

Values, Questions, and Methods in Intellectual Property

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SYMPOSIUM

VALUES, QUESTIONS, AND METHODS IN INTELLECTUAL PROPERTY

INTRODUCTION

JEREMY N. SHEFF[†]

Intellectual property (“IP”) scholarship has a unique distinction among legal academic disciplines: some of its practitioners question whether the subject of their study ought to exist. We should pause to consider how remarkable this is. Constitutional law scholars usually do not question whether political communities should be governed by constitutions. Criminal law scholars generally accept that the state ought to be able to define and punish crimes. Contract law scholars do not question that some promises should be enforceable in court. To be sure, in each of these disciplines there are hotly debated questions over the appropriate scope and justification for particular legal rules, and that is true for IP as well. But perhaps the central theoretical question in IP debates—and particularly patent debates—is whether IP rights should exist at all, or whether we would be better served by some other system for regulating the creation and distribution of knowledge.¹

This skepticism has a long pedigree in American IP law. In patent law, it encompasses Thomas Jefferson’s musings on how societies could reasonably disagree about whether patents “produce more embarrassment than advantage,”² and Fritz Machlup’s ambivalent quip:

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¹ See Daniel J. Hemel & Lisa Larrimore Ouellette, *Beyond the Patents–Prizes Debate*, 92 TEX. L. REV. 303, 304–05 (2013) (reviewing the literature).

² Letter from Thomas Jefferson, to Isaac McPherson (Aug. 13, 1813).

If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one[, b]ut since we have had a patent system for a long time, it would be irresponsible, on the basis of our present knowledge, to recommend abolishing it.³

America's history of copyright law is less ambivalent but more checkered. In the nineteenth century, America was a pirate nation, protecting the few works produced by its own citizens but refusing to grant copyrights over the far larger and more highly demanded body of works of authorship produced overseas. Now that we have become a net exporter of copyrightable works, we have also become a net exporter of rightholder-favoring copyright laws, embedding protective Western—and particularly American—standards into international legal instruments such as TRIPS and bilateral and multilateral trade agreements.⁴

Our ambivalence about the very existence of IP rights suggests an unsteady normative foundation for those rights. The normative justifications offered for IP law have traditionally taken two forms in the American academic literature. There are consequentialist justifications, which hold that IP rights exist to avoid the free-riding problems that attend production of nonrivalrous and nonexcludable “public goods,” such as inventions and works of authorship. Under this view, a limited period of exclusivity gives creators a window to engage in supracompetitive monopoly pricing, allowing them to recoup their investment of time, effort and resources in production of intangible resources that are costly to create but cheap to copy.⁵

³ SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 85TH CONG., AN ECONOMIC REVIEW OF THE PATENT SYSTEM 80 (Comm. Print 1958) (review written by Fritz Machlup).

⁴ For a discussion on the history of American copyright and the relationship between levels of cultural production and levels of copyright protection, see generally B. Zorina Khan, *Does Copyright Piracy Pay? The Effects of US International Copyright Laws on the Market for Books, 1790-1920* (Nat'l Bureau of Econ. Research, Working Paper No. 10271, 2004). For a discussion on the extension of U.S. copyright law to developing countries through trade agreements, see Carsten Fink & Patrick Reichenmiller, *Tightening TRIPS: Intellectual Property Provisions of U.S. Free Trade Agreements*, in *TRADE, DOHA, AND DEVELOPMENT: A WINDOW INTO THE ISSUES* 285, 295–96 (Richard Newfarmer ed., 2006).

⁵ See generally Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609 (1962); Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSP. 57 (2005).

