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AGAINST UTILITARIAN FUNDAMENTALISM

ROBERT P. MERGES[†]

INTRODUCTION

I was tempted to pull punches in the title of this piece, but I thought better of it for three reasons. First, the essay I am responding to—“Faith-Based IP” (“FBIP”)¹—itself pulls no punches. Second, the title I chose captures what I want to say.² Third, I am an inveterate punch puller and thought I would try something different.

My overall point is that there are many paths to the truth. Not just one. To privilege one path is bad enough, in my book; it excludes others that may lead to valuable insights. But to choose one path and accuse those on other paths of being exclusionary—that goes too far.

This is especially true where some of those on other paths have tried very hard to be generous and inclusive. To have labored in an effort to include other views and to state my own as modestly as possible and then be labeled a wild-eyed, exclusionary zealot was not pleasant.

I make three points in this Essay. First, that the idea of “faith-based IP” is misleading. The thrust of the “faith-based” critique is that (1) nonempirical reasoning is inherently suspect; (2) any theory that is not strictly empirical is based on fundamental commitments that are resistant to counterarguments, particularly empirically based counterarguments; and (3) as a consequence, nonempirically

[†] Wilson, Sonsini Goodrich and Rosati Professor of Law and Technology, UC Berkeley School of Law. Thanks to all the participants in the St. John’s Law School Conference on Values, Questions, and Methods in Intellectual Property. Remaining errors are mine.

¹ Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328 (2015).

² It would be more honest to say I “borrowed” the title; it was suggested to me by Justin Hughes, of the Loyola Law School, Los Angeles.

based theories of IP are beyond the pale of scholarly discourse, because those who advocate these theories operate in the realm of religious belief—"faith," in its pejorative sense—rather than hard-headed reason. I counter each of these points and argue that the critique, though common enough in philosophical debates, is as wrong here as it has been elsewhere. There are ways of reasoning that are not based on strictly empirical data. And belief in these forms of rationality does not equate to "faith" in the pejorative sense. People reason in nonstrictly empirical ways about what is right, and what is wrong, and have done so for a very long time. These very same people are often not resistant to empirical data. Indeed, one novel aspect of my argument is that empirical data have helped researchers to understand the strength and universality of people's sense of right and wrong—a powerful answer to the FBIP critique that deontological theories are somehow resistant to empirical evidence.

Second, I take pains to recapitulate some of the arguments in my book, *Justifying IP* ("JIP").³ The ones relevant to this Essay are that (1) some people are personally unconvinced by the empirical case for the existence of IP law—that is, the empirical foundations of the field; (2) other rationales for IP are available, some of which are convincing—though, of course, not to everyone; and (3) at the operational level, beyond the issue of foundations, empirical evidence is important in deciding on the details of how to operate an IP system—once the decision to have one is made.

Third, I take aim at the concluding portion of FBIP, which says that those who disagree with the case for empirical foundations cannot take part in a scholarly conversation with utilitarians/empiricists. FBIP says people such as these "have nothing to say" to those who do buy the case for empirical foundations. In *JIP*, I anticipated just this species of "foundational exclusion" and tried my best to preempt it. My strategy was drawn from pluralist political theory, particularly the work of the late John Rawls.⁴ I said then, and still believe now, that one of the virtues of policy conversations in the IP field is that they take place at a level above those of fundamental commitments. Indeed, I used the phrase "room at the bottom" to

³ ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 3, 9 (2011).

⁴ *Id.* at 9–10, 104.

denote the foundational pluralism I had in mind. The very idea of a “bottom layer” of IP theory was to cordon off foundation-level commitments from prosaic policy debates in IP law. The explicit purpose of this multi-tiered construct was to guard against exclusionary claims regarding one or another set of foundational commitments. I tried, in other words, to be clear that we need a “public space” in which we can debate IP policy regardless of our personal foundational commitments. This is not close minded or restrictive; quite the opposite.

I. THE CRITIQUE OF NONSTRICTLY EMPIRICAL IP THEORY

FBIP is a highly charged rhetorical performance that also makes some interesting theoretical points.⁵ It makes three

⁵ I use rhetoric here in the sense of an appeal to emotion rather than reason—a slightly pejorative denotation for a term that, in its more neutral hues, means simply argumentation in all its forms. *Compare Rhetoric*, DICTIONARY.COM, <http://www.dictionary.com/browse/rhetoric> (last visited Dec. 10, 2016) (defining it as “the undue use of exaggeration or display; bombast”), *with id.* at British Dictionary meaning 2 (defining it as “the art of using speech to persuade, influence, or please”). FBIP uses rhetoric, in this sense, primarily to damn nonstrictly empirical theories of IP by association with religious fundamentalism—I use the same technique in the title of this piece; touché. The rhetoric is skillful and subtle. Here is an example:

Because that is a belief, evidence cannot shake it any more than I can persuade someone who believes in the literal truth of the bible that his god didn't create the world in seven days. Sure, there may be geological and archeological evidence that makes the seven-day story implausible. But faith is not just ambivalent about evidentiary support; it is remarkably resistant to evidentiary challenge.

Lemley, *supra* note 1, at 1338. Here, belief in different types of rational evidence—such as arguments from Kantian first principles or normative ethical arguments generally—are implicitly equated to stubborn, irrational beliefs, such as those of creationists and flat earthers. Doubts about the adequacy of empirical data are transmuted into an unshakeable resistance to all empirical proof. In other words, to abandon the solid world of empirical foundations is to automatically commit to a stubbornly irrational set of foundations. The rhetoric is extreme and polarizing. In fact, it commits precisely the error that FBIP attributes to others. It takes an extreme position, cutting off conversation and debate. In technical—and neutral rhetorical—terms, it is fallacious. See Matthew Finn, *In Defence of Deontological Justifications of Intellectual Property* 2 (Nov. 14, 2015), <http://ssrn.com/abstract=2690947> (“Latching on to Merges’s use of the word ‘faith,’ Lemley calls this recent development ‘faith-based IP.’ There are two ways of understanding his argument. The first, which is suggested by the Merges quote, is that the IP adherents believe in IP because of their faith, independently of the justifications. Despite what they say, they do not believe in IP because of the deontological justifications. Rather, these justifications are offered in bad faith or as post-hoc rationalizations. The problem with this argument is that it is an *ad hominem* fallacy. It is an attack against the IP adherents rather than against their arguments. Even if the IP adherents’ belief in IP is based on faith, the deontological justifications of IP could still be valid.”

arguments: (1) reasoning that is not based on strictly empirical evidence is unscientific and unpersuasive; (2) this is so because by definition such reasoning resists refutation and is therefore akin to foundational religious beliefs; and (3) as a result, adherents of such reasoning do not and cannot take part in true scholarly exchange—their zealotry has cut them off from rational argumentation.

