This is a critical question left unanswered by the scholarship and jurisprudence dealing with intellectual property and morality. This Article considers the question.

This Article posits that each theory of intellectual property suggests that moral values should inform whether intellectual works receive protection. The Article then contemplates likely objections, responding to arguments that academics have raised against the position that moral values should define intellectual property. Specifically, it responds to the argument that denying protection in some instances may increase the output of an immoral work, that laws in areas other than intellectual property should address moral problems, and that the government should not interfere with the laissez-faire approach of letting the public decide the moral worth of an intellectual creation. The Article concludes that, within constitutional limitations, certain moral values may serve as reasons to deny intellectual property protection.

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Introduction

Last year, a young man filmed himself carrying out a deadly shooting spree that killed fifty-one Muslim worshipers in a half-hour's time.[1] Should the immorality of his atrocious actions preclude him from holding a copyright in his video creation? In recent years, methods of physical and psychological

1. *See, e.g.*, Graham Macklin, *The Christchurch Attacks: Livestream Terror in the Viral Video Age*, CTC Sentinel 18–19 (July 2019), https://ctc.usma.edu/wp-content/uploads/2019/07/CTC-SENTINEL-062019.pdf [https://perma.cc/65YD-L5GE] ("[T]he central point of his attack was not just to kill Muslims, 'but to make a video of someone killing Muslims.' [The perpetrator] visually choreographed his attack, filming the atrocity using a GoPro camera, which gave the footage the quality of a first-person 'shoot 'em up.'" (footnotes omitted) (quoting Jason Burke, Opinion, *Technology Is Terrorism's Most Effective Ally. It Delivers a Global Audience*, Guardian (Mar. 17, 2019), https://www.theguardian.com/commentisfree/2019/mar/17/technology-is-terrorisms-most-effective-ally-it-delivers-a-global-audience [https://perma.cc/AX3J-QVQ6])).

torture have been developed for use on criminal detainees.[2] Should the immorality of torture preclude patent protection for those methods?

As various creative works increasingly raise such moral questions, this issue of whether morality should affect intellectual property protection demands consideration. Although scholars have discussed specific moral values that should inform intellectual property eligibility,[3] few have considered intellectual property theories as part of that analysis.[4] The literature has been surprisingly silent. The question thus arises: Do the theories of intellectual property imply that morality is relevant to whether the law should recognize patent or copyright protection? This Article is the first to consider this question. It argues that the utilitarian, labor-desert, and autonomy theories of intellectual property each imply specific moral values in evaluating the eligibility of works. In setting forth this position, this Article also contemplates likely objections, including theoretical arguments that academics have raised against the application of moral values in defining intellectual property. This Article responds to those arguments, filling a critical void in the scholarly discussion about the role of morality in intellectual property.

Importantly, the discussion of this Article is limited in nature. It does not purport to consider all systems of morality, nor does it argue for the adoption of a specific moral system arising independent of intellectual property. Rather, this Article is limited to the moral values that are implied by the three most common theories which underlie patent and copyright law—not trademark and trade secret law. This Article argues that these theories imply moral values that are relevant to defining the copyright and patent eligibility of works and defends that conclusion against potential objections.

The starting point for this discussion is an examination of the three theories of intellectual property, as set forth in Part I. First, the utilitarian incentive theory posits that intellectual property exists to provide an economic incentive to create and disseminate expressive and inventive works. This theory implies the moral value that the law should not incentivize works that result in a net cost to society. The utilitarian theory's economic rationale further suggests that denying intellectual property protection is appropriate where the market for an intellectual work fails to account for a negative

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2. *See* Mark P. Denbeaux, Stevie Moreno Haire, & Tatiana Laing et al., How America Tortures (Dec. 2, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3494533 [https://perma.cc/5Q8N-8GE3].
3. *See, e.g.*, Ann Bartow, *Copyright Law and Pornography*, 91 Or. L. Rev. 1 (2012); Margo A. Bagley, *Patent First, Ask Questions Later: Morality and Biotechnology in Patent Law*, 45 Wm. & Mary L. Rev. 469 (2003).
4. Robert Merges has written a strong defense of intellectual property. Robert P. Merges, Justifying Intellectual Property (2011). He provides a rich discussion of philosophical foundations and principles that guide the decision of whether to recognize intellectual property. His writing, however, does not specifically address whether the theoretical justifications contemplate moral values dictating a denial of protection.

externality or asymmetric information. Second, the labor-desert theory posits that intellectual property exists to reward a creator for her labor or investment in creating the work. This theory is premised on the moral value that the law should not reward creators whose intellectual works harm life, health, liberty, or property of another, or society generally. Third, the theory of autonomy and personality posits that intellectual property exists to recognize a creator's individuality that is present in creative works. This theory implies the moral value that the law should not recognize rights in works that inhibit another's autonomy or exercise of personality. Taken together, these three theories provide justification for denying intellectual property protection to certain types of works.

Having reached this conclusion, the Article considers three specific theoretical arguments that are cited as reasons not to deny protection on moral grounds. The first argument is that denying protection in many instances may actually increase the output of the specific immoral work. This Article explains, however, that under any of the intellectual property theories, a denial of protection is not supposed to control or solve a moral problem that is inherent in a work. Dealing with that problem is the role of other areas of the law. The purpose of denying intellectual property protection is simply to refrain from incentivizing or rewarding immoral activity. The denial of protection has nothing to do with controlling or curbing such activity.

The second argument is that other laws, not intellectual property, should address the moral problems associated with a work. This Article responds that other laws should indeed be the means for resolving the moral problem. To that end, intellectual property should support these other laws by not incentivizing or rewarding the very behavior that the other laws attempt to control. Moreover, intellectual property comprises violable rights, which are sufficiently flexible in nature such that they may be affected by moral considerations—regardless of whether other laws address the specific moral problems.

The third argument is that the government should not interfere with the laissez-faire market approach of letting the public decide the moral worth of an intellectual creation. This Article responds by acknowledging the merits of this approach. In many, if not most, situations, the free market should decide the moral worth of a work. However, this presumption should not represent an absolute bar that would preclude Congress, or in rare circumstances the courts, from denying protection for moral reasons. Just as the government must intervene in limited circumstances to address market failures in other laissez-faire marketplaces, the market for intellectual creations is no different. The government should act within the marketplace based on an assessment of market failures. Within certain constitutional limitations set forth in the Intellectual Property Clause and First Amendment, denial of protection may be appropriate in the laissez-faire market.

This Article thus proceeds in two Parts. Part I sets forth the three theories of intellectual property and argues that each implies a specific moral value that limits the scope of protection. Part II responds to arguments against the conclusion that moral criteria should inform the scope of intellectual property.

I. Moral Limitations in Intellectual Property Theories

Before addressing the issue of morality within intellectual property, it is necessary to establish the meaning of morality. Morality may be defined to mean a code of conduct that dictates what a person ought or ought not to do.[5] For instance, the proposition that stealing is wrong represents a moral judgment: people ought not to steal. Morality therefore dictates whether an action is right or wrong; it prescribes the actions that people should and should not choose.[6]

With this understanding of morality, this Article considers issue of whether morality should play a role in defining intellectual property. The moral values considered in this Article are those implied by three established theories of intellectual property: utilitarian (incentivizing beneficial effects for society); labor-desert (rewarding the creator's labor); and personality-autonomy (recognizing the creator's autonomy and personality in a work).[7] In the Subpart below, this Article observes that each theory recognizes a specific moral value to justify intellectual property rights and also suggests certain moral limitations on intellectual property protection.

A. *Utilitarian*

Utilitarianism posits that people should act in a way that maximizes utility. John Stuart Mill propounded the general moral theory of utilitarianism, writing: "The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness."[8] Fundamentally, this utilitarian rationale invokes a moral principle—specifically, the principle that the consequences of an action define whether the action is moral.[9] If an act promotes utility, it ought to be pursued.

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5. *See* Bernard Gert & Joshua Gert, *The Definition of Morality*, Stan. Encyc. Phil. (Feb. 8, 2016), https://plato.stanford.edu/archives/fall2017/entries/morality-definition [https://perma.cc/KH73-WBYK].
6. *See id.*
7. *See* William Fisher, *Theories of Intellectual Property*, in New Essays in the Legal and Political Theory of Property 168, 169–73 (Stephen R. Munzer ed., 2001). Fisher proposes a fourth theory—social planning. *See id.* I do not discuss that theory herein.
8. John Stuart Mill, Utilitarianism 6 (T.N.R. Rogers ed., Dover Publ'ns 2012) (1863).
9. *See id.*; *see also* Walter Sinnott-Armstrong, *Consequentialism*, Stan. Encyc. Phil. (June 3, 2019), https://plato.stanford.edu/archives/sum2019/entries/consequentialism [https://perma.cc/UCC4-3MCE].

This simple moral principle underlies the utilitarian theory of intellectual property. Essentially, the utilitarian theory of intellectual property is based on the moral view that the consequences of recognizing intellectual property protection yield greater utility for society than the consequences of not recognizing intellectual property protection. Society is better off with intellectual property laws because of the utility they provide.

Several questions follow from this moral principle. First, as a theoretical matter, how does extending intellectual property protection yield greater utility for society? Second, are there exceptional situations in which the utilitarian rationale does not suggest extending intellectual property protection? Third, if such an exceptional situation does arise, what practical considerations should guide the denial? These questions are discussed in the three Subparts below.

1. Incentive for Production

Utilitarian theory justifies intellectual property rights as a necessary means for bringing about a useful result for society. Under this theory, intellectual creations are "public goods."[10] A public good is a product that is available to anyone (non-exclusive) and has a supply that does not decrease when a person consumes it (non-rivalrous). Owing to these characteristics, creators of these goods cannot bar "free riders" from consuming the goods. Thus, left to natural market forces, the goods will be underproduced in relation to public demand. The underproduction of intellectual creations is a failure of the free market.

Intellectual property law represents the government's intervention into the free market to resolve the problem of the market's underproduction of certain types of intellectual creations. The government provides creators with intellectual property rights to exclude others from committing specific uses of their creations. In this way, intellectual property rights provide creators with a monopoly over uses of their creations, and that monopoly facilitates an economic incentive for them to produce and disseminate their creations for public consumption.[11] More specifically, inventors and authors can charge a

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10. *See generally* William M. Landes & Richard A. Posner, The Economic Structure of Intellectual Property Law 13–14, 19 (2003) (defining and discussing public goods in intellectual property).

11. The necessity of the incentive function of copyright has been called into question by several scholars. *See, e.g.*, Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 Theoretical Inquiries L. 29, 29 (2011) ("[T]he empirical foundation for the copyright-as-incentive story is seriously suspect. It fails to account for the economic conditions under which most art, literature and other expressive works are produced, and it contravenes the insights provided over the last forty years or so by psychologists interested in creativity and by behavioral economists."); Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 La. L. Rev. 1, 3 (2008) ("[T]he law should take creator and distributor motivation into account in determining how robust

fee for others to make certain uses of their patented inventions or copyrighted expressions. That fee allows creators to recover the investment costs that were necessary to create the invention or expression. Hence, intellectual property rights represent the government intervening in the free marketplace to incentivize the production of otherwise underproduced intellectual creations. Utilitarian theory, then, is essentially a theory based on economic incentives to bring about a useful outcome for society.

2. Moral Limitations

In some instances, the utilitarian justification for intellectual property is lacking. To the extent that an intellectual work lacks sufficient beneficial effects to compensate for the costs that the work imposes on society, utilitarian theory suggests that the law should not encourage the creation. For example, developing a method for torturing humans does not appear to provide a net benefit for society. The harmful consequences that might follow from this invention suggest that the invention imposes a cost on society greater than any benefit that it might provide. Under this circumstance, the utilitarian theory suggests against granting patent protection for the invention. Hence, the utilitarian theory implies a simple limitation on the scope of protection: creations that impose a net cost on society ought not to be encouraged by extending protection. The law should not intervene by extending intellectual property protection where the creation is harmful to society.

This moral limitation has problems in application. It is difficult to assess whether a creation is, in fact, harmful to society. Consider a tabloid newspaper that knowingly publishes a falsehood, purporting that the false story is true. Some people are certain to gain utility from the tall tale, perhaps because it supports their belief system or simply serves as entertainment. Although those people wrongly believe that the story is true, they are not made any worse off by holding a false belief that does not affect their actions or property rights. The entertainment value to readers might outweigh any reputational harm to the person subjected to the defamatory content. Similarly, consider the invention of cigarettes, which are highly destructive to human health. Some people value the utility from consuming cigarettes more than the cost that they impose on their health. Is the cigarette invention harmful to society? Perhaps not, given that a significant portion of the population values the immediate utility from cigarette consumption more than the longterm cost of smoking. The utility calculus depends on whose viewpoint is considered and, as a result, harm can be difficult to establish.

Related to the above argument, it is often difficult to identify which values are relevant in assessing societal harm. Does the value of preserving

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the copyright protection afforded should be."); David A. Simon, *Culture, Creativity, & Copyright*, 29 Cardozo Arts & Ent. L.J. 279, 281 (2011) ("[A]uthors may not always create copyrightable works for remuneration.").

environmental resources matter when assessing harm? Opinions vary on whether human behavior that negatively affects environmental resources is in fact a harm to society. For some, negative environmental effects may be outweighed by societal economic gain. Similarly, is the value of economic gain more important than educational achievement? Than the individual mortality rate? Than leisure time? Many value judgments must be made to assess whether a creation affecting various aspects of life promises a net benefit or cost to society. Yet in explaining utilitarianism, Mill simply defines harm generically as pain.[12] The incentive theory discussed previously does not define which values matter, as it concerns overcoming an economic failure in the marketplace for intellectual works. Hence, uncertainties inherent in assessing whether a creation is harmful to society present a significant challenge to applying the moral value of utilitarianism.