Then there are deontological justifications, principally drawing on the labor-desert theories of John Locke, which hold that the labor undertaken in creating a new invention or work of authorship endows the creator with a moral claim to be compensated for—and to control—its use.⁶ In recent decades, these justifications have been examined using new methods, as IP law scholarship has taken what might be called an “empirical turn.”⁷

One line of scholarship in this vein purports to test a fundamental premise of the consequentialist justification for IP laws: they incentivize people to create new inventions and works of authorship. We may call this premise the “incentive thesis.”⁸ Much of the new empirical evidence suggests that in some circumstances, for some purposes, the incentive thesis is false. For example, the innovative experiments reported by our panelists Chris Buccafusco, Jeanne Fromer, and Chris Sprigman demonstrate that small pecuniary incentives do not correlate positively with creative or innovative activity or outputs in discrete short-term tasks.⁹ Of course, other empirical work is consistent with the theory that for works that require a significant and long-term investment of effort or resources—such as classical operas—the incentives provided by IP rights do, in fact, increase production.¹⁰ Thus the empirical data, as a whole,

⁶ See generally Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1 (2005); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993).

⁷ See, e.g., Craig Allen Nard, *Toward a Cautious Approach to Obeisance: The Role of Scholarship in Federal Circuit Patent Law Jurisprudence*, 39 HOUS. L. REV. 667, 669–70 nn.9–10 (2002).

⁸ The turn of phrase is borrowed from Professor Jonathan Barnett. See, e.g., Jonathan M. Barnett, *Do Patents Matter? Empirical Evidence on the Incentive Thesis*, in HANDBOOK ON LAW, INNOVATION AND GROWTH 178 (Robert E. Litan ed., 2011); Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1381–82 (2005).

⁹ St. John’s Intellectual Property Law Center, *St. John’s IPLC 2016 Symposium | Panel 3: Methods*, YOUTUBE (Nov. 15, 2016), <https://youtu.be/ud6D9kEFsnI> [hereinafter “Panel 3”].

¹⁰ See generally Michela Giorcelli & Petra Moser, *Copyright and Creativity: Evidence from Italian Operas* (Oct. 19, 2016) (unpublished manuscript), <https://papers.ssrn.com/abstract=2505776>.

suggests that the incentive thesis is not categorically true or categorically false across all the areas of human endeavor on which IP law has purchase.

A second line of empirical scholarship attempts to quantify the costs of IP rights. Such research typically focuses on the most readily measurable aspect of those costs: litigation costs. Again, empirical researchers dispute the magnitude of those costs, and even the proper basis for measurement.¹¹ Other components of the costs of IP law—such as the deadweight losses that result from excluding people from access to goods and services covered by IP rights based on their ability and willingness to pay, and the loss of follow-on contributions that could have been made by those so excluded—appear frequently in theoretical discussions but are much harder to get a handle on empirically.¹²

Yet, a third line of empirical scholarship attempts to determine whether IP rights are necessary to generate innovative and creative activity.¹³ The key theme in this line of research is identification of industries and fields of endeavor where creativity and innovation emerge without any IP rights.¹⁴ Underlying this inquiry is the theoretical argument that other legal regimes—prizes, government sponsorship, or a laissez-faire approach—can provide satisfactory or even preferable substitutes for IP rights.¹⁵

In a recent lecture, one of our panelists, Mark Lemley, reviewed the body of current empirical scholarship along these lines and concluded that the evidence in support of the

¹¹ Compare JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK 120–46 (2008), with David L. Schwartz & Jay P. Kesan, *Analyzing the Role of Non-Practicing Entities in the Patent System*, 99 CORNELL L. REV. 425 (2014).

¹² See Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891, 950 (2012) (“The challenge that has always confronted those who have attempted to link copyright enforcement with lost innovation involves the difficulty of tracing exactly what we have lost. One cannot pinpoint with certainty technologies that would have developed if history had followed a different course.”).

¹³ This is to be distinguished from the first line of research, which attempts to determine whether such incentives are sufficient to generate creative or innovative activity.

¹⁴ See generally, e.g., KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* (2012).