A. *Strict Adherence to Empirical Data Is the One True Path*

To understand the first claim in FBIP, it is best to consider its words directly:

Merges refers to his “faith” in IP law, and that is exactly the right word. I call this retreat from evidence faith-based IP, both because adherents are taking the validity of the IP system on faith and because the rationale for doing so is a form of religious belief. The adherents of this new religion believe in IP.⁶

Next, we read:

(footnotes omitted)). As is clear from the main text, I disagree with Finn that the use of the word “faith” in *JIP* suggests a belief in IP systems independent of justifications. The faith spoken of is because of those justifications. Faith or belief can be based on authority, but also on evidence of other kinds. And the evidence of human reason about right and wrong—deontological reasoning—can be just as valid or solid as strictly empirical evidence. Finn is not alone in characterizing the tone of FBIP. See James Grimmelman, *Faith-Based Intellectual Property: A Response*, THE LABORATORIUM (2D SER.) (Apr. 21, 2015), <http://2d.laboratorium.net/post/117023858730/faith-based-intellectual-property-a-response> (“This is how pundits and politicians argue all the time. It is a little startling to see such rhetoric used in a debate among academics. . . . ‘Faith’ is a pejorative in the language of academic discourse. Lemley’s essay is an attempt to turn a scholarly debate into a culture war. . . . [I]t harnesses intellectual property law—not usually thought of as a fraught subject—to genuinely divisive controversies. . . . This kind of culturally charged polarization might or might not be an effective tactic in pushing back against strong intellectual property laws. But it is a disappointing development for intellectual property scholarship.”). See also Lawrence Solum, *Lemley on Non-consequentialist Justifications for Intellectual Property*, LEGAL THEORY BLOG (Apr. 2, 2015, 11:30 AM), <http://solum.typepad.com/legaltheory/2015/04/lemley-on-non-consequentialist-justifications-for-intellectual-property.html> (“Lemley argues that the classic figures in the social-contract tradition (for example, Locke and Rawls) did not themselves discuss IP. This is a version of the argument from authority (perfectly valid when discussing legal issues where there is ‘authority’ from the internal point of view), but simply fallacious as an approach to moral and political philosophy. And Lemley makes an ad hominen argument that the advocates of non-consequentialist justifications are motivated by ‘faith,’ but this kind of argument is a classic informal fallacy.”).

⁶ Lemley, *supra* note 1, at 1337 (footnote omitted).

Now, you can think what you like about religion. I know lots of people who find value in it. But IP strikes me as an odd thing to make the basis of one's faith, for several reasons. First, once one abandons utilitarianism it is hard to find a basis for a pre-political right to IP.⁷

And then:

[T]hey turn to some version of the "I made it and so I own it," often attributing that sentiment to John Locke, or Hegel, or, more recently, Rawls. But those theories have more than their fair share of problems, starting with the fact that none of these latter-day prophets of IP actually included IP at all in their theories.⁸

Note the rhetoric: "latter-day prophets." Then later, "the IP faithful."⁹ Also, "that sentiment," as opposed to "that idea" or "that theory." The subtle reinforcement of the primary theme—deontology equals religion equals unreason—is artful, but no more defensible than the general thrust of the article. To compare nonconsequentialist IP theories to irrational, unscientific beliefs is to commit two very large errors. The first is to collapse all "opposing" theories—all those not empiricist/utilitarian—into a single derogatory category. The second and larger error is to raise the empirical/utilitarian theory to the status of the one and only true path, the sole road to enlightenment. By collecting all competing theories into a single bundle and labeling that bundle as atavistic, naïve, irrational, and backward, FBIP makes it quite clear there really is no other alternative to its way of thought. And this article says its opponents are narrow-minded! If that line of reasoning does not raise a chuckle then you will probably never find any source of amusement in academic debate.

To be fair, *JIP* does use the word "faith"—and that invokes, for some anyway, a cascade into the dark realm of antiscience and irrational, atavistic, primitive, belief. But, judge for yourself whether FBIP has it right that this represents a "retreat from evidence," a refusal to accept clear and solid facts. Here is the passage containing the reference to "faith":

[T]ry as I might, there was a truth I could never quite get around: the data are maddeningly inconclusive. In my opinion,

⁷ *Id.* at 1338.

⁸ *Id.* at 1338–39 (footnotes omitted).

⁹ *Id.* at 1343.

they support a fairly solid case in favor of IP protection—but not a *lock-solid*, airtight case, a case we can confidently take to an unbiased jury of hardheaded social scientists.

And yet, through all the doubts over empirical proof, my faith in the necessity and importance of IP law has only grown. I seem to have a lot of company. Countless judges begin their IP decisions with one or another familiar “stage setter” about how IP protection exists to serve the public interest, often intoning one of a few stock passages penned in a spare moment by Thomas Jefferson.¹⁰

Here is an author who believes that the available empirical evidence supports a “fairly solid case” in favor of an IP system, just not a solid enough case to be completely convincing. Is this a “retreat from evidence?” Is this a refusal to face facts when they undermine a strongly held belief? If facts and evidence do not matter at all, why mention them? Does the invocation of “[c]ountless judges” seem like a statement about “a form of religious belief?” Are there really that many die-hard absolutist defenders of IP in the judiciary? And so on. Quoting the full passage only highlights that this is an author not rejecting empirical evidence of all kinds, but expressing honest doubts about the adequacy of the available evidence. Taking a snippet from such a passage makes for a good straw man. But it is more in the way of propaganda than scholarship.

Context aside, the word “faith” need not denote religious faith. The Oxford English Dictionary defines the word as “trust . . . or reliance upon . . . the efficacy or worth of a thing.”¹¹ Further, one definition of “belief” is “mental . . . acceptance of a . . . proposition, statement or fact . . . [as true,] on the ground[] [of] authority . . . [or] evidence.”¹² Faith in this broader, more accurate sense, need not stem from religious fervor; if this were logically implied, then the phrase “blind faith” would not be necessary because all faith would be of this character. Instead, faith can come from a wide variety of sources. It is not improper, for example, to say “on the faith of the empirical evidence, I choose to believe X.” This truth is obscured by the very title of

¹⁰ MERGES, *supra* note 3, at 3.

¹¹ *Faith*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/67760?rskey=ccW2Sj&result=1#eid> (last visited Jan. 15, 2017).

¹² *Belief*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/17368?redirectedFrom=belief#eid> (last visited Jan. 15, 2017).

FBIP. The OED defines “faith-based” as “based on religious faith.”¹³ And that is very much the thrust of FBIP. Consider:

They don’t believe it is better for the world than other systems, or that it encourages more innovation. Rather, they believe in IP as an end in itself—that IP is some kind of prepolitical right to which inventors and creators are entitled. Because that is a belief, evidence cannot shake it any more than I can persuade someone who believes in the literal truth of the bible that his god didn’t create the world in seven days. Sure, there may be geological and archeological evidence that makes the seven-day story implausible. But faith is not just ambivalent about evidentiary support; it is remarkably resistant to evidentiary challenge. Indeed, many proponents of this new religion even tout that as an advantage for their faith, claiming that it “avoids the need for empirical validation demanded by the utilitarian approach.”¹⁴

This is wrong in so many ways, it is difficult to get a start on it.

First, to say that those who believe in deontological theories to support a system “don’t believe it is better for the world than other systems” is far from misguided. It could not, in all honesty, be much more wrong.

If moral rules are to guide us, and if we follow those rules in deciding on a certain “system,” it is then precisely and exactly the case that that system “is better for the world than other systems.” To one who subscribes to deontology, rules guide us to what is better. Our rules say we must judge that system to be better. If that is what the moral rule indicates, it is simply the better system. Judgments about what is better are coextensive with application of a deontological approach. To say one who follows deontological reasoning does not think his or her choice is better for the world is to speak nonsense. It is also, as mentioned earlier, a way of saying that there is one and only one way to judge what is “better for the world”—maximization of wealth, happiness, or utils under a utilitarian system. To repeat: This commits the very type of exclusion—“only my way of thinking is right”—that FBIP accuses others of committing.