Although these uncertainties are inherent in assessing harm, they do not affect application of the moral limitation under the incentive theory. That theory provides a basis for measuring harm. Recall that the incentive theory justifies intellectual property rights on the ground that intellectual creations are public goods that the market underproduces. A market failure, caused by the public-good nature of the creation, justifies government intervention in the market for intellectual creations. This means, then, that the incentive theory defines harm according to market failure—that is, where the market fails to produce an optimal level of the creation. Harm may thus be defined as existing where circumstances result in the market failing to provide an efficient level of production of a work. Harm is not one person's subjective opinion about moral values. It is an inefficient level of production in the marketplace for the work.

Under this definition of harm, it is possible to identify other circumstances that may result in a market failure. Unlike the circumstance of a public good, other circumstances may result in an overproduction of intellectual creations, namely, the circumstances of asymmetric information and negative externalities.[13] Asymmetric information arises when consumers and producers of a good do not have the same information about the good and that information affects the decision to purchase or sell.[14] Suppose that an inventor knows that a side effect of his useful invention is likely to cause health problems for the consumer in the future, but individual consumers do not know this fact. In this situation, demand for the invention will be higher than the optimal level because of asymmetric information—consumers will want more of the prod-

12. Mill, *supra* note 8, at 6 ("By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure.").
13. *See* Ned Snow, *Content-Based Copyright Denial*, 90 Ind. L.J. 1473, 1512–13 (2015).
14. *See generally* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. Econ. 488, 489–92 (1970) (discussing the effect of asymmetric information in the free market system).

uct than they would have had they known about the potential negative health consequences. Similarly, a negative externality occurs where a third party to a transaction incurs a cost.[15] Suppose that an inventor creates and sells an invention that pollutes the environment. Members of the public are negatively affected by the invention, even though they themselves are not direct consumers in the transaction.[16] The cost is diffused to the public instead of remaining concentrated with the individual consumers, so the cost is not accurately felt by the individual consumers, causing demand to be higher than the optimal level for society.[17]

The presence of these circumstances thus results in an overproduction of intellectual creations. This simple fact suggests that the justification for intervening in the marketplace to grant intellectual property may be lacking. Recall that incentive theory provides a reason to justify government intervention in the marketplace for intellectual creations—namely, their underproduction. Yet where other circumstances are present that indicate an overproduction of certain intellectual creations, those other circumstances indicate a different market failure than the original failure which justified intervention in the first place. Indeed, those other circumstances may be sufficiently grave that the overproduction is likely to be great. For instance, in the previous polluting-invention example, if the negative externality of pollution is sufficiently costly to the third parties (say, completely eliminating the earth's ozone layer), that market failure would cancel the original justification for granting intellectual property protection in the first place (specifically, its public-good nature). In such instances, the justification for granting protection would be inadequate.[18]

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15. *See* Anne Steinemann, Microeconomics for Public Decisions 191 (3d ed. 2018).
16. *See* Peter T. Wendel, *Protecting Newly Discovered Antiquities: Thinking Outside the "Fee Simple" Box*, 76 Fordham L. Rev. 1015, 1032–33 (2007) (describing market failures that would result from pollution); *cf.* Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 Cornell L. Rev. 1101, 1175 (1988) ("[A]ll consumers were not necessarily free to choose safe or safer cars, nor were they adequately informed to make a correct choice. Congress thus rejected arguments that the market alone would provide the level of automobile safety that Congress now sought to ensure.").
17. *See* Wendel, *supra* note 16, at 1032–33.
18. This argument draws support from observations by Brett Frischmann and Mark Lemley about "spillover" effects of intellectual property. *See* Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 Colum. L. Rev. 257 (2007). In their landmark article, they observed that the traditional justification for intellectual property rights is that an intellectual creation yields spillover effects for society (or in other words, it yields positive externalities). *See id.* at 284–85. For example, a new drug that can cure ailing patients yields positive externalities which are not usually present in the absence of patent rights: the patients will both be cured and contribute productive outcomes to society. Yet, as Frischmann and Lemley explained, this justification does not always hold true: the cost of propertizing a creation could result in market distortions that are detrimental to social welfare. *Id.* at 299. In the example just cited, strong property rights in the drug might hinder an optimal level of dissemination or impede the production of

Thus, the problems that arise in applying the moral limitation of harmful consequences may be resolved by the identification of a negative externality or asymmetric information. The circumstances may indicate a market failure resulting in the overproduction of a work, which diminishes the argument for extending intellectual property protection. This is not to say, however, that in every instance of a negative externality or asymmetric information the law should deny intellectual property protection. Some market failures that result from these circumstances may be minimal. Consider again the polluting machine. If the machine emits a pollution level that is very minimal, the effect on third parties may be negligible, such that the externality would not be sufficiently problematic to undermine the argument to grant protection. The presence of only a slight market failure would not imply that granting protection would result in a net harm for society, so a slight market failure would not imply that protection should be denied. Hence, other circumstances that challenge protection must cause a level of *over*production that is at least as great as the level of *under*production caused by the public-good circumstance. In the pollution example, the harmful effects of the pollution on third parties must result in an overproduction of the machines at least equal to the underproduction of the machines that results from their invention being a public good. The upshot is that market failures implying a denial of protection must be sufficiently severe to deny protection. This requirement, of course, raises a question of practical application. That question, along with others, are discussed next.

3. Practical Issues

The moral limitation of the utilitarian theory raises some practical issues. First, for a denial to be justified, must the denial alleviate the circumstance of asymmetric information or a negative externality? Second, must the severity of the market failure caused by that circumstance be well established? Third, which government actor should make the assessments that would justify the denial? These issues are discussed below.

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other productive drugs that are only remotely similar to the original. Hence, intellectual property law should not simply assume that the presence of a positive externality that follows from an intellectual creation justifies incentivizing it through property rights. The spillover argument supports my argument for two reasons. First, it relies on the premise that a creation's ultimate effect on society should determine whether a creation should be propertized. The fact that an intellectual property right might increase the output of a creation does not imply that extending it protection is necessarily good for society. Second, the spillover argument implies that market distortions caused by negative externalities that follow from a creation may be reason *not* to protect the creation. *See* Brett Frischmann, *Spillovers Theory and Its Conceptual Boundaries*, 51 WM. & MARY L. REV. 801, 806–07 (2009) ("[T]oo few (*many*) resources may be allocated to activities that generate positive (*negative*) externalities because those persons deciding whether and how to allocate resources fail to account for the full range of benefits (*costs*)." (emphasis added)).

a. Fixing Other Failures

The first question deals with whether a denial of intellectual property protection must necessarily resolve the market failure that called into question the original basis for granting intellectual property protection. For instance, if a work causes a negative externality, is denial of patent protection appropriate only if the denial will cure that negative externality? The answer is no. The denial of protection does not represent an attempt to cure the market failure. Rather, the denial represents a choice *not* to cure the original market failure (namely, the underproduction of the public good). The presence of a market failure that would overproduce the creation simply undercuts the original justification for granting protection in the first place. In the pollution example, denying protection for the polluting machine is not intended to fix the problem of pollution. Indeed, it is not intended to bring about any result. The denial simply reflects a choice not to intervene. Likewise, denying protection for a defamatory news story is not supposed to alleviate the effects of the defamatory publication. Rather, it reflects a choice not to support that content. In short, denial of protection is not intended to remedy the market failures that suggest an overproduction of intellectual creations. The denial reflects the law leaving the parties as it finds them. Rather than incentivizing the harmful creation, intellectual property law should do nothing. Thus, the purpose of denial is not to cure the market failure.

Of course, other legal means might be employed to correct the market failure. Perhaps a tax, a disclosure requirement, a tort action, or a criminal penalty would resolve the negative externality or asymmetrical information. Denial of intellectual property is not supposed to replace these other legal means for curing market failures. Moreover, if such other means were effective at curing market failures, intellectual property protection could yet be justified. For instance, a tax on a specific invention that polluted might both decrease demand for the invention (decreasing the aggregate pollution level) and generate sufficient funds to remedy environmental damage. In this situation, it might make sense to grant patent protection for the polluting invention. More generally, other legal means may be employed in conjunction with intellectual property protection in order to produce an optimal level of production. Other legal means may cure the market failures so that beneficial consequences may yet be realized for society through extending intellectual property. However, until those other legal means can cure the market failures, intellectual property protection should be denied.

b. Assessing the Severity of Other Failures

As discussed above, market failures that challenge the argument for granting intellectual property protection must be sufficiently severe to deny protection. Recall that market failures resulting from negative externalities or asymmetric information must cause a level of overproduction that is at least as great as the level of underproduction caused by the market failure

resulting from the public-good nature of the work. How does one establish this fact? Admittedly, this question poses evidentiary difficulties. It is difficult to precisely identify the amount that the market underproduces of an intellectual work as a result of that work being a public good. Likewise, it is difficult to identify the amount that the market overproduces of an intellectual work specifically because the work causes a particular negative externality or asymmetric information. These sorts of inquiries require assessing market responses under hypothetical conditions that are difficult to model. Therefore, the inquiry would likely lead to guesswork.

The difficulty surrounding such inquiries does not imply that the inquiries are not worth considering. The point of weighing the market failure that calls for recognizing intellectual property (owing to the public-good nature of a work) against an offsetting market failure (owing to negative externalities or asymmetric information) is to ensure that not every instance of an offsetting market failure will lead to a denial of protection. Some of the other offsetting market failures may simply not be sufficiently detrimental or established in fact to result in a denial of protection. Accordingly, the severity of an offsetting market failure should be considered, but not necessarily empirically proven, in deciding whether to withhold protection. Even in the absence of empirical evidence, the question of severity is still worth considering as a theoretical and intuitive matter. Asking the question ensures that denials are not commonplace.

With this in mind, consider purposefully deceitful expression in a newspaper. The circumstance that would suggest against recognizing intellectual property protection is asymmetric information: the creators of the content realize the falsity of the newspaper story, whereas the consuming public may not. If, however, such expression were to occur in a tabloid newspaper, consumers might not actually believe the deceitful assertions, for the public has come to expect falsehoods in tabloids. This fact suggests that the potential market failure from asymmetric information is likely minimal, so there is not likely an overproduction of the work. At the same time, tabloid newspapers likely rely on the copyright incentive to create their work, for their stories seem creative and unusual; the copyright ensures that other tabloids do not copy the creativity of the original tabloid's stories. This means that without copyright protection, there would be a great underproduction of work. Taken together, the potential overproduction from the asymmetric information in the tabloid's story appears to be less than the potential underproduction from the tabloid's public-good nature. Copyright should not be denied.

Now consider the same situation of deceitful expression, but on a major news network that presents itself as providing news that is fair and balanced. In this situation, viewers would expect accurate information, so viewers likely would not read or watch that news if they knew that the information was purposefully inaccurate. There would be a clear overproduction of the "fake news"

story resulting from the asymmetric information. At the same time, the copyright on the news story seems to be only minimally effective in incentivizing its creation. The lack of an effective incentive is because the facts in a news stories are not protected under a copyright—only the expression is—which means that the copyright in the news story is necessarily thin.[19] Hence, copyright plays little role in incentivizing the creation of pure news stories. This implies that the public-good nature of news stories would not likely cause an excessive underproduction of those stories—at least not any less than with copyright protection. In short, the potential overproduction from the asymmetric information in fake news appears more than the potential underproduction from the news's public-good nature. Copyright should be denied.

c. Choosing the Government Actor

The moral limitation that depends on the existence of another market failure calls for evidence of those other failures. Denial of protection requires more than theoretical possibilities of other market failures. This leads to the third issue: Which government actor should make the determination that another market failure justifies denial of protection? Given the intensively fact-based inquiry, courts are not likely competent to make those judgments. Such factfinding processes should usually be performed by the branches of government best equipped to engage in that process—the legislative or executive branch. Those branches represent the government institutions charged with deciding policy based on factual findings, so they should work together to arrive at a conclusion. The point is that the government actor that makes the denial must be equipped to engage in the sort of factual inquiries that reveal other market failures for intellectual creations. Courts are not usually that actor.

This conclusion, though, does not mean that courts can never identify market failures. There are some instances where market failures may be so obvious that a court's equitable and constitutional obligations require courts to deny protection.[20] However, these instances are relatively rare, and in most situations the legislative or executive branches should make these determinations. These branches are politically accountable, so if they were to deny protection for reasons other than actual market failures, their decisions may be reversed. More must be said on this point in considering the doctrine that would govern application of the denial.[21] For now, it is enough to note that

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19. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344, 348 (1991) (recognizing that "facts are not copyrightable" but that if an "author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression").
20. *See* Ned Snow, *Copyright, Pornography, and Unclean Hands*, 72 Baylor L. Rev. (forthcoming 2021).
21. *See* Ned Snow, Intellectual Property and Immorality: Against Protecting Harmful Creations of the Mind (Apr. 9, 2021) (unpublished manuscript) (on file with author).

determining which actors are responsible for identifying other market failures is an important practical consideration in implementing the moral limitation of utilitarian theory.

In sum, the utilitarian theory implies a moral limitation: actions with harmful consequences should not be encouraged through the economic incentive of intellectual property rights. The economic framework of utilitarian theory suggests that the harmful consequences are manifest through a market failure. A market failure may result from negative externalities or asymmetric information. Those circumstances suggest an overproduction of works, which cancels the market-failure justification for extending intellectual property, namely, that the public-good characteristic of an intellectual work will result in an underproduction of works. The presence of either circumstance, which leads to an offsetting market failure, suggests that the government should not extend protection to those creations.