¹⁵ See generally Nancy Gallini & Suzanne Scotchmer, *Intellectual Property: When Is It the Best Incentive System?*, in 2 INNOVATION POLICY AND THE ECONOMY 51, 52–53 (Adam B. Jaffe et al. eds., 2002).

consequentialist justification for IP law is “decidedly ambiguous.”¹⁶ He notes that while earlier ambivalence about consequentialist justifications for IP could have been based on ignorance, we now have enough evidence to conclude that IP “probably [is]n’t helping much, or [i]s only helping people in a few specialized areas, and might in fact be making things worse.”¹⁷ In Professor Lemley’s view, this ambiguity suggests that recent expansionist trends in IP law have been a mistake, and that even maintaining current levels of IP protection ought to be reconsidered.¹⁸

The failure of empirical evidence to support consequentialist justifications for IP has also been noted by another of our panelists, Rob Merges.¹⁹ But Professor Merges’s response to the indeterminacy of empirical assessment of IP laws has been to investigate other justifications for intellectual property—alternatives drawn from deontological philosophical authorities such as Locke, Kant, and Rawls.²⁰ These two leading lights of the IP academy have sparred in print over the implications of the move away from consequentialism—Lemley deriding appeals to deontological reasoning as “faith-based,” and Merges defending his approach—in this Symposium Issue—as “pluralist” insofar as it accommodates both consequences and abstract moral claims.²¹ In print, each of these authors has accused the other of closing his mind to arguments inconsistent with their approach to the problem, but in person, at our Symposium, we managed to have a collegial discussion, revealing much common ground.²² I suspect this is because their disagreement over the implications of recent empirical scholarship on IP is not, in fact, as profound as it might appear, and that the real issue is a much more serious challenge

¹⁶ Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1334 (2015).

¹⁷ *Id.* at 1334–35.

¹⁸ *Id.*

¹⁹ ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 2–3 (2011).

²⁰ *See id.* at x.

²¹ Robert P. Merges, *Against Utilitarian Fundamentalism*, 90 ST. JOHN’S L. REV. 681 (2016).

²² St. John’s Intellectual Property Law Center, *St. John’s IPLC 2016 Symposium | Panel 1: Values*, YOUTUBE (Nov. 14, 2016), <https://youtu.be/FENnzTkGUkw>.

to the work of legal scholars who study IP. This Introduction discusses why I think that is the case, and where I think we ought to go from here.

We might begin by asking why we think the types of empirical research discussed above are useful. Professor Lemley suggests that he views empirical scholarship as part of a Popperian scientific process in which theories of how the world works are tested for resistance to falsification.²³ But if this is our model, the epistemic humility of Popper's theory of science must be borne in mind: Popper explicitly abandoned any notion of scientific truth.²⁴ In other words, Popperian science cannot tell us what is true; the best it can do is tell us which of two competing stories is less plausible. It is worth remembering what Popper himself had to say about this:

Scientific theories can never be "justified", or verified. But in spite of this, a hypothesis *A* can under certain circumstances achieve more than a hypothesis *B*—perhaps because *B* is contradicted by certain results of observations, and therefore "falsified" by them, whereas *A* is not falsified . . . The best we can say of a hypothesis is that up to now it has been able to show its worth, and that it has been more successful than other hypotheses although, in principle, it can never be justified, verified, or even shown to be probable.²⁵

If this is our standard, then specifying our theories becomes a problem of crucial importance. For example, what exactly is the consequentialist justification that we might be trying to falsify? One possibility is the incentive thesis itself: the hypothesis that, all else being equal, promising a property right over the fruits of creative or innovative activity will induce individuals to undertake and complete such activity more frequently than they otherwise would. On this point, Professor Lemley is clearly right to claim that the evidence is "decidedly ambiguous" as to a context-independent version of the incentive thesis, and less ambiguous—though less consistent—when we begin specifying particular types of creative or innovative activities or particular types of incentives.

²³ Lemley, *supra* note 16, at 1346 n.67.

²⁴ This is particularly so for the elusive truth by induction that has haunted empiricist epistemology at least since Hume: Popper literally claimed "there is no such thing as induction." KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 18 (Taylor & Francis e-Library, 2005).

²⁵ *Id.* at 317.