¹³ *Faith-based*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/67760?redirectedFrom=faith-based#eid4672949> (last visited Jan. 15, 2017).

¹⁴ Lemley, *supra* note 1, at 1337–38 (quoting RICHARD A. SPINELLO & MARIA BOTTIS, A DEFENSE OF INTELLECTUAL PROPERTY RIGHTS 150 (2009)).

At the same time, *JIP* does use a theological analogy, saying that a search for foundations for IP might be equated with a scientist's search for an answer to the question of where nature came from, or what is its purpose. But I explicitly distanced the foundations I was discussing from the theological source in the example of the scientist:

I am not saying that Kant and Locke are in any sense theological figures; just that they serve the same purpose for me as the spiritual-theological reading does for the scientist in my analogy. They provide a grounding outside the contours of my field as conventionally practiced, one that helps me resolve foundational doubts and get back to work confidently "inside" my field.¹⁵

So, again, there is just no validity at all to the charge that *JIP*—or deontological theory generally—operates at the level of religious faith.

B. Antecedents: Efficiency Versus Justice

The argument in FBIP goes back quite a ways. In this sense, it is in good company; luminaries such as Oliver Wendell Holmes and Richard Posner have embarked on similarly misguided missions.¹⁶ As political philosopher John Mikhail explained:

From time to time, lawyers and judges seeking to promote economic values such as efficiency and wealth-maximization have taken the further step of arguing that competing paradigms of jurisprudence based on commonsense notions of justice are theoretically inadequate bases on which to ground a system of legal rights and obligations. [Oliver Wendell] Holmes himself is a leading example of this tendency. [Richard] Posner's book [The Problematics of Moral and Legal Theory (1999)] is perhaps the most ambitious attempt yet by a judge to attack the foundations of natural justice in order to promote the law and economics movement in this way. It contains many telling criticisms of recent professional moral philosophy, delivered with a force and directness only a secure outsider can provide. Nonetheless, the book's central arguments are remarkably unsuccessful. In his zeal to criticize philosophers,

¹⁵ MERGES, *supra* note 3, at 11.

¹⁶ John Mikhail, Note, *Law, Science, and Morality: A Review of Richard Posner's The Problematics of Moral and Legal Theory*, 54 STAN. L. REV. 1057, 1057–58 (2002). For Holmes's views, see ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 25 (2000).

Posner commits surprising mistakes that suggest he misunderstands basic questions, not only of moral philosophy, but of jurisprudence as well.¹⁷

The mistake Posner makes is very close to FBIP's point that commitments based on nonempirical foundations cannot be influenced by rational evidence. According to Posner, "there are no general moral principles, just particular moral intuitions."¹⁸ Moral philosopher John Mikhail critiques the Posner view:

Posner takes for granted the standard "particularist" assumption that moral judgments are made on a case-by-case basis, without the support of moral principles. This assumption is incompatible with the best explanation of the properties of moral judgment. To explain how the normal individual is able to make stable and systematic moral judgments about an indefinite number of novel cases, we must assume she is guided, implicitly, by a system of principles or rules. Without this assumption, her ability to make these judgments—and our ability to predict them—would be inexplicable. Posner's insistence that the capacity for moral judgment consists of nothing more than "theoretically ungrounded and ungroundable preferences and aversions" is therefore suspect from the start.¹⁹

C. *Alternatives to Strict Empiricism Are Unscientific and Against Enlightenment Values*

FBIP accuses nonstrict empiricists of abjuring the Enlightenment, of casting aside rational argumentation. There are two mistakes here. First, Lemley conflates empirical with rational, when in fact, reason is a broader genus than the narrow species of strict empiricism. And second, the argument contains a false dichotomy. Rational arguments about morality often involve an appeal to a universal sense of justice or fairness—they are explicitly not particularistic. Indeed, a vast literature explores empirically the regularities in people's moral judgments. There is great deal of empiricism, in other words, about moral intuitions. So in both senses Lemley is wrong. Those of us with deontological commitments do not eschew reason, we rely on it.

¹⁷ Mikhail, *supra* note 16, at 1057–58 (footnote omitted). For Holmes's views, see ALSCHULER, *supra* note 16, at 25.

¹⁸ RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 11 (1999).

¹⁹ Mikhail, *supra* note 16, at 1092 (footnote omitted) (quoting POSNER, *supra* note 18, at 11).

And we are not resistant to empirical proof; we are often hungry for it and interested in it—the difference is that a deontologist is interested in shared judgments about right and wrong, rather than a strict and exclusive interest in empirical data about the consequences of different courses of action.

Perhaps it is FBIP that is “remarkably resistant to evidentiary challenge.” This appears to be so, at least when it comes to proof of shared judgments about right and wrong. It turns out there is an extensive literature showing—empirically and scientifically—that there are indeed widespread shared judgments about right and wrong,²⁰ including judgments about ownership, possession, and property rights, and even judgments about ownership of intangibles such as ideas and personal creations.

1. Empirical Evidence for Deontological Reasoning

Evidence has mounted in the past twenty-five years or so that there are very extensive overlaps in peoples' basic moral intuitions. Indeed, it has become common in some circles to speak confidently of “moral universals.” And in general, recent research suggests that quick first impressions—based on intuition—are more reliable bases of judgment than many would suppose.²¹

Consider, for example, a well-known hypothetical situation designed to explore moral judgments. In the basic version of this scenario, called “the trolley problem,” a person observes that an out-of-control trolley is heading for five people and will kill them unless it is diverted.²² The only way to divert the trolley is to pull a switch that turns the train onto a different track—where it will kill one person. In another basic variation, the only way to save the five people is to throw a large person, standing on a walkway above the train track, in front of the trolley to stop it.

Students of moral theory use these and many other variations on the trolley problem to explore moral judgments. But an empirical branch of this field uses the trolley problem to test moral judgment across cultures, age groups, and other

²⁰ See *infra* Section I.C.1.

²¹ See generally MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005).

²² F.M. Kamm, *Harming Some To Save Others*, 57 *PHIL. STUD.* 227, 228 (1989); Judith Jarvis Thomson, *The Trolley Problem*, 94 *Yale L.J.* 1395, 1395 (1985).

demographic categories. In one study, researchers asked people from many countries about two simple variations on the famous “trolley problem” and found widespread agreement about which actions were right and wrong across ethnicities, religions, ages, and backgrounds:

[A]cross a variety of nationalities, ethnicities, religions, ages, educational backgrounds (including exposure to moral philosophy), and both genders, shared principles exist. That is, across every subpopulation tested, scenario 1 (turning the train) elicited a significantly higher proportion of permissibility judgments than scenario 2 (shoving the man), suggesting that one of . . . three [common moral] principles . . . or their combination, guided the moral judgments made by each group.²³

Scholars such as Donald E. Brown have also documented what are called “human universals”—consistent moral judgments across cultures about important subjects such as murder, rape, and theft.²⁴ Anthropologists, in particular, have revised the widespread view of “cultural relativism” that prevailed in an earlier era, in part by revisiting some famous case studies purporting to show aberrant practices, and revising those findings in light of more detailed research.²⁵ But some philosophers are less than convinced.²⁶

²³ Marc Hauser et al., *A Dissociation Between Moral Judgments and Justifications*, 22 MIND & LANGUAGE 1, 15–16 (2007). The three principles are explained by the authors:

[T]he observed pattern of judgments was consistent with at least three possible moral distinctions: (1) *Foreseen versus intended harm (Principle of the double effect)*: it is less permissible to cause harm as an intended means to an end than as a foreseen consequence of an end; (2) *Redirection versus introduction of threat*: it is less permissible to cause harm by introducing a new threat (e.g. pushing a man) than by redirecting an existing threat (e.g. turning an out-of-control train onto a man); and (3) *Personal versus impersonal*: it is less permissible to cause harm by direct physical contact than by an indirect means. The first two distinctions have been discussed in the philosophical literature as the content of plausible moral principles, while the third has emerged from considerations of both behavioral and neurophysiological evidence.

