Intellectual Property and Natural Law

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I. Introduction

A natural-law theory of property does not require that a legal system incorporate protections for intellectual property (IP) and, in fact, militates against its doing so.[1]

IP is standardly treated as a creation of positive law that is defensible on utilitarian grounds, though some of its supporters regard obligations to respect others' intellectual property claims as flowing from what they take to be creators' inherent rights[2] – rights to reap returns on their investments of time and energy or simply to control their creations.[3] Natural law theory

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1 For overviews of contemporary natural law theory, see, *eg*, John M. Finnis, *Natural Law and Natural Rights* (1980); John M Finnis, *Fundamentals of Ethics* (1986); John M Finnis, *Aquinas: Moral, Political, and Legal Theory* (1998); Germain G Grisez, *The Way of the Lord Jesus 1: Christian Moral Principles* (1983); Germain G Grisez, *The Way of the Lord Jesus 2: Living a Christian Life* (1993); Germain G Grisez, *The Way of the Lord Jesus 3: Difficult Moral Questions* (1997); Gary Chartier, *Economic Justice and Natural Law* (2009); Mark C Murphy, *Natural Law and Practical Rationality* (1999); Mark C. Murphy, *Natural Law and Jurisprudence and Politics* (2006); Germain G Grisez and Russell Shaw, *Beyond the New Morality: The Responsibilities of Freedom*, (3rd ed, 1988); Robert P George, *In Defence of Natural Law* (2001); Alfonso Gómez-Lobo, *Morality and the Human Goods: An Introduction to Natural Law Ethics* (2002); Timothy Chappell, *Understanding Human Goods: A Theory of Ethics* (1995); John M Finnis, Joseph M Boyle Jr and Germain G Grisez, *Nuclear Deterrence, Morality, and Realism* (1987). Most of these works emerge from or in dialogue with the 'new classical' natural law theory, in a version of which the argument of this Article is rooted.

2 I am dubious about the locution 'creators', but I employ it throughout because of its simplicity and because it is frequently used in discussions of IP. No one creates an abstract pattern any more than anyone creates a law of nature or a mathematical principle; rather, laborers embody abstract patterns in physical media in various ways.

3 This account finds particularly clear expression in, for instance, *U. S. Const.*, art I. sec. 8, in which the Congress is authorized '[t]o promote the Progress

regards all rights in physical objects external to the self as derivative and contingent, and so might be thought to be consistent with the enunciation of positive-law IP rights. However, the nature of legal rules related to property is, on a plausible natural law view, robustly constrained in a way that precludes the free-wheeling manufacture of morally binding claims by means of positive law (Part II). Positive-law IP rights seem to be inconsistent with the baseline property rules supported by natural law theory; and arguments that such rights generate necessary incentives for innovation or protect the legitimate interests of creators do not succeed in showing that they are either necessary or desirable from a natural law perspective (Part III). A natural law account of IP-like rights as rooted in contract is unlikely to offer the kinds of protections IP proponents characteristically desire (Part IV). Given the constraints on possible property rights that form part of a credible version of natural law theory, it is difficult to make a case for the justice of establishing IP rights by positive law (Part V).

II. Natural law theory grounds an account of property rights as contingent but robust

A. Introduction

According to natural law theory, property rights are derivative, rooted in more fundamental and generic moral principles (Section B). They are contingent: from a natural law perspective, property rights may justly take different forms. Nonetheless, multiple constraints limit the forms property rights can reasonably take (Section C). These constraints render just property rights in physical objects stable and robust (Section D). Thus, natural law theory supports *baseline rights* to acquire, control, and transfer physical objects (Section E).

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of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries'. But the focus of the argument here is on the broad structure of IP rights as conferring monopolistic privileges, and not on the particular features of individual jurisdictions. Considering such features of US copyright law as the 'fair use' and 'first sale' doctrines, say, would obviously complicate the pure IP monopoly model considered here because these features impose some constraints on monopolistic privileges. But the existence of nuances and limitations within particular IP regimes does not, I think, alter the overall account of IP as unreasonably restrictive which I seek to defend here.