But we must remember that the incentive thesis is not in itself a justification for IP rights; it is just one piece of the argument. The ultimate question in consequentialist normative assessments of policy is whether the policy has a positive effect on outcomes compared to some baseline alternative policy. In most consequentialist approaches, the outcome of interest is some version of aggregate social welfare, and the means for assessing it is some form of cost-benefit analysis. Within this welfarist normative framework, the attractiveness of attempting to falsify the incentive thesis is understandable: if the incentive thesis were always and everywhere false, and the creation of new inventions and works of authorship were the only benefit flowing from IP laws, we could short circuit our analysis. We would conclude that the benefits generated by IP are—relative to the absence of IP—less than or equal to zero, meaning we need not consider the costs of IP at all to find it unjustified. Evidence that the incentive thesis is true in some circumstances but not in others defeats this strategy in part: A consequentialist must consider the social costs of IP rights in at least those circumstances where they generate creative activity, and somehow attempt to compare those costs to the value of that activity. In such circumstances, the hypothesis we really care about—and should be attempting to test against alternative hypotheses using the criterion of falsification—is that the benefits of IP are greater than its costs. A Popperian welfarist interested in justifying IP rights—or their elimination—would thus need, at a minimum, empirical evidence on both costs and benefits.

But before we even reach that point, a deeper problem remains: there may be other benefits to IP laws that a cost-benefit analysis would need to take into account, besides the generation of creative outputs. We can begin to understand the nature and scope of this problem by considering the value of creative work to creators themselves. For example, Rebecca Tushnet argues that many people deeply enjoy engaging in creative work: they feel motivated to create and derive personal satisfaction and fulfillment from doing so, independent of any pecuniary compensation.²⁶ Relatedly, Professor Merges places

²⁶ See Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WILLIAM & MARY L. REV. 513, 526–527 (2009).

particular weight on the autonomy of creative professionals who are able to earn a living from their creative efforts under an IP regime.²⁷ Both of these phenomena—the fact that creators derive personal satisfaction from the process of creation itself and the fact that creators can enjoy material security while pursuing such personally fulfilling activities according to their own wishes—would seem to be relevant to an assessment of a legal regime that purports to channel and regulate creative activity by reference to the benefits that flow from such activity. But both authors argue that the phenomena they identify simply cannot be properly accounted for in a consequentialist framework.²⁸

I think it is an overstatement to claim that a consequentialism premised on cost-benefit analysis can't account for these features of creative work. However, attempting to do so reveals an essential incompleteness in consequentialist justifications for regulation of complex social phenomena, such as innovation and creativity, and exposes serious limitations on the power of empirical methods in evaluating such justifications. This is principally because such cost-benefit analysis requires costs and benefits to be quantified in ways that allow them to be measured and compared to one another, and the process of doing so is beset with contestable value judgments. The pitfalls of attempting such quantification and comparison are frequently cited in critiques of cost-benefit analysis as it applies to health and safety regulations,²⁹ but they are equally relevant to evaluation of IP.

²⁷ MERGES, *supra* note 19, at 195–236.

²⁸ *Id.* at 112 (“[E]ven if the special incentive of an IP right leads to a somewhat unequal distribution of resources . . . the right may be justified. It may enable someone to pursue her most cherished career goal, and to do so independently. The freedom to do this might well be worth the loss of some social value that would be provided if the creator worked for less money, or under less autonomous conditions.”); Tushnet, *supra* note 26, at 521–22 (“Creativity, as lived, is more than a response to incentives, working from fixed and random preferences.”).

²⁹ Compare Cass R. Sunstein, *The Value of a Statistical Life: Some Clarifications and Puzzles*, 4(2) J. BENEFIT-COST ANALYSIS 237, 238–39 (2013) (suggesting ways of incorporating critiques of quantification into cost-benefit analysis), with FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004) (arguing that many goods—particularly environmental goods—are not subject to the quantification that cost-benefit analysis requires).

We need not resort to life-and-death stakes to show how value judgments creep into any cost-benefit analysis of IP law. Take, for example, the autonomy enjoyed by a creative professional who is able to earn a living from her creative work, and the satisfaction she derives from doing so. What is the value of her autonomy or her satisfaction? How might we measure it? Should we try to quantify it in dollars? Can we? Is her income itself a proper measure? Should we instead try to identify some alternative, more remunerative labor she might engage in, and treat the difference between her imputed foregone income from that labor and the income flowing from exercise of IP rights as the “value” of her autonomy? If so, how? Do we know what alternative labor she would have engaged in, or what the imputed income from it would be if we cannot observe either directly in the real world? Should we instead ask her to put a dollar value on her autonomy or on the satisfaction she derives from creative work? If she did so, should we take her estimate at face value? Could we treat her answer as useful data?