B. *Labor-Desert*

As articulated by John Locke, the labor-desert theory (or "labor theory," for short) posits that property rights derive from a person mixing his labor with a thing so that the person severs that thing from the wilderness.[22] Locke explained:

> Though the earth and all inferior creatures be common to all men, yet every man has a "property" in his own "person." This nobody has any right to but himself. The "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 it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men.[23]

Here, Locke relies on self-evident premises that a person has a property right in himself, his labor, and the work of his hands. Based on these premises, Locke reasons that if a person works to remove a thing from the state of nature (which no one has owned previously), the person must have a property right in that thing as well. Locke thus grounds property rights in the moral view that a person deserves property rights because of the labor that he has invested in removing something from nature.[24]

Applying this simple rationale to intellectual property is straightforward.[25] A person who has labored to create something with her intellect deserves to

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22. JOHN LOCKE, *An Essay Concerning the True Original Extent and End of Civil Government*, *in* TWO TREATISES ON CIVIL GOVERNMENT § 27, at 130 (J.M. Dent & Sons 1955) (1690).
23. *Id.*
24. *See id.*
25. For explanations of Lockean theory applied to intellectual property, see MERGES, *supra* note 4, at 35–48; and Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J.

have property rights in that creation. The wilderness from which she severs her creation is the public domain from which creators draw material.[26] Because of the investment that a creator makes in taking public-domain materials and putting their effort into works, so as to sever them from the public domain, creators deserve property rights in those creations.

The labor theory of intellectual property is based on moral premises that imply a significant role for morality in defining intellectual property rights. Yet the labor theory is often ignored,[27] and seems less influential in developing intellectual property rules than the utilitarian theory. As discussed in Subpart I.B.1, however, the labor theory is integral to the claim of rights holders over their intellectual creations. Although not as widely recognized as the utilitarian theory, the labor theory still fundamentally underlies claims to intellectual property. Based on this conclusion, Subpart I.B.2 examines the moral premises on which labor theory relies, and how those premises relate to intellectual property.

1. Complement to Utilitarian Theory

Does labor theory accurately describe a reason for the existence of intellectual property rights? The answer to this question informs whether the moral values inherent in labor theory should define the rights. The argument against labor theory as an explanation for intellectual property rights and the response to this argument are addressed below.

a. The Argument Against Labor Theory

As a practical matter, the labor theory is much less influential than the utilitarian theory in the legal reasoning of judges and commentators who consider intellectual property.[28] To begin with, the Constitution specifies a utilitarian purpose that underlies Congress's power to legislate both copyright and patent laws. Specifically, the Intellectual Property Clause states: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."[29] According to the clause, promoting the progress of science and useful arts is the purpose of intellectual property laws, and that purpose exists to benefit society. The collective public benefit of promoting the progress of science and useful arts is unmistakably

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287, 296–330 (1988).

26. *See* MERGES, *supra* note 4, at 39–41.
27. *See* discussion *infra* Subpart II.A.1 (explaining reason for ignoring labor theory).
28. *See, e.g.*, Fisher, *supra* note 7, at 169–70, 173 (observing primacy of utilitarian theory over labor theory); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 353–57 (1991) (rejecting Lockean sweat-of-the-brow argument as basis for copyright protection).
29. U.S. CONST. art. I, § 8, cl. 8.

focused on a utilitarian end.[30] There is no mention of any labor-desert rationale in the Constitution.[31]

In patent law specifically, the prevalence of utilitarian influence over labor-desert is undeniable. Mark Lemley and Dan Burk have observed that, especially in the context of patent law, theories that are based on moral right of labor-desert "are hard to take seriously as explanations for the actual scope of patent law."[32] They explain:

> The short term of patent protection, the broad right to prevent independent development of an idea, and the control patent law can give over products never built or contemplated by the patent owner are all difficult to square with the idea that a patentee "deserves" to own the rights granted by the law. We grant patents in order to promote innovation, and so we should grant patents only to the extent necessary to encourage such innovation.[33]

This assertion by Lemley and Burk is undeniable: empirical observations about why inventors seek patent protection strongly suggest a utilitarian explanation.[34]

In copyright law, the Supreme Court has explicitly repudiated the labor-desert rationale. In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Court considered whether factual information in a telephone directory could receive copyright protection.[35] Holding that facts could not receive protection, the Court explained: "[T]he 1976 revisions to the Copyright Act leave no doubt that originality, not 'sweat of the brow,' is the touchstone of copyright protection in directories and other fact-based works."[36] *Feist* makes clear that the labor that an author expends in creating a factual work does not necessarily imply copyright protection.[37]

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30. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 212 (2003) (recognizing purpose of copyright law as creating a societal system that will promote the progress of science); Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 5–6 (1966) (explaining social-welfare purpose of patent law).
31. *See* Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 850 (1993) ("The Constitution makes it clear that intellectual property rights are limited rights subordinated to a social purpose, and the point is reinforced in both judicial doctrine and legislative history."). Waldron provides insightful criticism against a Lockean theory of intellectual property. *See id.* at 851–52.
32. *See* Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1597 (2003).
33. *Id.* at 1597–99 (footnotes omitted).
34. *Cf.* Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1017, 1024–30 (1989) (explaining utilitarian justifications for patent rights under the Constitution).
35. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 342–43 (1991).
36. *Id.* at 359–60.
37. *Id.*

b. The Argument for Labor Theory

Given the argument against labor theory, should Locke's justification for intellectual property be filed away as a mere theoretical exercise without practical import? Hardly so.[38] Without the moral justification for the individual's claim, property rights would be based entirely on what benefits society as a whole. And what benefits the whole is not necessarily consistent with the moral claim of an individual. Consider the argument that property rights generally should be based on the societal utility for which individuals promise to use the subject matter of the rights—be it land, a physical object, or an intellectual creation.[39] Under this argument, whoever promises to put the land, the object, or the creation to the most beneficial use according to society's interest would receive the property rights. The individual's moral claim to a creation would not matter. Consider also the argument that intellectual property rights should not exist at all. There is some support for this argument: in the absence of intellectual property, market forces would still incentivize innovation and creativity (just in a different way and perhaps to a different degree); the monopolies of intellectual property impose collective costs on society that arguably outweigh their marginal benefits.[40] As previously noted, this argument has some strength under utilitarian theory.

Most would agree, though, that creators should have some sort of rights over their works—not necessarily because society would be better off, but out of fairness to the individual creator.[41] Fairness to the individual does not reflect utilitarian reasoning, but rather, the fairness rationale reflects the labor theory. Labor theory is based on the moral claim of an individual to her creations. It implies that the moral bases of natural law and fairness require a property right

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38. For a well-reasoned response to criticisms against Lockean theories applied to intellectual property, see Adam Mossoff, *Locke's Labor Lost*, 9 U. Chi. L. Sch. Roundtable 155 (2002).

39. *Cf.* Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347, 350 (1967) ("If the main allocative function of property rights is the internalization of beneficial and harmful effects, then the emergence of property rights can be understood best by their association with the emergence of new or different beneficial and harmful effects.").

40. *See, e.g.*, Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 Fla. St. U. L. Rev. 623, 624 (2012) (questioning copyright's assumption that external incentives are necessary); *cf.* Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 Wm. & Mary L. Rev. 513, 515 (2009) ("[T]he desire to create can be excessive, beyond rationality, and free from the need for economic incentive . . . . [A] copyright law that treats creativity as a product of economic incentives can miss the mark and harm what it aims to promote.").

41. For a discussion on utility and fairness in relation to property, see Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967). For arguments in support of recognizing property as a keystone right, consistent with Locke's labor theory, see Carol M. Rose, *Property as the Keystone Right?*, 71 Notre Dame L. Rev. 329 (1996).

in the fruit of an individual's creative acts. This is not to say that utilitarian explanations for intellectual property are unsound or not influential. Indeed, labor theory complements the utilitarian theory insofar as the utilitarian theory has the effect of validating moral claims of the individual. But where utilitarian theory might fail to recognize the claim of an individual, the labor theory gives reason to still recognize it. So even though Locke's labor theory may not have value as an explanatory theory for why individuals create certain works (especially in the patent context), the theory is still valuable to provide a moral basis for an individual's claim to property rights in a creative work.

This understanding that utilitarian theory works in conjunction with labor-desert theory is consistent with the Intellectual Property Clause. As stated above, the clause adopts a utilitarian rationale to justify copyright and patent laws: the promotion of the progress of science and useful arts. Yet that utilitarian rationale does not suggest a rejection of Locke's moral theory.[42] The clause merely provides Congress a power to effectuate an instrumental end without suggesting whether an individual may hold a moral claim to intellectual property. To be sure, the clause is entirely silent on the question of an individual moral claim to intellectual property rights. And that makes sense. The clause arises in the context of setting forth powers of Congress—not individual rights or claims. Indeed, not until the Bill of Rights did the Constitution address individual rights. It would be highly irregular for the original Constitution (without the Bill of Rights) to even suggest the individual's moral claim for a right, especially in the context of setting forth a congressional power. Hence, labor theory is consistent with the Intellectual Property Clause's utilitarian rationale.

Although the clause is silent on the question of whether an individual has a moral claim to a creation, colonial statutes of the time do speak to this issue. Those statutes explicitly apply Locke's moral view to intellectual property. The language of the 1783 Massachusetts Copyright Act, which several other colonies adopted, provides an example of this. It states:

> Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences: As the principal encouragement such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and as such security *is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labour of his mind*:

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42. *See* Kenneth Einar Himma, *Toward a Lockean Moral Justification of Legal Protection of Intellectual Property*, 49 San Diego L. Rev. 1105, 1119 (2012) (observing that the Intellectual Property Clause provides a legal justification for Congress passing intellectual property laws, but not a moral justification).

> Therefore, to encourage learned and ingenious persons to write useful books for the benefit of mankind:
>
> Be it enacted . . . [t]hat all books, treatises, and other literary works . . . shall be the sole property of the said . . . authors . . . .[43]

While the statute recognizes the societal benefits of intellectual property rights, it also recognizes that such property rights in intellectual creations are "one of the natural rights of all men," because intellectual creations are "produced by the labour" of the mind.[44] Hence, the statute employs both utilitarian and labor-desert rationales to justify the intellectual property.

Similar to the Intellectual Property Clause, the cited statements by the Supreme Court in *Feist* do not mean that the labor theory is irrelevant to copyright law.[45] The import of its statements is that an author's labor cannot replace the requirement that expression be original. That does not imply that labor does not give rise to an individual's moral claim to property rights. Indeed, the Court has recognized that the public's interest in recognizing intellectual property law supports the individual's claim under a labor-desert rationale. In *Mazer v. Stein*, the Court explained:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.[46]

Hence, at the same time that the clause implies an economic utilitarian end, the Court recognized that "creative activities deserve rewards."[47] The presence of labor theory in intellectual property could not be more explicit.

The upshot is that the prevalence of the utilitarian theory as a supporting rationale for intellectual property does not imply that the labor-desert theory is not also relevant. Locke's theory addresses the individual moral

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43. Copyright Off., Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright 4 (1973) (emphasis added and omitted). Other colonial copyright statutes adopted similar language: the statutes of New Hampshire and Rhode Island contained language that was nearly verbatim to the Massachusetts statute quoted above, *see id.* at 8, 9; the statutes of Connecticut, Georgia, and New York contained language indicating that "principles of natural equity and justice" call for copyright laws, *id.* at 1, 17, 19; the statute of North Carolina stated that "nothing is more strictly a man's own than the fruit of his study," *id.* at 15. For further observations about state copyright statutes, see Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 Geo. L.J. 1771, 1807–09 (2006).
44. Copyright Off., *supra* note 43, at 4.
45. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359–61 (1991).
46. Mazer v. Stein, 347 U.S. 201, 219 (1954).
47. *Id.*

justification, whereas the utilitarian theory addresses the collective moral justification of society. Both justifications serve as bases to recognize intellectual property rights.

2. Moral Limitations

Having discussed the relevancy of the labor theory for intellectual property, this Article now considers certain moral values that underlie that theory. Although Locke does not state these moral values in his explanation of the labor theory, he states them in another part of the same treatise, and their application to that theory is unmistakable.

a. Moral Premises of Labor Theory

Locke premises his labor-desert theory on two moral values that limit his theory.[48] The first moral value is that everyone ought not to harm anyone else. This value derives from Locke's premise that God holds a property right in everyone and that God's property right in everyone implies that everyone must "shar[e] all in one community of Nature."[49] Because everyone must share in one community, men have no authority "to destroy one another," and "[e]very one . . . ought [to do] as much as he can to preserve the rest of mankind, and not . . . take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another."[50] Locke explains this natural-law principle as follows: "[N]o one ought to harm another in his life, health, liberty or possessions."[51]

The issue that follows is whether this general moral value represents a limitation on Locke's labor-desert theory. Recall that the labor theory relies on the premise that a person holds a property right in himself.[52] At the same time, Locke also recognizes that everyone is the property of God.[53] Given that God created people, God's interest in a person would appear superior to the person's own interest in himself. This implies that the labor theory, which follows from holding a property interest in oneself, must be subject to the natural-law principle of not harming another, which follows from everyone being the property of God. More specifically, if a person were to labor to remove something from the wilderness, and if his labor involves harming someone else in her life, health, liberty, or possession of something, that person would not

48. *Cf.* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1544–45, 1560–62 (1993) (explaining Locke's "no-harm principle" as it relates to property law and noting that "[i]f the property claim itself would do harm, it cannot be enforced without raising additional problems of justification").
49. LOCKE, *supra* note 22, § 6, at 120.
50. *Id.*
51. *Id.* at 119.
52. *Id.* § 27, at 130.
53. *Id.* § 6, at 119–20.

deserve property rights in the thing that he removed from the wilderness. His moral claim to property would be barred by the moral value that no one ought to harm another in his life, health, liberty, or possessions.

Locke recounts a second moral value that limits behavior which he describes as "the first and fundamental natural law."[54] The moral value is that everyone must act for "the preservation of the society and (as far as consistent with the public good) of every person in it."[55] This is so fundamental, Locke argues, that it "should govern even the legislat[ure]" itself.[56] As first and fundamental relative to all other natural laws, this moral value must limit the labor-desert theory. Preservation of society and its members is the most fundamental tenet of natural law. This moral value thus implies, once again, that if a person's labor to remove something from the wilderness involves him acting in a way that is detrimental to the preservation of society (or a person in society), that person would not deserve property rights in the thing removed.