B. Natural law property rules emerge from principles of practical reasonableness

Natural-law moral principles govern human *choices*. On the natural-law view, a morally permissible action is one that does not violate any of several basic requirements of practical reasonableness—reasonableness in practice, in action. Most fundamentally, reasonable action is action open to—action undertaken in view of the genuine value of—all of the varied aspects of human welfare; and it is action undertaken in order to *participate in* one or more of those aspects.[4] Different natural law theorists offer different accounts of the dimensions of human well being, but a satisfactory list might include life and bodily well being; speculative knowledge; practical reasonableness; friendship; religion; æsthetic experience; peace of mind; play; physical pleasure; and imaginative immersion.[5]

Each of these varied aspects of well being is, it seems, irreducibly different. Friendship isn't the same thing as practical reasonableness; æsthetic experience isn't the same thing as peace of mind. And there doesn't appear to be any additional substantive thing, any goal or purpose of which each aspect is an instance or to the achievement of which participation in each aspect might reasonably be understood as a means. Thus, there is no common metric than can be used in relation to each. no scale on which they can be combined and weighed.

It's worth emphasizing, too briefly, that two kinds of things wouldn't appear on a satisfactory list of the varied dimensions of welfare. Emotional satisfaction is absent because reasonable emotional satisfaction is a function of participation in some objective dimension of welfare, rather than an end in itself. And physical objects external to the self are judged by most natural law theorists to be instrumentally rather than intrinsically valuable. Otherwise, it's not obviously crucial just what items fall on a satisfactory list, at least for present purposes.

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4 See, *eg*, Grisez, *Principles*, above n 1, 184; John M Finnis, 'Commensuration and Practical Reason' in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (1997) 225-8.

5 See, *eg*, Chappell, above n 1, 37-45; Murphy, *Rationality*, above n 1, 96-138; Gómez-Lobo, above n 1, 6-25; Grisez and Shaw, above n 1, 77-88; Grisez, *Principles*, above n 1, 121-5; Finnis, *Law*, above n 1, 59-99; Chartier, *Justice*, above n 1, 7-10.

There are varied desiderata of reasonable choice with respect to these aspects of human welfare. Primarily relevant here is the requirement of fairness that is commonly called the *Golden Rule*.[6]

At its most generic, the Golden Rule precludes discriminating arbitrarily among those who are affected by our actions. In particular, in natural law terms, this means, first of all, not discriminating among those affected by our actions except in order to participate in, or foster participation in, a genuine aspect of well being—and not, for instance, simply in response to feelings of aversion or resentment. This aspect of the Golden Rule follows from the fact that only basic aspects of well being, and not emotional reactions, provide appropriate reasons for action. Second, it means not treating someone in a given way if one would be unwilling to be treated that way oneself in relevantly similar circumstances. This aspect of the Rule reflects the fact that there does not seem to be any immediate moral relevance to superficial differences, in location and quality, between persons: what is morally relevant—the capacity to participate in basic aspects of human welfare—is constant. Relationships with physical objects and with money—which effectively represents (among other things) a *claim* on physical objects serving as commodities—are not, on the natural law view, valuable in their own right. Rather, they matter insofar as they facilitate participation in basic aspects of human well being.

C. The golden rule, applied in light of multiple truisms, constrains the content of just property norms

A basic standard embodying a strong presumption against interference with the things people actually possess seems to follow from the Golden Rule, since almost everyone is ordinarily unwilling to be deprived of her possessions. But, of course, this is true of thieves as much as of rightful possessors, so criteria for just acquisition, incidents of the ownership of justly acquired possessions, and standards governing the disposition of justly held property, are important as well.

A range of truisms about human beings and their environment further constrain the sorts of legal rules governing these relationships that could be consistent with the Golden Rule.[7]

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6 *See*, eg, Finnis, *Law*, above n 1, 106-8; Finnis, *Aquinas*, above n 1, 140; Chartier, *Justice*, above n 1, 15-8; Grisez, *Principles*, above n 1, 220; Finnis, *Ethics*, above n 1, 75, 91-2; Finnis, 'Commensuration', above n 2, 227-8; Finnis, Boyle, and Grisez, above n 1, 284.

Most people seek *autonomy*, which is not only something people happen to desire but also an essential prerequisite for moral agency.[8]

- Clearly defined rights to control physical objects can facilitate the *coordination* of supply and demand.[9]

- People expect to be compensated for their fulfilment of exchange-related agreements with others and want others to respect the simple fact of their possession of this or that—all as a matter of *desert*; the Golden Rule means that others can expect the same of them.[10]

- People frequently welcome opportunities to exhibit *generosity*, and both they and others benefit when this trait is manifested.[11]

- People respond well to *incentivisation*.[12]

- Rights to particular physical objects can serve as boundary-markers that reduce conflict (especially conflict over scarce

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7 On this general approach to property rights, see, *eg*, Aristotle, *Politics*, trans. Benjamin Jowett (1905); Finnis, *Law*, above n 1, 169-71; Chartier, *Justice*, above n 1, 32-3; Gary Chartier, 'Natural Law and Non-Aggression' (2010) 51 *Acta Juridica Hungarica* 79. The new classical natural law theorists emphasize the significance of incentivisation, stewardship, and autonomy as rationales for property rights. The additional considerations I adduce here constrain the range of reasonable property rights options, I believe, rendering significantly fewer options on the table than Finnis and Grisez suggest would be viable given the factors on which they focus.