And what if the creative autonomy in question is not that of a rights-holder, but of a user—the “amateur” of Professor Merges’s discussion, or the fanfiction authors of Professor Tushnet’s analysis? If stronger IP rights prevent these users from incorporating existing copyrighted works into their own creative endeavors, should we consider that a cost of those rights? Again, how would we measure that cost? How can we know what works are not getting created because a would-be creator is unable or unwilling to secure a license on terms demanded by a prior creator?³⁰ How could we put a value on those uncreated works, even if we knew what they were?³¹

When we do turn to questions of life and death, these fundamental uncertainties become even more unsettling. What is the aggregate social benefit of a cure for a rare disease that kills ten people per year? What about the benefit of a marginally improved treatment for a superficial health condition, like mildly itchy skin, that affects millions of people per year? Can we

³⁰ See Carrier, *supra* note 12, at 950; see *supra* text accompanying note 12.

³¹ I raised similar questions in an earlier comment on the debate between Professors Lemley and Merges. See Jeremy Sheff, *Faith-Based vs. Value-Based IP: On the Lemley-Merges Debate*, JEREMYSHEFF.COM (Apr. 2, 2015), <https://jeremysheff.com/2015/04/02/faith-based-vs-value-based-ip-on-the-lemley-merges-debate>.

measure these benefits in dollars? If so, how many millions of people with mosquito bites are equivalent to ten victims of a deadly disease? For that matter, how many works of fanfiction would we be willing to give up to eradicate such a disease? To more effectively relieve the mild itching of ten million people?³²

And here is perhaps the most difficult question of all: if we did ask the terminally ill, the mildly itchy, the creative professionals, and the fan-fiction authors of our examples to put a dollar value on these costs and benefits of their lived experiences, and they all gave us different answers, which answer should we plug in to our cost-benefit analysis? Should it matter whether the difference in their answers is influenced by their heterogeneous pre-existing levels of wealth or income over which they have no control?³³ Should we simply average their answers together, and if so, should we weigh the components of our average? Should anybody else have a say? If so, who?

Answering all these questions requires us to make value judgments—about the value of freedom to develop one's expressive capacities, about what level of material support a member of society deserves in exchange for a technological or cultural contribution, about our collective obligations to the sick and the needy, about the allocation of control over cultural development between the last generation and the next one, about how to balance respect for individuals with wariness about bias and self-interest. These values are not readily amenable to academic quantification.³⁴ Specialized training in law, economics, or empirical methods does not confer any privileged position in answering these questions.³⁵ My value judgments are

³² These questions implicate deeper philosophical questions about the transitivity of value and its aggregation. See, e.g., DEREK PARFIT, REASONS AND PERSONS 381–90 (1984) (laying out the famous “repugnant conclusion” as a challenge to welfarist normative systems that rely on aggregation); LARRY S. TEMKIN, RETHINKING THE GOOD: MORAL IDEALS AND THE NATURE OF PRACTICAL REASONING 134–39 (2012) (using an example comparing degrees of pain ranging from torture to mosquito bites over gradually extending periods of time to dispute the transitivity of the “better than” relation in evaluative judgments).

³³ See generally James K. Hammitt & Lisa A. Robinson, *The Income Elasticity of the Value per Statistical Life: Transferring Estimates Between High and Low Income Populations*, 2 J. BENEFIT-COST ANALYSIS 1 (2011).

³⁴ Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 842 (1994).