Id. at 15.

²⁴ DONALD E. BROWN, HUMAN UNIVERSALS 6 (1991).

²⁵ See, e.g., STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 23 (2002); see also BROWN, *supra* note 24, at 10.

²⁶ See Mark Alfano & Don Loeb, *Experimental Moral Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (Mar. 19, 2014), <http://plato.stanford.edu/archives/sum2016/entries/experimental-moral>.

Part of the misunderstanding about moral intuition has to do with the nature of intuition itself. Many casual observers equate intuition with a “retreat from evidence,” meaning a substitute for empirical observation or even scientific fact.²⁷ But this view seriously misunderstands the nature of moral reasoning. One prominent explanation of moral judgments is that they are based not on irrational intuitions, but instead on a “universal moral grammar” that is inherent to all human beings.²⁸ This concept is based on an analogy to Noam Chomsky’s famous finding that all humans are born with a common human template for grammar and language.²⁹ The key point is how researchers learned of this template. It was not itself invented speculatively, but instead was induced from extensive empirical observations. In the world of language, the universal grammar notion came to prominence because researchers constantly observed that native speakers without sophisticated language training “just knew” proper word usage and sentence structure, even with regard to words and sentence types they had never encountered before.³⁰

This led linguists to look for further evidence of an ingrained, “hard-wired” capacity for language and language structure—evidence which has mounted ever since.

Moral philosophers familiar with empirical studies of moral judgment across cultures posited a similar type of template, only in the moral sphere. Observations, such as those centered on the trolley problem, confirm that people from all cultures and with all education backgrounds share similar judgments concerning right and wrong actions in several basic human situations.³¹

2. Moral Reasoning About Property

A different strain of empirical research has some important things to say about moral judgments concerning IP. Psychologists who study children’s responses to moral issues are

²⁷ Lemley, *supra* note 1, at 1337.

²⁸ See JOHN MIKHAIL, ELEMENTS OF MORAL COGNITION: RAWLS’ LINGUISTIC ANALOGY AND THE COGNITIVE SCIENCE OF MORAL AND LEGAL JUDGMENT 15 (2011).

²⁹ *Id.* at 4.

³⁰ See VIVIAN COOK & MARK NEWSON, CHOMSKY’S UNIVERSAL GRAMMAR: AN INTRODUCTION 55–59 (3d ed. 2007); RAY JACKENDOFF, PATTERNS IN THE MIND: LANGUAGE AND HUMAN NATURE 108–10 (1994); STEVEN PINKER, THE LANGUAGE INSTINCT 44–45, 285–88 (1994).

³¹ Steven Pinker, *The Moral Instinct*, N.Y. TIMES MAG. (Jan. 13, 2008), <http://www.nytimes.com/2008/01/13/magazine/13Psychology-t.html>.

interested in a number of issues, including the way moral sensibility develops as children grow. But one subfield in the area of children's moral judgment is of particular relevance to issues of right and wrong as they pertain to intellectual property. A group of studies with children centers on questions of ownership. A brief review of these studies will be helpful in exploring further the issue of shared moral intuitions.

In a typical experiment, pre-school age children are exposed to a person handling an object. The object is then left and picked up by another person. A robust finding is that children infer ownership from first possession: "[T]he first possession heuristic guides children's ownership inferences. The findings provide the first evidence that preschoolers can infer who owns what, when not explicitly told, and when not reasoning about objects with which they are personally acquainted."³²

Research shows that the first possession heuristic extends to ideas as well as physical objects. As one article title in this field says, "Children Apply Principles of Physical Ownership to Ideas."³³ At the same time, children are also able to distinguish ownership from possession. In studies where an object moves among a group of people, children track the person that others look to for permission to take possession. This person they infer is the owner. In this and other studies, it has been demonstrated that even very young children make sophisticated judgments about issues of ownership. The authors of one study put it this way:

[C]hildren (6–8 years old) determine ownership of both objects and ideas based on who first establishes possession of the object or idea. Study 2 shows that children use another principle of object ownership, control of permission—an ability to restrict others' access to the entity in question—to determine idea ownership. In Study 3, we replicate these findings with different idea types. In Study 4, we determine that children will not apply ownership to every entity, demonstrating that they do not apply ownership to a common word. Taken

³² Ori Friedman & Karen R. Neary, *Determining Who Owns What: Do Children Infer Ownership from First Possession*, 107 *COGNITION* 829, 829 (2008).

³³ Alex Shaw, Vivian Li & Kristina R. Olson, *Children Apply Principles of Physical Ownership to Ideas*, 36 *COGNITIVE SCI.* 1383, 1383 (2012).

together, these results suggest that, like adults, children as young as 6 years old apply rules from ownership not only to objects but to ideas as well.³⁴

Other studies, concentrated on creative labor, are also highly pertinent to moral judgments about IP. For example, when presented with a conflict between someone who abandons an object and someone who finds it, adults are more likely to endorse the first owner when he or she has invested creative labor in the object.³⁵ In one study, children were shown an object, such as modeling clay, owned by person A, then observed as person B expended labor in making something creative—like a small figure—with the clay. In this and similar studies, “creative labor increases the likelihood that 3-year-old and 4-year-old children will endorse the creator and not the original owner of materials as the owner of a final product.”³⁶ And the instinct to recognize creative effort extends both to children’s own creations and those of others:

[W]e found that children applied the [same] rules to their own property and to the property of the person they were directly interacting with. Although this behavior may have arisen as a by-product of the cooperative social setting of the experiment, our results do indicate that young children are able to overcome a previously established bias to maximize their own gain.³⁷

Beyond the general assimilation of ideas to objects when it comes to notions of ownership, children also have a distinct reaction to plagiarism. In one article, the authors show that adults, older children from 9 to 11 years old, and children from 5 to 8 years old all respond with negative moral judgments about plagiarism.³⁸ Original creativity is more highly valued, and one who copies and claims credit is assessed negatively even by these very young children. The study authors found that only 3 and 4 year olds fail to distinguish between original creators and

³⁴ *Id.*

³⁵ James K. Beggan & Ellen M. Brown, *Association as a Psychological Justification for Ownership*, 128 J. PSYCHOL. 365, 369–70, 372 (1994).

³⁶ Patricia Kanngiesser, Nathalia Gjersoe & Bruce M. Hood, *The Effect of Creative Labor on Property-Ownership Transfer by Preschool Children and Adults*, 21 PSYCHOL. SCI. 1236, 1238 (2010).

³⁷ *Id.* at 1240.