Thus, the two moral values that underlie the labor theory lead to the same practical conclusion: individuals should not harm others in working to create the subject of property rights, and efforts that result in harm to society or its members should not be rewarded with property.

b. Application to Intellectual Property

These moral values that limit Locke's labor theory imply complementary limitations for intellectual property rights. They imply that if creating an intellectual work would harm others in their life, health, liberty, or possessions, or prove detrimental to the preservation of society, the creator would not deserve intellectual property rights. The general principle remains that harmful actions disqualify the actor from receiving property recognition.

This general moral limitation on intellectual property is distinct from the moral limitation in utilitarian theory. The most obvious difference is that the labor theory defines harm according to subject matters—life, health, liberty, possessions, and the preservation of society. Although these subject matters certainly entail a broad scope of creations, they do not merely rely on market failures to define harm. The market might correctly value some creations, but if the creation effectuates harm to one of these subject matters, the moral limitation of labor theory would suggest against recognizing property rights. Unlike utilitarian theory, market preferences and market failures are simply not relevant to defining harm under the moral principle that limits labor theory.

The labor theory is also distinct in that it recognizes a moral objection to harming individuals. Even if a creation on balance is beneficial for society, harmful effects to one individual warrant against granting protection. For instance, methods of torture as an effective means for gaining truthful

54. *Id.* § 134, at 183.
55. *Id.*
56. *Id.*

information might be beneficial to society at large, but the cost of human health and life to a single individual would suggest against recognizing patent protection for the torture method. Even assuming that the market fully internalizes the cost to the individual tortured, such that no market failure would exist in the price of the invention, that fact would not matter under the moral limitation of labor theory. So, as distinct from the market-failure limitation under utilitarian theory, the moral limitation under labor theory would not recognize protection because of harm to the individual. Labor theory does not view the absence of any market failures as implying an absence of any disqualifying harmful consequences.

Of course, the moral limitation on labor theory is a general one. It leaves open many questions. How much harm must occur before denying intellectual property protection? Must the intellectual creation directly cause the harm? Must the harm follow from the act of creation, from the subject matter of creation, or from the exercise of rights? Locke does not provide any answer to these questions. The questions must therefore be addressed in discussing the specific doctrines that serve to apply the general principle. For instance, the equitable power of courts may allow for judicial denial of rights to works that involve unlawful actions in their creative process or involve unlawful actions in the exercise of rights to works.[57] Similarly, Congress may deny protection for works that are harmful to society's preservation under its power to promote the progress of science and useful arts.[58] Doctrinal discussion is thus necessary in other works. Here, this Article notes merely that judgments must be made to apply the general moral limitation of labor theory.

C. *Autonomy-Personality*

The third theory of intellectual property is the theory of autonomy and personality. This theory recognizes a moral claim to a creative work because the work reflects who the creator is as a person and manifests his or her autonomous choices.[59] This theory is the least influential in intellectual property law;[60] therefore, any moral limitations that this theory might imply are likely to matter less as compared to limitations in the other theories. This theory and its moral limitations are discussed below.

1. Theory and Intellectual Property

The writings of Immanuel Kant and Georg Wilhelm Friedrich Hegel have given rise to the autonomy-personality theory (or autonomy theory). Kant and Hegel recognize a moral claim to property rights over an object because

57. *See* Snow, *supra* note 20.
58. *See* Snow, *supra* note 21.
59. *See* Fisher, *supra* note 7, at 171–72.
60. *See id.* at 173.

individuals exercise their autonomy and will through the object.[61] Objects enable us to make choices, which is a compelling reason for giving us rights to control the object. Under this theory of property, then, rights exist to effectuate a person's basic human desires.

This philosophy applies well to intellectual creations. Intellectual creations manifest a person's personality and exercise of will, even more so than a physical object.[62] Indeed, exercising the intellect to create a work constitutes the very exercise of will and personality that this theory recognizes as giving moral claim to property rights. Whether you create an expression or an invention, the creation manifests your choices; a part of your person is manifest through the creation. On this ground, you have a moral claim to control the use of the creative work. Therefore, autonomy theory recognizes an individual's moral claim to property rights in intellectual creations.

The immediate implication of this moral theory is that people ought to decide for themselves the subject matter of their creations which receive intellectual property protection. That is, the theory suggests that if the government believes that a work lacks moral value, this fact should not be a reason to deny protection for intellectual works. The individual's moral claim to intellectual property rights is based on the individual's choices and values that give rise to the creation. This theory therefore recognizes moral value simply in refraining from denying protection because a creator's individuality merits recognition of rights.

2. Moral Limitations

The autonomy theory is not without moral limitation. Kant wrote that a person exercising her will over an object cannot inhibit others from exercising their wills.[63] This principle could be seen as a basis for arguing that an author's own exercise of will should not inhibit others' creativity, such as precluding subsequent authors from creating follow-on works.[64] Yet the principle need

61. *See* Merges, *supra* note 4, at 68–85 (discussing Kant); Hughes, *supra* note 25, at 330–65 (discussing Hegel); Christopher S. Yoo, *Rethinking Copyright and Personhood*, 2019 U. Ill. L. Rev. 1039, 1041 (discussing the influence of both Hegel and Kant).

62. *See* Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 Notre Dame L. Rev. 1945, 1947 (2006) (examining "spiritual or inspirational motivations that are inherent in the creative task," including "the desire for challenge, personal satisfaction, or the creation of works with a particular meaning or significance for the author"); Justin Hughes, *The Personality Interest of Authors and Inventors in Intellectual Property*, 16 Cardozo Arts & Ent. L.J. 81, 83, 138–79 (1998) (recognizing personhood interests in intellectual property based on intentionality and sourcehood).

63. *See* Merges, *supra* note 4, at 87–88.

64. *Cf.* Yoo, *supra* note 61, at 1042 (conceptualizing personhood theory in terms of how the process of creation itself promotes self-actualization); Immanuel Kant, On the Wrongfulness of Unauthorized Publication of Books (1785), *reprinted in* Practical Philosophy 28, 35 n.* (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1996) ("This

not be limited to the context of subsequent authors' creativity. Indeed, the application of this principle to all aspects of autonomy is apparent from Kant's categorical imperative, which requires each person to respect the humanity (and thereby autonomy) in all other persons, and act only according to rules that could universally apply for everyone.[65] Inhibiting others' will would not respect the humanity or autonomy of others, and the reason for such treatment would not be able to serve as a universal rule.[66] Hence, if the categorical imperative condemns the particular act of exercising one's will over an object, Kant would condemn the act, such that it would not give rise to property rights.[67] Accordingly, where the exercise of one's will over an object would inhibit another's autonomy, one should not hold property rights in that object.[68]

Applying this moral limitation to the context of intellectual property suggests that intellectual property rights should not be recognized where intellectual creations inhibit the autonomy of others. For instance, a murderer who creates a video of himself murdering another has definitely inhibited the other's autonomy in order to create his work. The moral limitation would therefore suggest against recognizing copyright. Likewise, an infectious disease invented to cause human suffering inhibits others' autonomy, so it should not receive patent protection. Simply put, the moral limitation of autonomy theory implies that certain creations should not receive protection.

As with the utilitarian and labor theories, problems arise with defining and assessing harm under this moral limitation within autonomy theory. Many creations may appear moral, yet from a different perspective those creations may seem to inhibit others' autonomy. An example may be the jet engine, which inhibits people's opportunity to view the sky in its natural state: Does this mean that the jet engine should not receive patent protection? How do we determine which inhibitions of autonomy are acceptable and which are not? There may not be an easy answer as all acts—to a certain extent—affect others, and the effects on others preclude certain choices. Merely by interacting with someone, a person precludes another from acting in a certain way; to a degree, the person has inhibited another's autonomy. Where should the law draw the line?

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right of the author is . . . not a right to the thing, namely to the copy (for the owner can burn it before the author's eyes), but an innate right in his own person, namely, to prevent another from having him speak to the public without his consent . . . .").

65. *See* Immanuel Kant, Fundamental Principles of the Metaphysic of Morals 38, 45 (Thomas Kingsmill Abbott trans., Merch. Books 2009) (1785).

66. *See id.* at 48 (requiring that a maxim for action not frustrate the will of natural beings).

67. *See id.*

68. According to scholar Justin Hughes, Hegel recognized that "unhealthy identifications with property . . . should not give rise to legitimate property claims." Hughes, *supra* note 25, at 335. "Hegel hinted that certain self-identifications with property were destructive to the individual." *Id.*

The practical answer to this question is likely that this limitation should be a consideration, but not an absolute restriction, in recognizing intellectual property rights under autonomy theory. The government actor who is defining eligibility should consider the degree to which the creative activity or creation restricts others' autonomy. That is, the presumption to recognize creative activity with intellectual property rights should be weighed against the activity's negative effects on others. Autonomy theory therefore suggests a general principle that should limit the recognition of rights in a creator.

In summary, the three theories of intellectual property—utilitarian, labor, and autonomy—all recognize certain moral values in defining the boundaries of intellectual property. First, utilitarian theory recognizes consequentialist moralism, such that a creation should not receive property rights if it decreases societal utility.[69] This limitation applies where market failures stemming from negative externalities and asymmetric information are present in the market for certain intellectual creations.[70] Second, labor-desert theory posits an individual's moral claim to property based on the labor that she expends to create the subject matter.[71] The theory is premised on certain moral values, the absence of which would negate a person's moral claim to property, including acting in a way that does not harm the health, life, property, or liberty of another, or that harms the preservation of society generally.[72] Third, autonomy theory implies a moral claim to property in an intellectual creation based on the creation's manifestation of the person and her autonomy.[73] The theory favors recognizing rights in all subject matter, with a general limitation that creations should not inhibit others' exercise of autonomy.[74]

II. Arguments Against Moral Limitations

Academic commentators have questioned the proposition of denying intellectual property protection on moral grounds. Issues of free speech always arise, and those are more fully addressed in another article.[75] Putting aside those speech issues, the most common questions that commentators have raised are the following:

> (a) Would the effect of denying intellectual property actually increase the output of the harmful works that you are trying to prevent?

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69. *See* discussion *supra* Subpart I.A.2.
70. *See* discussion *supra* Subpart I.A.2.
71. *See* discussion *supra* Subpart I.B.1.
72. *See* discussion *supra* Subpart I.B.2.
73. *See* discussion *supra* Subpart I.C.1.
74. *See* discussion *supra* Subpart I.C.2.
75. Ned Snow, *Barring Immoral Speech Through Patent and Copyright*, 74 SMU L. Rev. (forthcoming 2021).

(b) The goal of intellectual property is not to control harmful or otherwise immoral behavior. Should we not leave the job of curbing such behavior to criminal law?
(c) Why should we trust the government to make moral decisions for us? Should we not instead allow the free market to determine the moral value of intellectual creations?

The three questions above represent theoretical challenges to the argument for moral limitations in intellectual property. Although the argument also raises doctrinal, policy, and constitutional issues (which are addressed in other articles),[76] this Article focuses on issues of theory. Hence, the three theoretical challenges are discussed next.

A. *The Propagation Argument*

Perhaps the most common argument against denying protection is the propagation argument. The argument contends that denying intellectual property protection will propagate copies of the works already in existence, resulting in a net increase of the work.[77] Intellectual property, then, should exist to decrease the propagation of undesirable subject matter. This "propagation argument" often arises in the context of pornography: deny copyright for pornography and everyone will start copying and distributing it, flooding the market with the very material that you are trying to reduce. This Subpart explains this argument and responds to it.

1. Argument

Without intellectual property protection, a work may be freely copied, distributed, and consumed.[78] So if the law removes copyright or patent protection for a work, the supply of that work may dramatically increase. For works that are immoral, the possibility of unrestricted dissemination and access is obviously a problem. Therefore, denying protection would seem to make the problem of immoral works worse—not better. This is the essence of the propagation argument.[79]

This propagation argument is stronger than it may initially appear. At first glance, one might think that denying protection would not increase the propagation of works (immoral or otherwise) because the denial would remove the

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76. *Id.*; Snow, *supra* note 20; Snow, *supra* note 21.
77. *See* Christopher A. Cotropia & James Gibson, *The Upside of Intellectual Property's Downside*, 57 UCLA L. Rev. 921, 961–66 (2010) (arguing that patent and copyright should exist for certain works that social policy suggests should be decreased).
78. *See generally* 17 U.S.C. § 106 (setting forth rights in a copyright); 35 U.S.C. § 271 (setting forth rights in a patent).
79. *See* Jennifer E. Rothman, *Sex Exceptionalism in Intellectual Property*, 23 Stan. L. & Pol'y Rev. 119, 156–57 (2012) ("[D]enying copyright protection and trademark protection to works and marks deemed pornographic or immoral may actually increase their dissemination.").

economic incentive to create the works in the first place.[80] However, this line of thinking does not account for works that are already in existence. For works already in existence at the time of the denial, the denial would result in their free copying and dissemination. For instance, suppose that Congress were to deny protection for all pornographic works. Even if that denial decreased production of future pornographic works, existent pornographic works for which authors sought to enforce copyright would immediately become freely available for anyone to copy, distribute, perform, or display. Propagation would flourish. In effect, although denying the copyright or patent incentive may result in fewer of those works created, that effect of the denial would be more than offset by the free copying and distribution of existent works.