³⁵ To be sure, cost-benefit analysis methodologies are usually explicitly laid out and defended against critiques, and this transparency is laudable and important—perhaps the most important feature of such analyses. See, e.g., *id.* at 843 (“[I]f goods

no better than those of the average person on the street—though of course I may believe they are. The problem here is not merely the familiar dilemma that philosophers refer to as “incommensurability”³⁶—that we are trying to compare apples and oranges—or dollars and lives—when there is no single acceptable metric or ordinal relation by which to compare them. Nor is it only the tenuousness of the transitivity and aggregation conditions that are assumed in cost-benefit analysis.³⁷ The deeper problem is that whether something is best thought of as an apple or an orange may depend on who is holding it—or looking at it—at any particular moment. Under these conditions, nearly all the work of cost-benefit analysis is contained in the act of deciding what gets measured, and how. Thus, the implicit

are diverse and valued in different ways, there will be considerable crudeness in [cost-benefit analysis of] regulation. . . . We should therefore have a presumption in favor of a much more disaggregated accounting of the effects of regulation, one that exposes to public view the full set of effects.”). And yes, individual preferences revealed in real-world transactions or survey responses can provide some indirect evidence of how people weigh tradeoffs between control over their current stock of material resources and their goals for an uncertain future, and we can construct plausible models by which we can try to derive from those shadows and reflections of individual values a comprehensive set of population-wide preferences. *See generally*, e.g., Jacob Goldin & Daniel Reck, *Preference Identification Under Inconsistent Choice* (June 13, 2014) (unpublished manuscript), <https://ssrn.com/abstract=2417709>. But even doing this requires the analyst to make contestable assumptions—for example, that a society’s collective decision as to how to distribute and marshal its finite resources ought to be a function of atomized individual decisions that specific people make under—often arbitrarily heterogeneous—individual budgetary or cognitive constraints. As another of our panelists, Amy Kapczynski, has argued elsewhere, if the existing distribution of those constraints offends our values, a regulatory framework that assumes such a distribution may be similarly offensive. Amy Kapczynski, *The Cost of Price: Why and How To Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 996 (2012) (“IP rations access via the price mechanism, and so it distributes resources in a way that is sensitive to the background allocation of resources. Yet the background allocation of resources may be unjust.”). This is equally true of a mode of analysis that assumes such a distribution—even where the assumption is simply a result of the limits of the methodology itself. For example, attempting to derive a society’s preferences from individual preferences—whether revealed in transactions or measured in some other way—may simply be an example of the “drunkard’s search” or “streetlight problem” endemic to empirical research methods: we measure what we can observe, even if it is not what matters. DAVID H. FREEDMAN, *WRONG: WHY EXPERTS* KEEP FAILING US—AND HOW TO KNOW WHEN NOT TO TRUST THEM* 40–46 (2010); ABRAHAM KAPLAN, *THE CONDUCT OF INQUIRY* 11 (1973).

³⁶ *See generally* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON (Ruth Chang ed., 1997); Sunstein, *supra* note 34.

³⁷ *See supra* note 32 and accompanying text.

answer to this most fundamental question in cost-benefit analysis—who settles disputes over the definition and measurement of value—is that the analyst decides.

To my mind, the most salient objection to empirical analysis of the consequentialist justification for IP is not that “it’s complicated”³⁸—though it is that. Rather, the most serious problem is that such analysis is not an act of observation, but an assertion of power. It is the act of deciding what counts, how to count it, and how to compare it to other sources and measures of value. Of course, resort to the authority of dead white male philosophers and their well-considered ideas of what is right and good is no less an act of power than the specification of a model for cost-benefit analysis. In both cases, the analyst’s conclusions rest on the privileging of a set of values embedded in the assumptions underlying their mode of analysis. My point is not that either consequentialism or deontology is true or false; it is that people—incredibly smart people!—legitimately disagree on that question, as they disagree on what conclusions should be drawn from either mode of reasoning. The fact of that disagreement ought to be taken seriously.

So what does this type of disagreement imply for the conduct of scholars studying IP? This Symposium was convened to try to start answering that question. The title of the Symposium—“Values, Questions, and Methods”—was selected to reflect the issues scholars must face as the value judgments underlying our assessments of our object of study are increasingly forced to the surface.