³⁸ Kristina R. Olson & Alex Shaw, *‘No Fair, Copycat!’: What Children’s Response to Plagiarism Tells Us About Their Understanding of Ideas*, 14 DEVELOPMENTAL SCI. 431, 433, 438 (2011).

plagiarists.³⁹ As the authors conclude, “by age 5 years old, children understand that others have ideas and dislike the copying of these ideas.”⁴⁰

What these studies show is that there are strong regularities in people’s thinking about ownership, fairness, and the importance of creative labor. And because the studies are cross-cultural, involve children, or both, they support the idea that moral judgments about these issues may be less due to socialization in a particular culture and more due to a basic shared moral sense.

These results contradict the notion that moral judgments about ownership and creative labor are highly idiosyncratic and unstable. Critics of deontological theories who argue against it as being “unscientific” should take note. As one commentator put it, in traversing the arguments of the critic Richard Posner:

Posner fails to come to terms in any serious way with the hypothesis that human beings share a sense of justice rich enough to support a universal system of rights and obligations, including the right not to be murdered. This hypothesis is plausible and supported by a considerable body of empirical evidence. Throughout [his book] *Problematics*, Posner adopts the mantle of science and pokes fun at philosophers for being unscientific. But in truth, it is his relativism, not their universalism, that seems out of touch with modern science.⁴¹

The same may well be said of those who criticize deontological theories of IP law. It is they who are out of touch with modern science. Hence, even if one rejects the systematic deontological systems of Kant or Rawls, one must still confront the fact that, empirically speaking, when it comes to issues of property rights many people revert to a common, innate template for making moral judgments. Paradoxically, there is empirical evidence that when it comes to moral issues, people are not primarily empiricists.⁴² They rely on a set of moral judgments so common and pervasive they are close to being universal. And whatever else they are, they are not simply raw, untestable, unstable

³⁹ *Id.* at 437.

⁴⁰ *Id.* at 431.

⁴¹ Mikhail, *supra* note 16, at 1062.

⁴² Olson & Shaw, *supra* note 38, at 438.

beliefs. They seem to take on a coherent shape and pattern. They are, in other words, not a matter of blind faith, but a type of reason unto themselves.⁴³

D. Non-Empiricists Are Outside the Circle of Reasoned Argument

FBIP implicitly presents the reader with a syllogism: (1) empirical data about consequences are the only rational form of evidence in reasoned argumentation; (2) deontologists, and all nonstrict empiricists, rely on evidence other than empirical data about consequences; and therefore (3) nonstrict empiricists rely on irrational forms of evidence. Put succinctly, they are irrational—not susceptible to rational persuasion.

This is, once again, an impressive performance: it skillfully draws a circle to exclude nonstrict empiricists, and then says, in effect, “look, they have placed themselves outside the great Circle of Reason. Burn them at the stake!”—Okay, I made that last part up.

But to work, one must accept the terms of the syllogism. And, of course, I do not. I reject the major premise, and therefore resist the conclusion. Once again, I would argue that reason is not coextensive with “empirical data regarding consequences.” To illustrate, I will use two examples. The first is intentionally incendiary while the second merely serves as a concrete example. The examples illustrate the two basic objections to consequentialism. One is that it can lead to outcomes that are morally reprehensible. The other is that it is impractical. I address them both briefly.

In its pure form, utilitarian thinking can lead to things like this: Given a certain demand for literature in a society, it could be plausible that the best way to obtain a steady stream of consumable literature would be to enslave a small group of high-

⁴³ Caveat: Does all this mean that we should base IP policy on the moral intuitions of children—that we should adopt an absolutist, simplistic “strong property” approach to IP rights in all cases, based on studies of children with toys and clay figures? Of course not. The point is simply that deontological reasoning is founded on shared judgments about right and wrong behavior. Elaborating detailed rules requires deeper and more extensive reasoning; and one important component of this reasoning will be empirical evidence of consequences. Put simply, deontological reason is a valid form of reason, as shown by evidence of shared judgments of right and wrong. It is not blind faith, and it is not impervious to empirical evidence about consequences.

output writers. Under threat of death or severe punishment, put them on a strict quota of words per day or chapters per month of novels, plays, short stories, etc. Feed them and house them but otherwise pay them nothing. If the literature they produce is even mediocre, many dedicated readers might be tolerably satisfied. The cost of each book or story would be minimal; just the cost of confining and supporting the writers, spread over all the readers of their literature.

How could this be defended? In a large enough society, the aggregated satisfaction of the readers might well outweigh the intense and concentrated disutility—that is, agony—of the writers. If net total satisfaction is all that matters, the small pleasure of the many could dominate the deep pain of the few.

Of course, it might bother some people that their literature is generated in such a fashion. That might reduce their utility in consuming it. But maybe not enough to make the practice overall net negative in terms of total utility. One also wonders whether being “bothered” in this way contains at least a hint of feelings of intrinsic right and wrong: shades of a deontological pull? The point is not to predict what the net utility numbers would be. It is to point out the simple fact that if the numbers came out net positive, a consistent utilitarian would have to approve of the practice. The motto “live by the numbers, die by the numbers” might be all too appropriate.

In short, all sorts of things most of us find morally repulsive might be possible under a strictly utilitarian setup. It is that sense of moral repulsion that, in effect, constitutes one traditional counterargument to pure-form utilitarianism.

E. The Calculability Critique

The second critique of utilitarianism is that it is impractical. It is too difficult to determine the net consequences of almost any simple action, which means it is hopeless to attempt to make a strict form of consequentialism; the comprehensive basis for all social policy.

This objection is about the limits of calculability. There are several dimensions to this. First, it is very difficult to predict all the consequences of a given action. This is, of course, well known in the literature on causation. Even deciding on what is an “important” or “proximate” cause of a downstream event is fraught with complexity. Matters become even more difficult

when we take into account interaction effects—when we try to predict how one decision may affect others, and how related actions may interact with the first decision to produce final outcomes.

Here is an example of this dimension of calculability. Let us say we are deciding whether the owners of internet platforms have to take responsibility for the copyright status of material that users post on the platforms. One proposal is to generally shield the platform owner from liability, subject to a duty to shut down the online posting activity of specifically identified, high-volume copyright violators. The other proposal is to raise the platform owners' level of responsibility—to make them liable in more circumstances for online postings that infringe copyrights, whether the person posting the material can be identified or not, and whether the platform owner knew the material was infringing before being told, or not.

What are the consequences of this decision? The high-shield proposal will certainly benefit the platform owner; it need not worry much about ruinous copyright infringement liability. But perhaps the creators of copyrighted works will suffer if this shielding cuts into their ability to make money? Perhaps. But then again the relative openness of the platform may provide a forum for more creators. Perhaps amateur creators will gain a larger audience. Perhaps users of the platforms will benefit from a greater diversity of creative works in the low-copyright-enforcement milieu. On the other hand, perhaps the low-shield/high-liability option will lead to the creation of sophisticated filtering software that helps to identify copyrighted works. Maybe this software will abet censorship. Maybe it will lead to automated compensation mechanisms that help identify specific instances where copyrighted works are used, and help direct small payments to creators. And perhaps this will lead to more creators entering the field in hopes of making a living. But then again if platform companies have to pay copyright infringement claims on a regular basis they may innovate less. They may not have the money to invest in creating their own studios for making videos and music. This may cause artists who would have benefitted from these investments to be worse off than they otherwise would be. Perhaps some of these artists who would have benefitted will leave the creative industries and the world will lose out on a masterpiece or two. One or more may

even die in despair, fail to have children they otherwise would have had. Maybe one of these unborn children would have been the scientist to cure cancer or discover cheap, safe fusion energy. And so on.