Adding further strength to the propagation argument is the fact that not all works require intellectual property protection to exist.[81] If a work would exist without intellectual property protection, then the intellectual property rights would not incentivize the work's creation, such that the rights (if exercised) would only serve to stifle the work's dissemination.[82] For those works, denying intellectual property rights would not affect their creation, but at the same time the denial would increase their free propagation. This reasoning draws support from an argument made by Christopher Cotropia and James Gibson.[83] They have argued this point with respect to pornography, tax-planning schemes, and morally controversial biotechnologies.[84] For pornography, they point out that the internet has given rise to amateur pornographers who have created a supply of pornographic works, seemingly without relying on any copyright incentive.[85] Similarly, for tax-planning schemes, accountants create those schemes for the simple reason of helping their clients avoid payment of taxes, regardless of patent protection.[86]

Likewise, other intellectual works may be produced in the absence of copyright or patent protection simply because the cost of creating the work is relatively low. For instance, suppose that an inventor creates a device for consuming nicotine, and that she invents the device at minimal cost. The cost is so low that her economic advantage of being the first to market exceeds that minimal development cost. The fact that competitors face no development costs for the nicotine device does not give them any advantage. Although the inventor might seek patent protection for her nicotine device if it is available, even

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80. *See* Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 BYU L. Rev. 259, 314.
81. *See* Cotropia & Gibson, *supra* note 77, at 936.
82. *See id.* at 937.
83. *See id.* at 923. Other commentators have made similar arguments with respect to "revenge porn," which is nude photographs that an ex-partner in a relationship distributes. *See infra* note 134.
84. *See* Cotropia & Gibson, *supra* note 77, at 940–53, 961–66.
85. *See id.* at 964.
86. *See id.* at 944–45.

if it is not available, she would still produce her device in a competitive market. These sorts of works would be created independent of the copyright or patent incentive, so the rights of copyright and patent would not serve to incentivize their creation. Nevertheless, for these sorts of works, copyright and patent may still serve to suppress dissemination if rights holders exercise their rights. Hence, for some works, denying protection would not decrease their creation, but could increase their propagation.

In view of this fact, intellectual property denial for certain sorts of immoral works would not seem to make sense. For immoral works that would be created without the incentive of intellectual property, intellectual property rights would serve only to reduce the propagation of those works. The rights would keep the public from freely reproducing, distributing, and accessing the works without incentivizing the production of those works. For this reason, Cotropia and Gibson have argued that intellectual property should be granted to certain works that public policy suggests should not be propagated.[87] Cotropia and Gibson have contended that for certain works, intellectual property should serve "to suppress innovation and production" of works, contrary to its "usual goal."[88] In effect, they argue, intellectual property should serve "as a regulatory instrument" in limited circumstances.[89] Cotropia and Gibson conclude: "We should grant protection when—indeed, *because*—its net effect is to discourage innovation in a disfavored industry."[90]

2. Response

The propagation argument certainly raises a strong reason to doubt that, for some works, denying intellectual property protection would decrease the net output of those works. In this regard, this Article does not disagree with that portion of Cotropia's and Gibson's argument: for some works, granting protection could in fact decrease the net output. However, this Article disagrees with a fundamental premise of their argument—that intellectual property can be used "as a regulatory instrument," so that its costs "can be turned around and used to promote a policy that is the exact opposite of intellectual property's usual goal."[91] To the contrary, intellectual property should not be employed for anything other than its "usual goal."[92] Even if granting

87. *Id.* at 923.
88. *Id.* at 923, 938, 976.
89. *Id.* at 938.
90. *Id.* at 923.
91. *Id.* at 938.
92. *Id.* Jake Linford has defined several values within the Intellectual Property Clause, including incentivizing creation and dissemination of works, expanding knowledge, and providing access to works. Jake Linford, *The Institutional Progress Clause*, 16 VAND. J. ENT. & TECH. L. 533, 555–66 (2014). Justin Hughes has defined the "primary objective of intellectual property" to be "increasing society's stock of knowledge." Hughes, *supra* note 25, at 295. These conclusions suggest that the intellectual property may only be

intellectual property protection might, in some cases, decrease the dissemination and creation of works, the government should not grant intellectual property rights for that purpose.

As discussed in Part I, the three theories that underlie intellectual property indicate that the purpose of granting intellectual property protection is to incentivize the production of works, to reward efforts in creating works, and to recognize an individual's autonomy and personality. Those theories do not indicate a purpose of suppressing the production of works for any reason. More specifically, utilitarian theory calls for the government to intervene in the commercial marketplace because of a market failure that causes an underproduction of works.[93] Under this theory, intellectual property protection exists for the sole purpose of incentivizing the production of works in response to a market failure caused by the public-good nature of intellectual property. The government is not attempting to decrease an overproduction of works when it grants rights.[94] Similarly, labor-desert theory calls for the government to reward efforts that produce creative works.[95] Under this theory, the grant of intellectual property is premised on rewarding only actions that are nonharmful; the grant is not premised on curing harmful effects of a work.[96] Finally, autonomy theory calls for the government to recognize the autonomy and personality of a person by granting intellectual property rights.[97] The grant is not intended to suppress a creator's autonomy and personality.[98] Therefore, none of the theories justifying the government's grant of intellectual property protection works rely on any reason remotely related to reducing the output of a work.

One might argue that granting intellectual property as a means to reduce the production of harmful works would further the overall utility of society. From a general perspective, utilitarianism would seem to support this use of intellectual property. Yet even so, such a utilitarian theory would be distinct from the incentive theory of utilitarianism discussed in Part I. And perhaps this is the point of the argument by Cotropia and Gibson: they explicitly argue that intellectual property should be employed for a use outside of the conventional theories.[99] For three reasons discussed in the Subparts below, this Article contends that such a use of intellectual property is not advisable.

a. Tool for Censorship

The most problematic aspect of granting intellectual property protection in order to suppress further propagation of works is that such a grant

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employed to increase the output of creative works.

93. *See* discussion *supra* Subpart I.A.1.
94. *See* discussion *supra* Subpart I.A.2.
95. *See* discussion *supra* Subpart I.B.
96. *See* discussion *supra* Subpart I.B.2.
97. *See* discussion *supra* Subpart I.C.1.
98. *See* discussion *supra* Subpart I.C.2.
99. *See* Cotropia & Gibson, *supra* note 77, at 923.

would employ intellectual property as a means to censor ideas and expression. Employed in this way, the law of intellectual property would serve the same purpose as copyright did under the British Crown in the mid 1600s. Fearing the threat of the printing press, the British Crown decreed exclusive printing monopolies to a single entity, the Stationers' Company: to print in the 1600s, a person would need to employ the Stationers' Company, and the Stationers' Company would print only that which pleased the Crown.[100] Effectively, then, the Crown granted copyright protection to the Stationers' Company in order to facilitate censorship (rather than creativity).

In the next century, the purpose of granting monopolies changed dramatically. Parliament passed the Statute of Anne in 1710, adopting an entirely contrary rationale for intellectual property—namely, to incentivize the creation of works for the benefit of public learning.[101] This purpose then became imbedded in the U.S. Constitution, providing Congress power to grant copyright and patent protection as a means to incentivize works that will encourage learning and knowledge.[102] Hence, granting intellectual property protection for the ultimate end of censoring content is the very purpose that was rejected by both Parliament in 1710 and the Framers in 1787. To grant copyright for the purpose of decreasing dissemination of content is antithetical to the well-established purpose of copyright. Stated differently, to grant intellectual property for the purpose of controlling the output of an immoral work contravenes three centuries of intellectual property history. Since 1710, the clear utilitarian purpose of intellectual property has been to promote works—not to censor them.

Thus, the reason against using intellectual property as a tool for censorship amounts to a historical argument: we tried it in the past and it did not work so well. Yet why did it not work so well? Was the problem that the Crown was simply not accountable for censoring content? Arguably, more transparency and accountability exists today than three centuries ago, and if the government abused its power to exercise intellectual property denials today, the democratic process could (in theory) correct the abuse. What, then, is the problem in the

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100. *See* L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 Emory L.J. 909, 913–14 (2003) ("In short, the hallmarks of the stationers' copyright were monopoly and censorship (in the hands of publishers as agents of the government) with no public ownership of, or access as of right to, any works . . . ." (emphasis omitted)); Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. Copyright Soc'y U.S.A. 675, 680–82 (2002).

101. *See* Act for the Encouragement of Learning 1710, 8 Ann., c. 19 (Gr. Brit.) (repealed 1842).

102. *See* U.S. Const. art. 1, § 8, cl. 8; Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 5 (1966) ("The clause . . . . was written against the backdrop of the practices—eventually curtailed by the Statute of Monopolies—of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public.").

modern era with using a grant of intellectual property as a means to control the output of immoral works?

At bottom, the problem with employing intellectual property as a means to cure moral problems is that those problems usually involve complexities that intellectual property is not designed to address. Intellectual property as a means of solving a social problem represents a blunt instrument, at best. That is, monopoly pricing does not work well to resolve societal problems that follow from creative works. Addictive substances, for instance, may still cause great harm to individuals regardless of how high the patentee sets the price for those substances. Price may have some effect indirectly, but the effect will depend on the elasticity of the demand curve for the good.[103] Price does not directly address the underlying problem. Thus, monopoly pricing through granting intellectual property rights represents an indirect means to curb behavior that involves complex problems. For this reason, intellectual property should not be a means for curing problems or controlling behavior. Protection should not be granted in order to reduce the output of a work.

There is a counterargument to this conclusion. One might contend that there is no practical difference between a grant of protection or a denial of protection when either is made for the purpose of decreasing the output of works. That is, in either situation of grant or denial, it would seem that the government is acting to decrease production of a work. For some works, decreasing production is arguably better accomplished by denying protection; for other works, (like pornography), decreasing production is arguably better accomplished by granting protection. Whether the government grants or denies intellectual property protection, the act may be seen as a tool for decreasing production. According to this counterargument, granting protection should not be viewed as unwarranted censorship if denying protection accomplishes the same sort of censorship. If the denial is justified to censor, the grant should be as well.

This counterargument relies on a false premise. Specifically, the counterargument assumes that denials are justified as a means of decreasing production. That is not so. As discussed in Part I, the theories of intellectual property call for denial only when the reason for granting protection is lacking. Under utilitarian theory, denial is appropriate when a negative externality or asymmetric information causes a market failure that results in an overproduction of a work, thereby canceling the justification for granting protection (namely, a market failure that results in the underproduction of a work, which follows from the public-good nature of the work). The denial is not intended to resolve the problems of the negative externality or the asymmetric information. Under labor-desert theory, denial is appropriate when creative efforts

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103. *See generally* Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 ANTITRUST L.J. 363, 364–67 (1998) (explaining that the effect of changing the price of a good on the quantity demanded depends on the elasticity of the demand curve for the good).

have harmed the life, health, goods, or autonomy of another. Those harms undermine the argument that a creator's efforts entitle her to property rights. The denial, then, is not intended to cure the harms that result from the creator's actions. Under autonomy-personality theory, denial is appropriate when a creator has inhibited another person's autonomy. The denial represents a choice not to support the creator's inhibition of autonomy; it is not intended to rectify, or serve as a remedy for, that situation. Simply put, none of the theories imply that denial is appropriate to decrease the production of works. None of the theories treats intellectual property as a means for resolving the problem that undermines the justification for granting intellectual property.

Thus, neither the grant nor the denial of intellectual property should be viewed as a means to decrease the output of undesired works. More specifically, granting or denying intellectual property should not be the means to resolve the social problems that stem from the creation or dissemination of certain works. This is because the choice to grant or deny protection cannot address the complexities that surround specific behavior. Each moral problem is different, calling for a different sort of solution. That is not the design of intellectual property.

Yet if not through intellectual property, how should the law deal with moral problems that arise in the production or dissemination of intellectual works? The answer will depend on the sort of work at issue and the circumstances surrounding market supply and demand. In some situations, a laissez-faire approach may be most effective. That approach would require denying intellectual property protection so that the market itself would bring about a desired result. Suppose, for instance, that a pharmaceutical drug causes harmful side effects to its users and the users do not usually internalize this cost in deciding whether to consume the drug. Suppose further that, in view of this fact, Congress denies patent protection for inventions requiring the use of the drug. Given that the creation and dissemination of pharmaceutical drugs is usually driven by the promise of monetary compensation, inventors (and investors) will not bother to expend resources to invent and disseminate products relating to the drug: without exclusivity over those inventions, the inventors cannot recover their costs of research and development. Production of the drug-related inventions would decrease, and the market might end up reducing the proliferation of the harmful-drug inventions.[104] The market—with its characteristic of failing to compensate for public goods—could alleviate the social problem. Although the denial of patent protection would play a role in decreasing production, the market would ultimately be responsible for that result. By denying patent protection, the law simply lets the market play out. A

104. *Cf.* Burk & Lemley, *supra* note 32, at 1581–82 (describing the extreme costliness of pharmaceutical research and development).

laissez-faire approach therefore allows market forces determine the fate of the work, such that the market is ultimately responsible for a decrease in output.

Of course, the laissez-faire approach does not work in all situations. As discussed above, denying protection might result in the propagation of undesired works that have already been created.[105] In such situations, tort, criminal, and regulatory laws might be necessary to facilitate a reduction of the specific intellectual works at issue—or more precisely, those other areas of law may be necessary to resolve the moral problem. With respect to inventions, tort liability might decrease distribution of machines that are potentially harmful to users or others.[106] EPA regulations for pollution might decrease incentives to use polluting devices.[107] Government programs that provide drug education and rehabilitation counseling may be effective at solving problematic behavior that follows from addictive substances.[108] With respect to expressions, tort liability might reduce the likelihood of defamatory expression.[109] Criminal obscenity laws, if enforced, can deter the production and distribution of specific sorts of immoral content.[110] The point is that laws specifically directed to the moral issue may be most effective at controlling problematic behavior. They can be tailored to the cause and symptoms of the problem.