First: Values. If the value judgments underlying our assumptions are really what drive the outcome of our analyses and define the stakes of our debates, then perhaps burying those value judgments in the methodology section of a cost-benefit analysis or the citations of a philosophical exegesis is not the best way to proceed. Perhaps we ought to direct our arguments to our value judgments themselves. For example, Professor Merges’s analysis reveals a default preference for the interests of creators;³⁹ Professor Lemley’s analysis reveals a default preference for the interests of consumers, or at least for market-

³⁸ Lemley, *supra* note 16, at 1343.

³⁹ MERGES, *supra* note 19, at 196 (“[C]reative professionals ought to be a special object of interest for IP law and policy.”).

based allocations—however we might define those.⁴⁰ If these default preferences are what really drives their disagreement, let us debate their merits directly. And let us be sure to include in that conversation as broad and diverse an array of values as might be brought to bear on the assessment of IP. In this Symposium Issue, for example, Jan Osei-Tutu argues that we ought to value human development as an independent good and incorporate it into our priorities for an IP system, raising the question how such a value can be integrated into the more familiar values that have traditionally been invoked in assessment and justification of IP laws.⁴¹ Ann Bartow's discussion of how IP law as implemented seems to systematically disfavor women requires us to confront the extent to which we value gender equity and what we are willing to do in pursuit of that value.⁴² These examples show just how broad an array of normative commitments might be implicated by the design of our IP laws.

Of course, it may be that we simply have irreconcilable differences of opinion regarding what we think is important, or how weighty we think each of our values is relative to the other. In such a case, neither academic debate nor even empirical evidence is likely to resolve the impasse. Our disagreement then becomes a question of politics, in the nonpejorative sense of organizing competing individual priorities into a plan of coordinated social action. Such fundamental differences may ultimately have to be resolved through an appropriate social choice mechanism—hopefully a democratic one—in which legal academics have no particular claim to precedence. But in discussing our normative commitments openly, we may find that in fact we have a great deal in common, and that we can identify

⁴⁰ Lemley, *supra* note 16, at 1330–31 (“IP rights represent government interventions in the marketplace that seek to achieve that desirable social end by restricting the freedom of some people (consumers, reusers, critics) to do what they want with their own real and personal property in order to improve the lives of other people (inventors and creators). . . . In a market-based economy, regulation requires some cost-benefit justification before we accept it.”).

⁴¹ See generally J. Janewa Osei-Tutu, *Human Development as an Intellectual Property Metric*, 90 ST. JOHN'S L. REV. 711 (2016).

⁴² See generally Ann Bartow, *Patent Law, Copyright Law, and the Girl Germs Effect*, 90 ST. JOHN'S L. REV. 579 (2016).

our areas of agreement and narrow and sharpen our disagreements in such a way as to identify targets for further research, discussion, and knowledge building.

This leads to the second heading of our Symposium: Questions. If indeed people make different value judgments in assessing IP systems, one obvious question is what those judgments are. While legal academics can—and should—lay out our own value judgments in our scholarship, we are not representative of the public at large. As Greg Mandel shows in his contribution to this Symposium, most laypeople have quite skewed beliefs about the content of IP law, and implicitly about what IP law ought to do.⁴³ If reconciling competing priorities is a social choice problem to be tackled by democratic institutions, the divergence between lay and expert priorities for IP should engender some additional humility on the part of the legal academy.⁴⁴

Now, assuming we know what we want from our IP system, what questions should a scholar of that system investigate? I have already cast some doubt on the ultimate cost-benefit question—whether the benefits of IP exceed its costs. But that doubt arises from the absence of agreed truth conditions for that question—a problem for the Popperian model under which we have been laboring. But we can still inquire meaningfully into the causal relationships between IP laws and human behaviors, and about observable and quantifiable costs and benefits arising from those behaviors, so long as we are mindful that the answers to such questions will always be incomplete. Nevertheless, even an incomplete answer may be a helpful input into the process of practical reasoning whereby our knowledge and our values are integrated to produce a course of action. For example, Oskar Liivak has argued that consequentialists should not be focusing on incentivizing innovation at all; that what we should really care about is providing a framework for transactions between creators and commercializers.⁴⁵ Under this view, we should prioritize scholarly investigation of how law interacts with commercialization, rather than with knowledge creation.