When we spin out the potential consequences in this way, what jumps out is the hopelessness of comprehensive consequentialism. As one philosopher put it: “We may not be *strictly* without a clue, but we are *virtually* without a clue. The trouble for consequentialism then is that the foreseeable consequences of an action are so often a drop in the ocean of its actual consequences.”⁴⁴ Even an attempt to mitigate the problem by assigning probabilities to various outcomes will not save the day. This does not eliminate the complexity of the problem; it just moves it to a different task—assigning weights to events. Put simply, “if utilitarians are worried about the impracticality objection, they should not turn to expected utility utilitarianism. That theory does not provide the basis for a cogent reply to the objection.”⁴⁵ It is easy to see the force of this critique when applied to IP law. To begin, there is almost no area of IP law that has been studied extensively enough to warrant a “net grand total” conclusion. The many empirical studies in this field often consider only one isolated doctrine or practice; very few are anywhere near comprehensive.⁴⁶ So even in this canonical case

⁴⁴ James Lenman, *Consequentialism and Cluelessness*, 29 PHIL. & PUB. AFF. 342, 350 (2000).

⁴⁵ Fred Feldman, *Actual Utility, the Objection from Impracticality, and the Move to Expected Utility*, 129 PHIL. STUD. 49, 49 (2006).

⁴⁶ See, e.g., Christopher Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, 28 BERKELEY TECH. L.J. 1, 29 (2013) (arguing that end of copyright term does not reduce availability of formerly copyrighted works); Eric Budish, Benjamin N. Roin & Heidi Williams, *Do Firms Underinvest in Long-Term Research?: Evidence from Cancer Clinical Trials*, 105 AM. ECON. REV. 2044, 2045 (2015) (proposing that effective patent term distorts pharmaceutical R&D, such that drugs requiring shorter development time, and hence longer effective terms, receive more R&D attention than drugs that require longer development times); see generally Robert P. Merges, *A Few Kind Words for Absolute Infringement Liability in Patent Law*, 31 BERKELEY TECH. L.J. 1, 12–14 (2016) (summarizing empirical research on absolute liability in intellectual property). There is, however, one possible exception. It seems safe to say that removing patent protection from the pharmaceutical and chemical industries would work a serious hardship on those industries as currently constituted. See Stuart J.H. Graham et al., *High Technology Entrepreneurs and the Patent System: Results of the 2008 Berkeley Patent Survey*, 24 BERKELEY TECH. L.J. 1255, 1325 (2009) (noting that study focused only on patent doctrine). Even here though, conclusions can only be tentative, because the studies concentrate on the

we cannot conclude that we have sufficient data on which to base a permanent and comprehensive decision about the consequences of eliminating IP protection for these industries.

II. INCLUSIONARY, PLURALISTIC IP THEORY

Having dealt with the critique first, it is time to turn to a different task. I will summarize the main arguments in my book, *Justifying IP*. Having now explained what I did not say, contrary to FBIP's characterization, it is time to spell out what I did say.

The critique in FBIP might be boiled down to this: nonstrict empiricists are true believers. They will not listen to reason. They think they have a lock on the truth.

Contrast that characterization with this statement from the introductory chapter of *JIP*. Do these sound like the words of a true believer? Consider:

Although I have arrived at my understanding of foundations over many years of study, I do not believe my ideas have any claim to exclusivity. The deontological foundations I describe in Part II are not the only plausible grounding for the field. As I said earlier, the current data (in my opinion anyway) are close to forming a lock-solid utilitarian case for IP. More data might tip the balance, leading me and perhaps others to believe that the field is basically all about net social utility, or perhaps that it can be justified by either set of core values, utilitarian or deontological rights.⁴⁷

And then, I expanded on my pluralistic approach. I reviewed the pluralist democratic theory of the late John Rawls, who argued that people with divergent foundational commitments could nevertheless respect and interact with each other, and thereby create a shared or common "public space" that allows active participation in a thriving democratic society. I argued that this same pluralistic spirit could work well for IP law:

My theory of IP includes this foundational pluralism. I am open to more or better evidence on the net social effects of IP protection. For me, a lock-solid utilitarian case might someday unseat deontological rights as the field's foundation. In the

industries in their current form. It is quite conceivable that after some fundamental restructuring—for example, government subsidies or strict regulation of consumer advertising expenditures relative to R&D investments—a pharmaceutical or chemical industry without IP rights might be viable.

⁴⁷ MERGES, *supra* note 3, at 9.

meantime, the great virtue of pluralism is that I can engage in a meaningful way with those who are already convinced of the utilitarian account, those who hold firmly to deontological rights, and those who place their faith in other foundations altogether. Midlevel principles provide our common space, our place of engagement. They are like a musical score, allowing us all to play together, even if we disagree about the deep wellsprings or ultimate significance of our shared performance, our common musical practice. The midlevel principles allow us to be tolerant about questions of ultimate importance. In my theory, the conceptual hierarchy includes a ground floor that is airy and capacious. There is room at the bottom.⁴⁸

Again, is this the claim of a close-minded fanatic? Re-reading these passages, and then looking at the text of FBIP, one is led to fairly ask: Does this article show any awareness of the book it was critiquing?

A. *The Nuts and Bolts of Pluralism*

So how does this pluralism work—how can one “conduct business” with others with whom one stridently disagrees on the basic justification for the field of IP law?

The fulcrum on which this turns is the “midlevel principle.” The terminology is borrowed from legal philosopher Jules Coleman, who describes the midlevel as beyond the deepest level of analysis—that is, philosophical bedrock, what I call foundations—yet below the level of doctrine and specific legal rules.⁴⁹

The idea of midlevel principles describes both a positive feature of the IP landscape and a theoretical construct supportive of foundational pluralism. As a positive matter, IP scholars and practitioners with all sorts of divergent foundational commitments come together to argue policy all the time. The IP literature, case law, and IP scholars’ blogs are full of back-and-forth over specific cases, doctrines, and rules in IP law. Indeed, Mark Lemley and I regularly argue and oftentimes agree on specific policy proposals.⁵⁰ There is obviously some set of shared

⁴⁸ *Id.* at 10.

⁴⁹ *Id.* at 140; JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 54 (2001).

⁵⁰ To take two examples from what would be a very long list: (1) we are both concerned that software patent claims have been allowed to become too broad and amorphous and have expressed highly compatible ideas regarding how to reverse

understandings that allow us to interact and cooperate despite disagreements about why a society has an IP system in the first place. My view is that we interact at a level beyond the foundational one; we share agreement on certain midlevel principles of the IP field such as efficiency and proportionality. On the practical level, we interact and exchange ideas. On the theoretical level, it is these midlevel principles that make this possible.