Thus, intellectual property should not be the means for resolving a problem that intellectual property was never intended to remedy. A grant or denial of patent or copyright cannot begin to be as effective as other legal mechanisms that the government can tailor to the specific moral problem. In short, intellectual property has everything to do with whether the law should encourage or reward behavior. It has nothing to do with whether the law should discourage or punish behavior. It should not be employed as a tool of censorship.

b. Reward for Bad Behavior

Another problem with the propagation argument is that it rewards bad behavior. Recall that the labor theory rewards the intellectual labor of creating, but that theory assumes that such labor will not harm the life, health, or possessions of another.[111] Simply put, harmful behavior does not deserve a property right. This tenet of the labor theory contradicts the propagation argument, which calls for the law to grant intellectual property rights to creators of

105. *See* Cotropia & Gibson, *supra* note 77, at 961–66.
106. *See generally* Restatement (Second) of Torts § 402A (Am. L. Inst. 1965) (imposing strict liability for unreasonable dangers based on design defects of a product).
107. *See generally* 42 U.S.C. §§ 7401–7671q.
108. *E.g.*, *Provide Education and Training*, Substance Abuse & Mental Health Servs. Admin. (July 22, 2020), https://www.samhsa.gov/workplace/toolkit/plan-implement-program/provide-training [https://perma.cc/Z8J5-LE8H].
109. *See generally* Restatement (Second) of Torts § 559 (Am. L. Inst. 1977) (explaining liability for defamation).
110. *See, e.g.*, 18 U.S.C. §§ 1464–1465, 2252(a) (criminalizing broadcasting of obscene material, sale or transfer of obscene material, and distribution of child pornography respectively).
111. *See* discussion *supra* Subpart I.B.2.a.

harmful works. Indeed, according to the propagation argument, creators of harmful works should receive a monopoly precisely because their works are harmful. Hence, the propagation argument attempts to effectuate a societal end that is good (specifically, reducing the dissemination of immoral works) by rewarding behavior that is bad (specifically, giving monopolies to those who cause harm to others). This act of rewarding bad behavior contravenes the fundamental premise of the labor theory—that intellectual property rewards good behavior.

Rewarding bad behavior is problematic because the law has never adopted this norm as a means for effectuating policy ends. As a general matter, the law does not attempt to reduce harmful effects of behavior by encouraging private monopolies over that behavior. Consider, for instance, harmful effects of certain drugs—say, the poor health effects of consuming cocaine. It is certainly possible to legalize the cocaine trade and refrain from enforcing antitrust laws against the few drug lords who would quickly dominate the market. Those few drug lords would increase the price of cocaine so dramatically that some users might stop consuming, which would ultimately reduce poor health effects of consuming cocaine. Likewise, the government could refrain from enforcing antitrust laws against tobacco companies, marijuana enterprises, or even businesses in the trade of excessively sugary drinks. The resulting monopolies (or oligopolies) that would form might price their goods so high that some consumers would cease consumption. But the law does not pursue this means for controlling the harmful effects of these products. This way of curbing behavior—by facilitating private monopolies—has the effect of rewarding producers of harmful substances. It rewards bad actors. No matter how laudable the end, it does not justify the means. That use of the law is immoral not only under the labor theory, but under general moral theories of law. Hence, applying the reasoning of the propagation argument to other contexts reveals the moral weakness of that argument.

c. Further Problems

There are three other problems with the propagation argument. The first problem relates to free speech. In order to understand this problem, we must recognize that a tension exists between copyright and free speech.[112] Copyright law suppresses other persons from being able to freely express copyrighted speech: I cannot repeat expression that you have copyrighted, so copyright law is suppressing my choice to speak copied expression. Yet free-speech doctrine tolerates this suppression of copied expression because the suppression of copied speech yields an increase in original copyrighted speech: the suppressive effect of copyright has the desirable effect of effectuating a monopoly

112. *Cf.* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (recognizing First Amendment safeguards in copyright law).

incentive for speakers to create original expression in the first place.[113] In other words, you speak your copyrighted expression because you receive a right to suppress me from speaking your expression. So without that copyright, you may not have created your expression. Hence, free-speech law tolerates copyright's suppressive effect on repeating other's expression because the suppressive effect serves to incentivize that original expression.

If, however, copyright exists only to reduce the output of expression (under the propagation argument), the justification for suppressing copied expression does not exist. Recall that the propagation argument posits that in some situations denying copyright would increase the output of certain expression, so in those situations and where the certain expression is undesired, copyright should be granted to reduce the output of expression.[114] Pornography is the example of this situation (cited by Cotropia and Gibson): copyright should exist to reduce the overall output of pornography.[115] Yet this argument is problematic from a speech standpoint. If employed only to reduce speech output, copyright is not serving to incentivize speech.[116] Copyright's suppressive effect on repeated expression could not be justified as a means to incentivize original speech because the purpose of copyright would be to reduce the overall production of speech. Any incentivizing of speech would be secondary to reducing the overall output of speech. In the pornography example, the propagation argument treats copyright as serving to reduce the dissemination of undesired pornographic works. Copyright in that situation serves only to restrict copied speech without any offsetting speech-increase justification. The upshot is that the propagation argument contradicts the justification for copyright's suppressive effect on speech. To justify copyright under free-speech law, copyright must exist for the purpose of increasing speech output.

The second problem with the propagation argument is that it relies on conditions that are difficult to prove. It relies on the assumption that rights holders will enforce their rights even though those rights do not usually incentivize the production of that sort of work. That assumption is often dubious. For example, it seems difficult to establish that a creator of pornography, who does not create the work for any reason of financial gain, will nevertheless choose to enforce his copyright against people who freely disseminate his pornographic work. Why would he sue for damages if money was never the

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113. *See id.* ("[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." (alteration in original) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985))).
114. *See* discussion *supra* Subpart II.A.1.
115. *See* Cotropia & Gibson, *supra* note 77, at 961–66.
116. *Cf. Eldred*, 537 U.S. at 221 ("But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.").

reason for creating the work in the first place? Even though the answer to this question varies by the type of work under consideration, the answer would be difficult to prove one way or the other.

The propagation argument further relies on another uncertain factual condition. The condition must exist where any additional creators incentivized by the intellectual property rights will not produce more works than would be freely disseminated by consumers if there were no copyright. Assume, for example, that some producers of pornographic works would not produce their works without copyright. If copyright were denied, would the decrease of those producers result in less pornography even though there would be an increase of users freely copying and disseminating it? A necessary condition of the propagation argument is that there would not be such a net decrease. As an empirical matter, that seems difficult to prove.

The propagation argument thus relies on the existence of certain conditions. This matters because the argument portrays intellectual property as serving a role that is warranted only because of exceptional circumstances. Normal circumstances suggest that intellectual property will, on balance, yield a net increase in the output of any sort of work; the propagation argument relies on the exceptional circumstance where intellectual property will, on balance, yield a net decrease in the output of a certain sort of work.[117] By relying on a circumstance that is exceptional, the propagation argument must prove that that circumstance does exist to justify application of intellectual property's exceptional role. In the absence of such certainty, the propagation argument's exceptional doctrine simply cannot apply: the usual presumptions that underlie incentive theory must control, and in particular, the law must presume that granting intellectual property protection will incentivize the production and dissemination of works more so than denying protection. In short, the propagation argument presents a theoretical argument that lacks practical certainty, and that certainty is necessary to overcome the presumptions inherent in the incentive theory.

The third problem is that the propagation argument does not hold true for works that are already freely available. Recall that the propagation argument contends that by granting protection, there will be a decrease in overall dissemination of some works because the rights holders would restrict access by enforcing their rights. As previously stated, it is questionable whether rights holders, who need no incentive to create the works, would start enforcing their rights if their works were already freely disseminated. Even assuming that

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117. The "normal circumstances" represent the economic assumptions underlying the Intellectual Property Clause—that monopoly protection is necessary to incentivize the creation and dissemination of creative works. *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146 (1989) ("The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the 'Progress of Science and useful Arts.'").

they would, the enforcement would not restrict overall access if there is an infinite supply available. In the pornography context, as long as some pornography may be freely consumed from accessible sites (for instance, PornHub), there will be a practically infinite supply available. The fact that some other sites or aggregators of content enforce their copyright does not present any meaningful decrease in the infinite amount available on PornHub. In this circumstance, enforcing copyright against some would not affect the practically infinite supply of pornography available. The grant would affect only the pornographers (likely the for-profit pornographers) who rely on the existence of copyright for their works. Granting protection does not reduce public access to the infinite supply available.

In sum, the justification for granting intellectual property rights can either be that the government is intervening in the free marketplace to cure a market failure, that the government is rewarding worthy behavior, or that the government is recognizing individual autonomy and personality. Reducing the output of undesirable expression, as suggested in the propagation argument, does not fit within any of these justifications. Moreover, the propagation argument is problematic for other reasons. It treats intellectual property as a tool for censorship, which is inconsistent with its constitutional and historical purpose, and which is a poor means for addressing the complexities of moral problems. The propagation argument reasons that rewarding bad behavior may lead to a good outcome, but the law traditionally rejects such means of achieving outcomes. The argument supposes a reason for copyright that stands in conflict with basic principles of free speech without offering any counterbalancing speech justification. The argument relies on assumptions that are difficult to establish. And because the argument cannot apply where works are already freely available, it would not seem to apply in any practical situation.

B. *The Other-Laws Argument*

Related to the propagation argument is the argument that controlling a moral problem is the role of other laws—not intellectual property. In other words, because the purpose of intellectual property is not to address the moral problems that other laws can address, morality should not be a basis for denying intellectual property protection.[118] This argument, which I call the "other-laws argument," is partially addressed in my response to the propagation argument above, so it may seem repetitive to include this as a separate argument. Yet the argument is often raised as an independent reason for why intellectual property should not be denied for immoral works.[119] Furthermore,

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118. *Cf.* Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d 852, 856 (5th Cir. 1979) (making this other-laws argument in the context of refusing to deny copyright protection to legally obscene works).

119. *See* Rothman, *supra* note 79, at 169 (citing other laws that should regulate harmful behavior related to sexual activity, and concluding that none of the activity "is properly the

the other-laws argument goes deeper than the propagation argument, for the other-laws argument concerns the very nature of intellectual property. To put it simply, if intellectual property rights constitute inviolable rights—much like real property rights—then moral problems should be dealt with only through other laws. It is thus useful to address the other-laws argument separately.

1. Argument

Denying intellectual property protection to solve moral problems invites gross inefficiencies and unintended consequences. Intellectual property protection represents only one variable among many that may affect a moral problem. Removing that variable may have little effect on or even exacerbate the problem. Indeed, denial of intellectual property represents a blunt instrument for resolving complex problems. Global warming, for instance, will not be solved through denying patents for novel technologies that pollute. Gun violence will not be solved by denying copyright for violent video games. To be sure, denying intellectual property protection will not necessarily decrease problematic technologies or expressions, and more to the point, the denial does not directly address the problematic consequences that may follow from those works. For most moral problems, denial of intellectual property protection does not represent a practically effective solution.

By contrast, other laws can directly address a specific moral problem. Other laws can be tailored specifically to the cause and symptoms of the problem. Regulating when a consumer can purchase a gun or how health providers should care for those with mental-health disorders are much more effective at controlling gun violence than is denying a copyright for violent video games. Regulating air quality standards is much more effective at controlling pollution levels than is denying patents for polluting technologies. Criminalizing dangerously destructive expression is much more effective at controlling death threats than is denying copyright law for that expression. In short, intellectual property was never intended to solve the world's problems. It is a poor substitute for specific laws tailored to specific problems.

2. Response

This Article disagrees with the premise that the effectiveness of other laws at controlling immoral behavior should be reason not to deny intellectual property protection. In truth, the effectiveness of those laws is reason not to grant that protection. Granting protection to works that cause or stem from problematic behavior encourages and rewards the behavior, in contradiction with other laws that are attempting to reduce or otherwise control that same behavior. Granting protection in that situation thereby threatens the

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purview of IP law").

effectiveness of those other laws. To encourage and reward behavior that other laws condemn simply does not make sense.

a. IP Theories

That other laws may effectively control immoral behavior is irrelevant to the intellectual property theories that dictate whether to grant or deny protection. The theories imply the grant or denial of protection independent from whether other laws may resolve moral problems better than intellectual property. As already discussed, the theories of intellectual property suggest that there are certain moral limits on intellectual property protection.[120] The existence of other laws does not change those limits.

Consider one example to illustrate the point: an inventor creates a method of torturing humans. It is very possible that the inventor would have created the method whether or not the law would grant him a patent. Assuming that the inventor intends to practice his method of torture, the absence of a patent will not deter his immoral act from occurring. Laws that criminalize torture would be more likely to prevent or otherwise control the inventor's actions. But the fact that criminal law is more likely to deter the immoral act does not change the fact that labor theory implies that a patent should not be granted for such an invention. Labor theory condemns the harmful effects that follow from the torturous invention, and for that reason, the inventor does not deserve patent protection. The reason is not because labor theory demands control or restraint of the immoral activity.

The other two theories of intellectual property support this conclusion. As explained in Part I, utilitarian theory implies a denial of protection where a negative externality or asymmetric information causes a market failure that results in an overproduction of a work, canceling the justification for granting protection. The denial is not intended to resolve the negative externality or the asymmetric information. Likewise, autonomy-personality theory implies a denial of protection where a creator has inhibited another person's autonomy. The denial is not intended to rectify the situation. In short, the theories of intellectual property that would imply denying protection are unaffected by the fact that other laws exist that can better control behavior.

b. IP as Violable Property

The other-laws argument seems to rely on the premise that intellectual property is an inviolable property right. Underlying the other-laws argument seems to be the premise that even if creative works lead to moral problems, creators hold an inviolable right to intellectual property protection. If creators have an inviolable, natural right to intellectual property, then any moral restraints implied by the theories of intellectual property would not matter.

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120. *See* discussion *supra* Subparts I.A.2, I.B.2, I.C.2.

Construed as inviolable rights, intellectual property would be like real property. Under real property law, if a landowner uses his land to harm another, the law does not strip the landowner of property rights; rather, the law recognizes a distinct cause of action for nuisance, perhaps enjoining him from using the land in a certain way. The landowner retains his land rights—able to possess, transfer, and exclude others from the land. Analogously, if intellectual property is like real property, a separate law would address the harm caused by an immoral work, but the creator should retain intellectual property rights to the creation. As an example, consider a photographer who photographs a private situation of another without her consent (say, a sexual encounter) sufficient to constitute the tort of intrusion upon seclusion. An inviolable intellectual property right would mean that although the photographer is liable in tort, he retains his right to exclude others from exercising his copyright in the work. His intellectual property would not be denied for reasons related to the fact that he acted immorally (specifically, he committed a tortious act). Thus, the question arises: Is intellectual property the same sort of inviolable right as real property?