⁴³ See generally Gregory N. Mandel, *What Is IP For? Experiments in Lay and Expert Perceptions*, 90 ST. JOHN'S L. REV. 659 (2016).

⁴⁴ *Id.*

⁴⁵ See generally Oskar Liivak, *Stop Rewarding: The Pathologies of Inducing Inventions*, 90 ST. JOHN'S L. REV. 639 (2016).

Another set of questions might ask whether IP is serving our priorities effectively. Funmi Arewa's contribution, for example, investigates the interface between the law of copyright and the traditions and lived experience of musicians to see whether the law is sufficiently accommodating of the creative community it purports to serve.⁴⁶ We could ask similar questions about any community that interacts with the IP system—on the producer side or the consumer side.

Once we have a set of questions we want answered, we must figure out how to go about answering them. This is the subject of our Symposium's final heading: Methods. Our panelists offer a wide array of methodological approaches. On the empirical side, we see tremendous diversity, from the experimental studies of Professors Buccafusco, Fromer, and Sprigman to the qualitative empirical methods pioneered by Jessica Silbey and the comparative analysis and case study methods championed by Brett Frischmann.⁴⁷ This richness of empirical scholarship is consistent with the maturation of the empirical turn described earlier. Irene Calboli's discussion of the benefits of comparative legal research offers a more traditional methodological approach, one that is perhaps neglected in the current scholarly environment.⁴⁸ And of course, we have considerable methodological diversity in papers discussed earlier: the theoretical approaches from Professors Bartow, Lemley, Liivak, and Merges; and the anthropological approach of Professor Arewa, for example. If there is one thing missing from this panel, it is traditional doctrinal scholarship—an omission that is perhaps understandable in a Symposium that was convened specifically to reflect on scholarship rather than on doctrinal developments.

Mapping these diverse methodologies to scholarly questions is not necessarily an easy task. For all the rich variety and sophistication of empirical methods available, I hope I have convinced my readers they are not well suited to the ends to which they have traditionally been put: proving or disproving

⁴⁶ See generally Olufunmilayo B. Arewa, *Copyright and Cognition: Musical Practice and Music Perception*, 90 ST. JOHN'S L. REV. 565 (2016).

⁴⁷ See Panel 3, *supra* note 9.

⁴⁸ Irene Calboli, *Value, Questions, and Methods in Intellectual Property: A Call for Strengthening the Role of Comparative Legal Analysis in the United States*, 90 ST. JOHN'S L. REV. 609 (2016).

that IP rights are a good thing. But they have tremendous value on important questions short of this ultimate value-laden question. Empirical research may not be helpful in telling us what we should want. But it can be very good at telling us whether we are getting what we want, so long as we identify what we want with precision and it can be observed in the real world. When we have two clearly defined and observable states of the world and are measuring the difference in one inherently quantitative variable between those two worlds, empirical research can be quite helpful. The most obvious scenario is when we define a target for particular outputs of our regulatory system—say, a reduction in emissions of a certain pollutant, or an increase in the catalog of digital music files available for legal streaming—and try to determine whether we are meeting our goals or not.

Moreover, empirical methods are tremendously useful for the purpose of informing us what is actually happening in the world at its points of interaction with the IP system. Whether it is documenting the experiences of affected communities or probing the inner workings of courts and agencies, such research provides a rich understanding of how the actual functioning of IP laws may differ in nonintuitive ways from what we might predict.

Of course, a fast-moving field like IP will always have a place for traditional doctrinal scholarship. But the type of theoretical scholarship that has long dominated IP—divided as it is between law-and-economics consequentialism and Lockean deontology—has begun to degenerate in ways that are troubling. It may be that these two camps are hardened and irreconcilable, and their differences can only be resolved outside the academy. But I hold out hope that a recognition of the value judgments underlying these two schools of thought, and a frank discussion of these values—informed, perhaps, by more current literatures from allied fields, such as philosophy and the various social sciences—may spark a rejuvenation of IP theory and open up new areas for productive inquiry by IP scholars.