Midlevel principles have a dual character. They serve as a “bridge” between pluralist foundational commitments and detailed doctrines and case outcomes. At this level, they are meant to serve as the equivalent of shared basic commitments in the “public” and “political” sphere described by Rawls in his later book *Political Liberalism*.⁵¹ That is, midlevel principles supply a shared language, a set of conceptual categories consistent with multiple diverse foundational commitments. They are more abstract and operate at a higher level than specific doctrines and case outcomes, but they are pitched in a language that is distinct from that of foundational commitments. They create a shared public space in which abstract, noncase-specific policy discussions can take place.⁵²

There are four specific midlevel principles I identify in IP law: proportionality, efficiency, nonremoval or the public domain, and dignity. These are the four principles that stand out in the broad sweep of IP cases across all doctrinal areas. They represent themes, tropes, and motifs that I see over and over again when judges and, to a lesser extent, legislators grapple with difficult cases. These principles span and tie together multiple, diverse areas of IP doctrine.⁵³

this trend, and (2) we co-authored a brief championing a certain interpretation of a provision in the new—as of 2011—America Invents Act concerning the definition of prior art. Our joint brief in the latter case relies on several policy arguments, including a respect for the established tradition of interpretation in past Acts, and a concern that the alternate interpretation runs contrary to the policy of preventing over-long exploitation of an invention prior to the filing of a patent application on the invention. See Brief for 42 Intellectual Property Professors as Amici Curiae Supporting Appellants, *Helsinn Healthcare S.A. v. Teva Pharms., Inc.*, Fed. Cir. Case No. 2016-1284 (March 14, 2016). This later policy depends in part on a concern with public reliance on the nonexistence of a patent—a variant on the “nonremoval” principle described in *JIP. MERGES*, *supra* note 3, at 141–42.

⁵¹ JOHN RAWLS, *POLITICAL LIBERALISM* 39 (1993).

⁵² *MERGES*, *supra* note 3, at 140.

⁵³ *Id.* at 139.

The idea behind midlevel principles may well be familiar. My version of it derives, as many will recognize, from John Rawls's conception of pluralism in a modern state. For Rawls, "public reason" plays much the same role as midlevel principles do in my approach to IP. He calls the shared deliberative space created by public reason an "overlapping consensus," and this is very much in the spirit of what I am describing in this Essay. Midlevel principles create an overlapping consensus among people with differing beliefs about the ultimate normative foundations of IP law. These principles provide a common conceptual vocabulary for conducting policy debates. They bracket, and in a sense transcend, disagreements about ultimate issues, while tying together disparate strands of doctrine and practice.

Cass Sunstein has a similar theory, the idea of "incompletely theorized agreement" ("ITA").⁵⁴ Sunstein's notion of an ITA applies primarily to judicial opinions and legal reasoning. The idea is that judges customarily avoid deep foundational theorizing in their opinions as a way of safeguarding pluralism; one may lose a case, based on conventional doctrine, precedent, and legal reasoning, without having one's deepest convictions rejected. Rawls's theory of overlapping consensus is aimed at a much different issue: whether individual citizens need to share a comprehensive moral/theological/foundational worldview to join together in liberal society. For various reasons, Rawls says that individuals often have deep foundational beliefs; that society should be organized so that people with reasonable but conflicting basic beliefs can live and function together effectively;

⁵⁴ See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 35–36 (1996); see also Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 *HARV. L. REV.* 1733, 1735 n.8 (1995) (suggesting an idea very similar to overlapping consensus). For an interesting and concise introduction to the ideas of overlapping consensus and incompletely theorized agreements, see Lawrence Solum, *Legal Theory Lexicon: Overlapping Consensus & Incompletely Theorized Agreements*, *LEGAL THEORY BLOG* (Aug. 14, 2016, 11:22 PM), <http://lsolum.typepad.com/legal-theory/2016/08/legal-theory-lexicon-overlapping-consensus-incompletely-theorized-agreements.html>.

and that the overlapping consensus that fosters this effective coexistence should go beyond a mere operational détente to embrace certain shared or “public” moral values.⁵⁵

B. *Plenty To Talk About*

The best way to make midlevel principles concrete is to give some examples. We can begin with a specific case, *Helsinn Healthcare S.A. v. Dr. Reddy's Labs. Ltd.*,⁵⁶ which interpreted an important provision in the America Invents Act (“AIA”) of 2011. The district court held that the AIA implicitly overturned longstanding law on the question of what constitutes “sale” of a patented invention. Inventions that are on sale before a patent application is filed can invalidate the patent, so the ruling has significant impact on the law of patent validity.

In a co-authored brief asking the United States Courts of Appeals for the Federal Circuit to reverse this decision, the authors of FBIP and *JIP* made a number of arguments.⁵⁷ To summarize, they argued: (1) the district court misinterpreted the new statute, the AIA; (2) the district court too readily accepted that the AIA meant to overturn longstanding precedent from over a century on the meaning of “sale”; and (3) the traditional policy of limiting an inventor’s ability to profit from an invention, and then later file a patent application—sometimes called the policy against extension of a monopoly—applied in *Helsinn* just as it always has in prior cases.

In the terms used in *JIP*, the first two arguments take place at the “top” of the conceptual hierarchy of IP law. This is where the details of doctrines and cases are hashed out. It is the level of analysis in which the traditional lawyer’s toolkit is deployed. Arguments from the structure of the statute, from analogy to precedent, and the like are typical at this level.

The third argument sounds more in policy than in statutory construction or precedential reasoning strictly speaking. Admittedly, precedent often embodies and supports a longstanding policy, so there is some conceptual overlap between the first level, rules and doctrines, and the second, midlevel

⁵⁵ For a helpful comparison of Rawls’s overlapping consensus and Sunstein’s ITA, see Scott J. Shapiro, *Fear of Theory*, 64 U. CHI. L. REV. 389, 390–91 (1997) (reviewing SUNSTEIN, *supra* note 54).

⁵⁶ No. CV 11-3962 (MLC), 2016 WL 832089, at *45 (D.N.J. Mar. 3, 2016).

⁵⁷ See *Amici Curiae Brief*, *supra* note 50, at 2.

principles. To use the midlevel principles described in *JIP*, the policy argument in *Helsinn* could be said to embody (1) the nonremoval principle, that is, nonremoval of information from the public domain; and/or (2) the efficiency principle, because the extension of monopoly that occurs when an invention can be sold for some time before a patent is filed on it may over-reward an inventor—by giving in effect an extended patent term. Over-rewards of this type may waste social resources. The policy argument in *Helsinn* also embodies efficiency in encouraging early disclosure of an invention, which both adds to the stock of current knowledge—when the patent application is published or the patent issued—and leads to earlier release of protected ideas into the public domain, because earlier filing leads to earlier expiration of the patent.

These midlevel policies are consistent with a number of deeper foundational commitments. For a utilitarian, the efficiency principle goes “all the way down” to foundations. Only if all aspects of the IP system, when aggregated, produce net social benefits would a strict utilitarian even be discussing the policy issues in *Helsinn*. And a particularly thorough utilitarian might require each rule, doctrine, and detail of IP law to be net positive in its overall consequences.

On the other hand, one might be skeptical of the overall utilitarian case for IP and still agree with the midlevel principles at work in *Helsinn*. If, for example, one believes that rewarding creative work with limited property rights promotes individual autonomy and self-expression, it still makes sense to structure the IP system in an efficient way. Operational efficiency, in other words, is in no way inconsistent with foundational skepticism about the utilitarian case for IP as a whole. For a person such as this, the efficiency rationale in *Helsinn* might be persuasive. In addition, or perhaps as an alternative, a utilitarian skeptic might still be concerned with extending property rights to include material that is already in the public domain. A strict reading of what constitutes “the public domain,” which is required to disagree with the district court ruling in *Helsinn*, is entirely consistent with a belief that in general property rights ought to be available for new creative works for deontological reasons. An insistence on a broad definition of the public domain, in other words, equates to a stringent definition of protecting only what is truly “new.”