The answer is that intellectual property is not. Intellectual property has always been treated as personal property, which is a violable right.[121] Its doctrines suggest a right that is flexible.[122] In copyright, the doctrine of fair use implicitly recognizes that the copyright owner's rights do not extend to uses that society deems laudable.[123] Real property rights, by contrast, are not restricted based on whether a trespasser makes a laudable use of another's land. In patent, the inequitable conduct doctrine recognizes that an inventor can be stripped of rights for unethical disclosures to the Patent and Trademark Office (PTO) about his creation of the invention.[124] An owner of real property, by contrast, is not stripped of his rights for unethical disclosures about his land.[125] Finally, intellectual property is not as essential to the exercise of fundamental rights and the provision of necessities of life as is real property: real property rights enable physical means to sustain oneself, to

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121. *See, e.g.*, Stewart v. Abend, 495 U.S. 207, 219 (1990) (quoting 2 M. Nimmer & D. Nimmer, Nimmer on Copyright § 9.02 (1989)) (describing copyright as "personal property"); Figueroa v. United States, 466 F.3d 1023, 1035 (Fed. Cir. 2006) ("Patent rights are a 'particular kind' of personal property.").
122. For an excellent discussion that compares the inviolability of real property to intellectual property, see Shyamkrishna Balganesh, *Demystifying the* Right *to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 Harv. J.L. & Pub. Pol'y 593, 627–29 (2008).
123. *See* 17 U.S.C. § 107(1) (examining "the purpose and character" of a defendant's use to determine fairness).
124. *See* Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276 (Fed. Cir. 2011) (explaining doctrine of inequitable conduct in patent law).
125. It is difficult to even conceive of a situation where a landowner would be punished for making a representation about her land to the government that is not truthful.

raise a family, to contribute value to society, to engage in religious practice, to assemble together, to voice political preference, and to speak one's mind and conscience.[126] By contrast, intellectual property rights may facilitate financial means of livelihood, but they are not essential to life and the exercise of fundamental rights.[127] On this basis, intellectual property does not seem as inviolable a right as real property.[128]

On further reflection, the premise that intellectual property represents an inviolable right seems to derive from the autonomy theory. As discussed in Part I, that theory treats intellectual property as the government's recognition of personhood in an intellectual creation.[129] To protect creative thought through law is to protect the essence of individuality. Based on this reasoning, it seems to follow that a moral objection to a creative work amounts to a moral objection to the individuality of a person. At a fundamental level, the law should refrain from making moral judgments about a person's individuality.[130] If a person commits a moral wrong against another, it is appropriate to punish that person for his wrong, but the law should not deny his value as a person. Accordingly, if a creative work is in some way harmful or otherwise immoral, it is appropriate to remedy the harm that the other person incurred through whatever law addresses that harm, but the law should not deny the value of the work as a manifestation of the creator's personality and auton-

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126. *See* Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 Cornell L. Rev. 1009, 1046–48, 1054–55 (2009). The democratic model of property recognizes that property serves plural values and that law should reflect those multiple values. Property gives us freedom and stability, provides a source of wealth and well-being, the bases for creative work and useful investment. Property provides a place to create a family life, to nurture friendships, to rest, and to have fun. Property allows us to be good neighbors and good citizens, and it promotes various human values, including privacy, the freedom to associate with others, religious liberty, tranquility, and peace of mind. *Id.* at 1054 (footnote omitted).

127. This is not to say that intellectual property rights do not play a significant role in shaping the culture and enjoyment of life. Nor does this mean that intellectual creations themselves could not be a means of sustaining life. Madhavi Sunder has persuasively argued that intellectual property is a powerful tool to promote cultural participation. *See* Madhavi Sunder, From Goods to a Good Life: Intellectual Property and Global Justice 3 (2012) ("[C]opyright and patent laws do more than incentivize the creation of more goods. They fundamentally affect human capabilities and the ability to live *a good life*.").

128. *Cf.* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354, 355–58 (1999) (observing that the conceptualization of intellectual property has shifted away from a presumption of free access to a presumption of ownership akin to property rights in physical things, and arguing that free speech calls for a less-protective conception of intellectual property).

129. *See* discussion *supra* Subpart I.C.

130. *Cf.* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992))).

omy. Stated differently, underlying the other-laws argument is the belief that intellectual property should always serve to recognize the personhood manifested within a creation, while other laws address any harms that might follow from the creation.

This autonomy argument for other laws to address the harms that follow from a creation does make some sense, but only up to a point. Certainly, other laws should address problems that follow from a creation. Yet the law should not recognize intellectual property rights in a creation that restricts another's autonomy. Under autonomy theory, such a creation should not be encouraged: to condone such creativity through legal recognition of a property right would be to favor one person's exercise of autonomy over another.[131] The creative act itself is what the law should refrain from supporting—not merely the effects of the creativity—for the act of creation is what ultimately leads to restricting another's autonomy. This means, then, that other laws which target the effects of a creative work are insufficient. The law should not recognize that the act of creation itself, which is harmful to another's autonomy, is a permissible way to exercise one's individuality. In that circumstance, denial of intellectual property would seem appropriate.

Consider again the photographer who committed the tort of intrusion upon seclusion by photographing another's sexual activity without her consent.[132] Similarly, a person in a relationship might photograph his or her partner nude, and then distribute the photos after they split up—a practice known as creating "revenge porn."[133] In either situation, the photograph manifests the photographer's personality: it represents his creative thought and his exercise of autonomy with regard to how he chooses to portray individuals and their actions. But this manifestation comes at a significant cost: anguish and suffering of the person photographed, who was not aware of either the photograph occurring or the subsequent public distribution. To grant copyright for the author's creative act would be to recognize his autonomy as being more important than the autonomy of the person being photographed.[134] The copy-

131. *See* discussion *supra* Subpart I.C.2.

132. *See, e.g.*, Gawker Media, L.L.C. v. Bollea, 129 So. 3d 1196 (Fla. Dist. Ct. App. 2014) (granting injunction to prevent media distributor from publishing tape of famous professional wrestler engaged in extramarital sexual activity).

133. *See* Amanda Levendowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. Intell. Prop. & Ent. L. 422, 423–25 (2014) (describing revenge-porn practices).

134. Scholars have argued that subjects of such photography should be able to control the use of the image. *See* Andrew Gilden, *Sex, Death, and Intellectual Property*, 32 Harv. J.L. & Tech. 67, 71 (2018) ("IP can be used to address a broad range of social and emotional vulnerabilities associated with the viral spread of images and text."); Levendowski, *supra* note 133, at 442–44 (arguing that the subject of nude selfies can use section 512's takedown procedure to limit distribution of revenge porn); Derek E. Bambauer, *Exposed*, 98 Minn. L. Rev. 2025, 2056–67 (2014) (proposing amendment to Copyright Act that provides subjects of "intimate media . . . the right to approve distribution or display

right would support an act that diminished someone else's personhood. Thus, by recognizing the photographer's autonomy through copyright, the law would contradict its very purpose of supporting personhood.[135] Regardless of the fact that the photographer could be punished under tort law, copyright law should not recognize his creativity as a permissible manifestation of his personality and autonomy.[136]

Thus, although the autonomy theory does support treating intellectual property as an inviolable right, the scope of the inviolable nature has limits. The argument for protection based on autonomy cannot include situations where the creator harms the autonomy interests of another. Simply put, it does not make sense to recognize rights where the creative act or exercise of rights harms another's autonomy. Even if other laws may be capable of dealing with the problematic behavior, this fact does not imply that intellectual property should serve to condone that behavior.

C. *The Laissez-Faire Argument*

The laissez-faire argument represents a common response when people hear the proposition to deny rights for moral reasons. In essence, the laissez-faire argument posits that the free market should determine the value of intellectual works so as to avoid the government judging the morality of thought. The argument thus draws from themes of free markets and free speech.

1. Argument

The laissez-faire argument holds that the government is the wrong actor to be making moral judgments about intellectual creations.[137] The public should serve as the judge of whether works are permissibly moral—not the court, nor the legislature, nor the executive official. Individual members of society should decide for themselves the moral worth of creations by their decisions whether to consume them.

This argument has strong intuitive appeal. Whenever we trust the government to make moral decisions, we yield our power to choose right from wrong to those who may have completely different moral values than our own, or perhaps even different motivations that would require ignoring those values. This possibility is especially dangerous in the context of intellectual property, for

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of that media").

135. *Cf.* Andrew Gilden, *Copyright's Market Gibberish*, 94 Wash. L. Rev. 1019, 1021–24 (2019) (arguing that courts should not disguise dignity interests—such as privacy, sexual autonomy, reputation, psychological and physical wellbeing—as market harms, but rather, courts should openly address the range of interests that they are weighing).

136. Shyamkrishna Balganesh has argued that privacy law does not adequately cover the interests at issue in revenge porn. He argues for a moral right of disclosure in copyright law. *See* Shyamkrishna Balganesh, *Privative Copyright*, 73 Vand. L. Rev. 1, 25–36 (2020).

137. *See* Rothman, *supra* note 79, at 158–61 (arguing against judges determining copyright eligibility based on their own moral views).

the decision about whether an intellectual work is sufficiently moral represents a decision about the morality of thought. Therefore, when the government denies intellectual property because of a moral reason, the government is passing judgment on the value of a thought. It is akin to thought police.

The democratic ideal further supports the laissez-faire argument.[138] Rather than ceding power to the government to make moral judgments about intellectual creations, the law should let the people decide. In the free market, the public will judge whether an intellectual creation should receive protection: if the creation leads to truly harmful results, the public will not consume the creation. In this way, standards of morality will impede the production of works only to the extent that the consuming public recognizes an absence of moral value in a work. If the public does not prefer a particular moral view, the market will reflect that preference. In this way, prioritizing the public's choice over the government's moral preference seems much more democratically oriented.

Closely related to this last point is the argument that government actors do not always make decisions that are in the best interests of their constituents. Congress can be captured by lobbyists; judges are not accountable to the people; agency officials are subject to political whims of the moment. Government actors may reflect interests that do not give adequate consideration to the sensitive nature and implications of moral choices. Moral choices include a variety of deeply personal and high-priority values. For instance, inventions relating to abortion practices or expression that communicates racial animus have very different effects on members of the public, who collectively hold a diversity of moral values. In the face of these sorts of moral choices and the diversity of moral values, government actors do not always seek to implement views that reflect those of the moral majority, or alternatively, even if they do, government actors do not always consider the importance of the moral minority.

Even assuming a trustworthy government actor who has the best intention of implementing moral views that will benefit society, intellectual property often presents moral questions that lack a straightforward answer. The proper subject matter of technology and expression quickly raises questions over which reasonable minds often disagree. Consider, for instance, the incentive theory's moral value in promoting the progress of science and useful arts under the Constitution. Which particular values inform whether inventions or expressions promote progress in science and the useful arts? Does the value of preserving the environment? Is a pollution producing automobile sufficiently immoral to deny patent protection? What about hate speech?

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138. *Cf.* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288, 341–64 (1996) (arguing for a conceptual framework of copyright that will enhance the democratic character of a civil society).

Does hate speech promote progress? Whose views determine whether speech is hateful? These questions are not easy to answer. Therefore, the proposal to apply moral judgments in defining intellectual property protection inherently involves answering difficult questions that turn on subjective opinion and thereby inject uncertainty into the law. Even for the most trustworthy government actor, issues of morality may not yield a single correct resolution. Moral issues generate uncertainty and subjectivity. For this reason, the laissez-faire argument calls for moral decisions to lie with members of the public rather than the government.

2. Response

The laissez-faire argument raises points that are certainly worthy of consideration. To be sure, the government should not have complete and absolute discretion to determine any and all moral bases for objecting to an intellectual work. For the most part, moral judgments that serve as a basis for rejecting an intellectual work should be exercised by individual members of the public in their decisions to consume or not to consume the work. Thus, each of the points above supports a general presumption that the public should exercise its own moral discretion to determine whether an intellectual work will ultimately succeed or fail in the marketplace. Absent exceptional circumstances, the public will decide whether to reward or incentivize such works by their accepting or rejecting the creation in the free marketplace.

This presumption, however, is just that—a presumption—not an absolute. There are exceptional situations where the free market fails to produce efficient or just outcomes. There are situations where the government must act. And in those situations, the potential problems set forth above regarding government officials making moral judgments should inform the principles that guide the moral decisionmaking process. Not all moral decisions, nor all government entities, should be treated equally. As discussed below, the laissez-faire argument suggests principles that should limit the government's application of moral judgments. Yet that argument does not compel the conclusion that there is absolutely no place for morality in the government's decision to grant or deny intellectual property protection.

a. Free Speech

The first point raised in the laissez-faire argument concerns the regulation of thought. That concern merits due regard as a whole body of law protects individual thought from government interference: the constitutional right to free speech. Whether or not the reason for government interference stems from a moral consideration, if the government is regulating permissible thought, the government could be abridging the speech right. Hence, denying intellectual property protection for certain intellectual creations immediately raises concern under the First Amendment.

In considering speech implications of denying intellectual property, we must recognize that not all regulation of intellectual creations violates free speech. If regulating intellectual creations through intellectual property law violated free speech, there could be no requirements at all for gaining protection. Copyright law requires expression to be original; patent law requires inventions to be useful, novel, and non-obvious.[139] These requirements discriminate based on the content of subject matter, yet presumably their long history in the law indicates that they do not violate the right of free speech.[140] Hence, considerations other than simply whether a criterion discriminates against the content of speech must be relevant in assessing the constitutionality of a content-based criterion for intellectual property protection. For instance, consider a bar to copyright protection for all expression that is created for the purpose of causing a criminal act. Would that criterion necessarily violate free speech? Similarly, would free speech preclude the government from denying patent protection for inventions that are created for the sole purpose of harming another person? It is not immediately clear that such denials of protection would necessarily cross the free speech line. Some denials clearly would; other denials might not. The point is that the issue of free speech is not as one-sidedly clear cut as the laissez-faire counterargument might make it seem. The issue calls for an analysis of speech theory and an examination of speech doctrine. There is

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139. *See* 17 U.S.C. § 102; 35 U.S.C. §§ 102–103.