The point here is to show how two students of IP with quite divergent views about the field's foundations might be able to discuss, and agree on, not only case outcomes but policy rationales for those outcomes. This is the work done by the midlevel principles described in *JIP*.

Schematically, we might describe this as follows:

Conceptual Theory Level	Arguments
1. Rules & Doctrines	Statutory construction
	Precedent
2. Midlevel Principles	Longstanding practice—efficiency
	Nonextension of monopoly—nonremoval
3. Foundations: Utilitarian	Net positive social welfare
Foundations: Deontological	Part of an efficient system of deserved rewards

The point is simple: Argumentation can take place at levels 1 and 2 without the need for deep agreement, all the way down to level 3. This explains why the authors of FBIP and *JIP* could cooperate and agree on an amicus brief in *Helsinn*. It also tends to refute the argument of FBIP that those with divergent foundational commitments have nothing to say to each other. Indeed, there is much to be gained from ignoring foundational disagreements when what is needed is discussion and cooperation on operational details of the IP system.

C. Another Example

A long line of cases confronts a common difficulty in the entertainment industries. At time 1, a creator licenses his or her work to a company that plans to exploit it in a conventional entertainment medium: print publication, film, television, etc. At time 2, a new medium comes into being: videocassettes, DVDs, the Internet, etc. A contract signed at time 1 perhaps includes a clause giving the licensee company rights to use the work "in any medium." The creator at time 2 seeks to license his or her work to a different licensee, one that specializes in the new medium; or the creator seeks to execute a new, separate license with the original licensee, on the theory that the original license does not extend to the new medium. What result?

Courts have wrangled with these issues over the years,⁵⁸ as have scholars who have studied them.⁵⁹ A wide range of arguments has been marshaled in the debates over how to approach these issues. Some arguments depend on the specific contractual language in a particular case. This again is part of basic legal argumentation; it occupies the top-level in the structure described in *JIP*. Another set of arguments abstracts from individual cases. These often sound in default rules or canons of contractual construction. For example, one interpretative canon, often invoked, is that contracts should be construed against the drafter of the agreement. This has been applied in the “new medium” copyright cases with courts split on the issue.⁶⁰

Another set of arguments moves down a level and invokes general policy considerations. For example, those who argue that an original licensee should naturally have rights in a new medium often emphasize the need for a corporate licensee to count on having full rights over work in its catalogue. This can be seen as an application of the general common law principle of accession under which, for example, one who owns a tree has rights over the fruit it produces.⁶¹ These are at root efficiency arguments.

Those arguing that original creators should normally win these cases point out that including new technologies under the grant of rights in old contracts deprives creators of a chance to

⁵⁸ See, e.g., *Manners v. Morosco*, 252 U.S. 317, 325–26 (1920) (analyzing a license to theatrical play, which licensee claimed included the right to make a film); *Bourne v. Walt Disney Co.*, 68 F.3d 621, 630 (2d Cir. 1995) (stating that “motion picture” is not necessarily limited to a series of images on celluloid, but rather is broad enough to include videocassette); *Tele-Pac, Inc. v. Grainger*, 168 A.D.2d 11, 15–16 (N.Y. App. Div. 1991) (stating that video is not covered by clause granting right to broadcast over future devices similar to television).

⁵⁹ See, e.g., Stacey M. Byrnes, Symposium, *Copyright Licenses, New Technology and Default Rules: Converging Media, Diverging Courts?*, 20 LOY. L.A. ENT. L. REV. 243, 244 (2000); Kate Darling, *Contracting About the Future: Copyright and New Media*, 10 NW. J. TECH. & INTELL. PROP. 485, 485 (2012).

⁶⁰ *Compare Rey v. Lafferty*, 990 F.2d 1379, 1391 (1st Cir. 1993) (noting that ambiguity there should be construed against the drafter-grantee, especially given the relative expertise and experience of the two parties), *with S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1088 (9th Cir. 1989) (disapproving the presumption against drafter-grantor in context of construing scope of copyright license).

⁶¹ See generally Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459 (2009).

make extra profit. The requirement of a new license seems fairer, they argue, because it gives more compensation to the creator as against the corporate licensee.

One may engage this debate at these levels, and participate in its details in full. Engagement is consistent with multiple, divergent foundational commitments. A utilitarian would want to balance the transaction costs of additional licenses against the incentive effects of lodging the rights with either the original creator or the licensee. A Kantian might emphasize the added autonomy flowing to creators from the opportunity to choose which licensee will exploit the work in each new medium that comes along.⁶² Again, a schematic representation will help clarify the different levels of argumentation:

Conceptual Theory Level	Arguments
1. Rules & Doctrines	Contract Interpretation
	Canons of Contract Construction
2. Midlevel Principles	Efficiency: Settled Expectations for Licensees
	Fairness: Original Purpose of Copyright
3. Foundations: Utilitarian	Net Positive Social Welfare
Foundations: Deontological	Creator Autonomy: Distributive Justice—higher incomes for original creators

As with the discussion of *Helsinn*, the point is simply that argument at levels 1 and 2 is quite possible without agreement about level 3 commitments. People with divergent foundational beliefs can and do engage each other in spirited and productive policy debates. They have, in other words, much to say to each other.

⁶² See Robert P. Merges, *Autonomy and Independence: The Normative Face of Transaction Costs*, 53 ARIZ. L. REV. 145, 150 (2011) (“[I]f independent production serves important social values beyond efficiency, then we might consider bearing slightly higher transaction costs than might be dictated by a strictly efficiency-based viewpoint. Put differently, we might be willing to accept higher transaction costs if they are shown to serve an important social purpose. Which means, of course, accepting that independence has distinct value, in and of itself, apart from its contributions to efficiency.”).

CONCLUSION

It is appropriate, here at the end of this Essay, to talk about Kant's Kingdom of Ends. Kant believed—on the basis of extensive and elaborate rational discourse—that all people should be treated as “ends in themselves.”⁶³ With respect and dignity, in other words. The idea is to resist thinking of other people as instruments or vehicles or obstacles—as mere things. This is true whether we are deploying troops, deciding whether to tell the truth, or, in the apposite case, using a scholar's writings to make our own scholarly points.

Everyone has a right to be treated with dignity, whether they subscribe to our own personal, deeply held commitments or not. This is the essence of liberalism. And it was in this spirit that *JIP* tries to formulate a truly liberal theory of the IP field. The book neither predicts nor expects universal agreement; rumor has it that the author of *JIP* does not even know if he agrees with himself sometimes. But *JIP* does try to show respect for all manner of IP theories. It tries to find a way to figure out how IP discourse is possible given the fact of widespread disagreement about foundations. In every sense, *JIP* builds in respect for others and recognition of plural commitments. You can accuse that book of being muddled and wrong; you can accuse it of being naïve; you can certainly accuse it of being boring and didactic and academic in the sense of quibbling over unimportant things. But it does not seem fair to accuse it of building a theory that shuts off discourse and resists reasoned arguments. Not when it tries so hard to be inclusive.

⁶³ IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSIC OF MORALS* 28–29 (Jonathan Bennett trans. 2005).