140. *See, e.g.*, Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 3–6 (1966) (recognizing patent requirements of novelty, utility, and non-obviousness); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (interpreting Intellectual Property Clause as requiring works to manifest "original intellectual conception[]" to receive protection). To illustrate this point, suppose that I repeat another's political message. Under principles of free speech, it would seem that I should receive as much speech protection as the original speaker. I should be able to repeat the unoriginal political speech without any restriction. Nevertheless, because copyright law imposes a requirement that expression be original to be copyrightable, I could not receive copyright protection for my repeated speech. So, apparently the Copyright Clause of the Constitution justifies content discrimination in the recognition of copyright protection. One might argue, however, that this apparent tension between free speech and copyright law is permissible because copyright law still allows me to disseminate the ideas in the other person's political speech (without repeating that expression) as well as make a fair use of the expression itself. *See* 17 U.S.C. §§ 102, 107. Yet that is beside the point: the speech restriction under consideration here is copyright's denial of copyright protection (not the imposition of penalties for infringement). Hence, the fact that I can still disseminate the idea without infringing, as well as repeat the expression without infringing (as a fair use) does not change the fact that a speech restriction is occurring—specifically, the effect on speech that follows from denying the economic benefit inherent in copyright protection. *See* Snow, *supra* note 75. Indeed, if the denial of protection for unoriginal expression were not a speech restriction, then neither would be the denial of protection for immoral expression.

a weighing and balancing of interests that must occur. Not every creation will raise the same speech interests.[141]

Thus, speech issues that follow from denying intellectual property for moral reasons raise complex issues. Both speech theory and speech doctrine must be addressed. As concluded in another work,[142] moral restrictions on intellectual property eligibility may be permissible under free-speech theory and free-speech law depending on which intellectual property regime is under consideration.[143] In the patent law context, free speech is consistent with broad discretion because moral reasons for denying protection reflect concern over an invention's potential to harm society, independent of any message held by the inventor. A patent denial essentially regulates conduct that incidentally affects speech. In the copyright context, moral denials are permissible only if the reason for denial does not relate to the expression's message. Thus, the First Amendment affords Congress broad discretion for moral denials of patent protection, but only limited discretion for moral denials of copyright protection.

Putting aside the conclusions addressed above, this Article simply notes that the "thought police" concern is a valid one, but it does not necessarily imply that moral denials are absolutely inappropriate. The theory and doctrine of free speech must be fully considered. Speech theory and doctrine will dictate the boundaries of denying protection.

b. Free Market

Another point in the laissez-faire argument is that the public—by its consumption choices in the free market—should democratically decide the moral value of works rather than a government official by fiat. To a certain extent, the preference for public choice of morals makes good sense. But as an absolute principle, the argument is subject to conceptual and practical flaws. As a conceptual matter, a pure laissez-faire approach would require that the government refrain from intervening in the market for intellectual creations. Yet the whole system of intellectual property constitutes government interference in the marketplace. Recall from Part I that under the utilitarian theory, intellectual property represents an artificial monopoly that the government creates to cure a market failure; in the absence of that government monopoly, the market will, in many instances, underproduce those works.[144] The government is therefore intervening when it grants intellectual property protection. This understanding means that the issue of whether the government should affirmatively act to exclude a work is incorrectly framed. Correctly framed, the issue is whether the government should refrain from acting to allow the free

141. Alfred Yen provides an engaging discussion on the nuanced nature of a speech analysis of copyright provisions. Alfred C. Yen, *Rethinking Copyright's Relationship to the First Amendment*, 100 B.U. L. Rev. 1215 (2020).

142. *See* Snow, *supra* note 75.

143. *See id.*

144. *See* discussion *supra* Subpart I.A.

market to control the fate of a work. Denying intellectual property protection does not reflect the government interfering in the marketplace.

On the other hand, if the government provides intellectual property rights for any intellectual creations, its decision not to provide those rights for other creations constitutes discriminatory intervention. By granting protection to all works—regardless of moral character—the government is not favoring one over another, whereas a selective grant (against works of an immoral character) represents government favoring one over another. That selectivity could be viewed as government intervening in a marketplace that it created by extending intellectual property rights. Favoring only those works that the government deems to be moral would appear to offend principles of a laissez-faire marketplace.

However, this offense against principles of a laissez-faire marketplace appears justified. Because intellectual property is itself a permissible government intervention to cure a market failure, this fact implies that market failures are sufficient reason for the government to intervene. Indeed, this is nothing new. The government intervenes in a variety of markets to prevent different sorts of failures: environmental, financial, transportation, education, and health to name only a few.[145] Even the marketplace of ideas is subject to government intervention.[146] The marketplace for intellectual creations is no different. The government must evaluate whether there are market failures that require it to intervene (by granting protection), or not to intervene (by denying protection). Underproduction of public goods is not the only market failure that informs the government's decision on whether to intervene. As discussed in Part I, the market failure of negative externalities is present where the market price does not accurately reflect the cost of harm that intellectual creations cause to third parties.[147] Immoral works often harm innocent third parties. Furthermore, asymmetric information in the marketplace is another failure that may affect the government's decision to intervene.[148] Sometimes consumers of an

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145. *See, e.g.*, Len M. Nichols, *Government Intervention in Health Care Markets Is Practical, Necessary, and Morally Sound*, 40 J.L. MED. & ETHICS 547, 550–51 (2012) (providing the economic justifications for state intervention within the health care market).

146. *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 965 (1978) (comparing market failures in economic markets to failures in the marketplace of ideas); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5, 15–17 (describing the laissez-faire economic model that free-speech theory follows and criticizing that model for employing faulty assumptions); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 44 (2000) (observing that speech regulation can improve the functioning of the speech market to increase the aggregate amount of choice among competing ideas).

147. *See* discussion *supra* Subpart I.A.2.

148. *See* discussion *supra* Subpart I.A.2.

immoral work do not realize the harm that the work causes, which translates to an inaccurate valuation of the work in the free marketplace. Hence, collective assessment of a work may reveal more information about the work than an individual assessment can. Thus, whether the discrimination against immoral works is termed intervention or non-intervention, it is a government decision that is justified.

Even assuming that the market accurately values a work and that the works yields a net benefit for society, the work may involve activity that society does not desire to incentivize. That is, the market's preference for a work should not absolutely imply a public view about the morality of the work sufficient to justify intellectual property protection. Consider, for instance, a pornographic film of a man beating a woman, who—at the direction of the filmmaker—seriously injures the woman, perhaps even killing her (and she never consents to such harm).[149] There may well be a market preference for this material sufficient to support its production. Would the market's preference for such material imply that the beating is moral? As discussed in Part I, the market success of the creation would not imply its morality under the labor-desert theory of intellectual property.[150] Even assuming that the filmmaker pays compensatory damages to the woman, the filmmaker's net profit should not imply that the making of the film, involving its inherently immoral act of beating, is moral. A market demand for an intellectual creation does not imply individual morality of a creative act. Commercial markets do not always provide a sound basis for assessing morality.

c. Untrustworthy Actors and Uncertain Answers

A final point in the laissez-faire argument is that government actors may be untrustworthy or ill-equipped to make moral choices that involve uncertainty.[151] In many instances, this is true. Yet this fact does not compel the conclusion that the government should never make any moral judgments in

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149. On the issue of consent, some jurisdictions do not recognize consent in this context. This assumes that any consent to the battery would not be a defense. *See, e.g.*, People v. Samuels, 58 Cal. Rptr. 439, 447 (Cal. Ct. App. 1967) (ruling that consent was not a defense to aggravated assault, where defendant filmed an allegedly consensual beating); *see also id.* ("[C]onsent of the victim is not generally a defense to assault or battery, except in a situation involving ordinary physical contact or blows incident to sports . . . ."). For a detailed discussion of the approaches taken by various jurisdictions, see W.E. Shipley, Annotation, *Consent as Defense to Charge of Criminal Assault and Battery*, 58 A.L.R.3d 662 (1974).

150. *See* discussion *supra* Subpart I.B.2.

151. *See, e.g.*, Craig Allen Nard, *Legal Forms and the Common Law of Patents*, 90 B.U. L. Rev. 51, 56–57 (2010) (noting issues with legislative patent reform, including "the more politicized legislative process," "capture-prone administrative rulemaking," and pressures from "divergent interest groups"); Jessica Litman, *The Politics of Intellectual Property*, 27 Cardozo Arts & Ent. L.J. 313, 314–16 (2009) (observing the influence of industry in forming copyright law).

deciding a creation's eligibility for intellectual property. As a general matter, government actors have a responsibility to protect the public from harms that consumers are unaware of and from collective harms that individual consumers do not value.[152] This duty suggests that the government should deny intellectual property where such harms are present. Indeed, the duty implicitly suggests that the government should not encourage such harms. To that end, denial of intellectual property protection represents the government fulfilling its duty to refrain from incentivizing and rewarding conduct that is harmful to the public.

Nevertheless, how can we rely on government actors where they may be untrustworthy? And where the matters often involve subjectivity and uncertainty? These questions are not unique to intellectual property. The problem of government actors exercising discretion for a reason that is contrary to the views and interests of their constituents represents a problem inherent in any governmental regime. Pretending that the government actors always make the right decisions does not solve the problem, yet neither does supporting harmful conduct merely because some government actors cannot be trusted. Instead, a democracy deals with this problem by implementing accountability for decisions. Where government actors are accountable for moral judgments, they are more likely to act in a way that reflects the best interests of their constituents. The more accountability that government actors face for their moral decisions suggests that those government actors may be trusted with decisions that involve greater subjectivity and uncertainty, or in other words, decisions that call for greater discretionary judgment. Stated differently, moral decisions that involve minimal discretion should lie with government actors that have minimal accountability, whereas moral decisions that involve great discretion should lie with government actors that have greater accountability.

This principle suggests that judgments involving controversial moral issues should lie with Congress. Congress faces both political and constitutional accountability. As a political matter, moral views that are highly controversial are always subject to reversal in the next election cycle; as a constitutional matter, the protection of fundamental rights, and in particular the freedom of speech, will safeguard against abuses of power. Nevertheless, Congress should still be cautious in applying a moral judgment to deny protection.[153] Congress should not deny protection unless an intellectual creation causes substantial harm to society, outweighing the potential benefit. In short, distrust of Congress's motives and the inherent subjectivity in many moral issues gives

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152. *See generally* Steve Sheppard, I Do Solemnly Swear: The Moral Obligations of Legal Officials 142–56 (2009) (articulating a government official's duty of charity to his subjects).

153. *Cf.* Brad A. Greenberg, *Rethinking Technology Neutrality*, 100 Minn. L. Rev. 1495, 1547–50 (2016) (recognizing that institutions other than Congress are necessary to adopt intellectual property law to technological change).

pause to legislating moral judgments. But that caution does not imply an absolute bar. There are exceptions to the general presumption against Congress denying protection for moral reasons. Those exceptions must be weighed and considered cautiously.

Moral judgments that do not involve much controversy may be made by judges. Judges are appointed for life and face minimal accountability for their views. They should therefore decide only those moral issues in intellectual property cases that admit minimal discretion. Their moral decisions must be based on a straightforward instruction from Congress, a clear application of a constitutional directive, or if under their equitable powers, a clear principle that intellectual property theory demands and which can be applied with minimal discretionary judgment.

Similar to judges are executive officials. The PTO and the Copyright Office face minimal oversight or accountability for their exercise of discretion. Although they may be replaced and are thereby subject to political accountability, in practice that political accountability is nonexistent. They should therefore not be charged with deciding controversial moral matters in intellectual property. Hence, congressional direction to the PTO or the Copyright Office involving a moral reason should be sufficiently specific so that the agency actors exercise minimal moral discretion in denying protection.

The upshot is that different government actors have different levels of accountability, so the moral discretion that they exercise should be defined accordingly. That being said, there should be a presumption that most moral judgments about intellectual creations lie with the people. Individual members of the public should decide for themselves whether intellectual creations should be incentivized or rewarded. Intellectual property protection should be the norm. And for the limited category of creations that require the government to deny protection, the different types of government actors should be responsible for the different types of moral judgments.

Conclusion

Questions of morality surround whether certain expressive and inventive creations may receive intellectual property protection. The theories of intellectual property offer valuable guidance. Each theory implies moral values that dictate the boundaries of intellectual property protection. The utilitarian theory implies the specific moral value that the law should not incentivize works that result in a net cost to society. Its economic rationale further suggests that denying intellectual property is appropriate where the market for an intellectual work fails to account for a negative externality or asymmetric information. The labor-desert theory is premised on the moral value that the law should not reward creators whose intellectual works harm the life, health, liberty, or property of another, or collective society generally. The theory of autonomy and personality suggests the moral value that the law should not

recognize rights in works that inhibit another's autonomy or exercise of personality. Thus, these three theories provide justification for denying protection to certain types of intellectual works.

With respect to the three theoretical arguments against denying protection on moral grounds, this Article concludes that none of them are persuasive. The first is that denying protection in many instances may actually increase the output of the specific immoral work. But under any of the intellectual property theories, a denial of protection is not supposed to control or solve a moral problem that is inherent in a work. Denying protection is not intended to control or curbing immoral activity. The second argument is that other laws should address the moral problem rather than intellectual property. Yet intellectual property should support other laws that are designed to address moral problems in society by not incentivizing or rewarding the very behavior that those other laws are attempting to control. The third argument is that the government should not interfere with the laissez-faire market approach of letting the public decide the moral worth of an intellectual creation. That is true in most situations. This presumption, however, should not represent an absolute bar that would preclude Congress or courts from ever denying protection for moral reasons. Within certain constitutional limitations, denial of protection may be appropriate even in the laissez-faire market.

Thus, theory supports denying intellectual property protection for some intellectual works that are immoral. Of course, this theoretical discussion is only a first step in the discussion. Additional questions regarding doctrinal application remain: How should the law determine which intellectual creations should be denied protection by the government? How do existent legal doctrines comport with such denials of intellectual property protection? These and many more questions may now be considered.