8 On property and autonomy, see, *e.g.*, Finnis, *Law*, above n 1, 168-9, 172, 192; Grisez, *Living*, above n 1, 794-5. Of course, it would be inconsistent with the Golden Rule for anyone who would resent an infringement on her own autonomy to violate someone else's in a comparable way: for such a person (who is, I would have thought, quite typical), disregarding the autonomy of others would be unreasonable, quite apart from its role in making moral agency possible.

9 See, *e.g.*, Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (1998); David D. Friedman, 'A Positive Account of Property Rights' (1994) 11 *Social Philosophy and Policy* 1.

10 See, *eg*, Stephen R. Munzer, *A Theory of Property* (1991) 254-91.

11 See, *eg*, Aristotle, above n 5, II.5.

12 See, *eg*, Finnis, *Law*, above n 1, 170-3; Grisez, *Living*, above n 1, 794.

resources)—good fences make good neighbours—and so contribute to *peacemaking*.[13]

- Physical objects that are used are more likely to play a part in overall *productivity* than ones that are left unused or underused (though, of course, there are many sorts of uses, and deliberate noninterference can be a kind of use).[14]

- People can plan most effectively, achieve their goals most consistently, and be most productive in an environment in which background rules are characterised by *reliability*.[15]

- Rules marked by *simplicity*—rules that are easy to formulate, understand, and apply—make efficient use of people's cognitive capacities and their time, as well as of resources devoted to preventing and remedying rule-violations.[16]

- A rule marked by the kind of *stability* reflective of its actual or potential status as a self-enforcing convention is likely to be less costly and intrusive to enforce, and more broadly acceptable to those expected to follow it, than one that lacks this quality.[17]

- Physical objects that many people value and which have the potential to benefit many people will be cared for most effectively when someone in particular is responsible for caring for them—when property rules reflect the importance of *stewardship*.[18]

D. The golden rule and the truisms provide strong support for baseline property rights

Even taking these truisms into consideration, the Golden Rule is doubtless compatible with multiple schemes of property rights. But these

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13 See, *eg*, John Hasnas, 'Toward a Theory of Empirical Natural Rights' (2005) 22 *Social Philosophy and Policy*111; Butler Shaffer, *Boundaries of Order* (2009); Friedman, above n 7.

14 See, *eg*, Munzer, above n 8, 191-226.

15 See, *eg*, Charles M. Fried, *Modern Liberty and the Limits of Government* (2006) 156-60; Munzer, above n 8, 191-226.

16 See, *eg*, Richard A. Epstein, *Simple Rules for a Complex World* (2005).

17 See, *eg*, Anthony de Jasay, 'Conventions: Some Thoughts on the Economics of Ordered Anarchy', in *Against Politics: On Government, Anarchy, and Order* (1997) 193-202.

18 See, *eg*, Finnis, *Law*, above n 1, 170.

considerations, which may be seen as grounding a range of complementary rationales for a just system of property rights, clearly constrain the range of systems likely to count as just, especially because they tend to overlap with each other and to reinforce each other's implications. Taken together with the Golden Rule, they are strongly consistent with, and provide substantial support for, a simple set of rules with respect to physical objects: (*i*) the first person to establish full-blown possession of an unowned object is its rightful owner; (*ii*) to be a rightful owner is ordinarily to have full control over what happens to each physical object one has justly acquired; and (*iii*) the rightful owner of a physical object may dispose of it freely by gift or as part of an exchange on any terms she wishes.[19] We may call these rules, taken together, the *baseline* property rules.

- This cluster of rules fosters autonomy by establishing a zone of control within which a person is able to choose without being constrained by others.

- It makes possible the exchange of goods at people's discretion, and therefore allows for the coordination of production and distribution effected by market prices.

- It gives people the resources needed for them to make agreements and provide goods or money in exchange for other goods or for services, thus rewarding their labour. Most people would, absent special circumstances, are not willing to be deprived without their consent of things they had acquired while those things were unowned, and thus have good reason not to deprive others of similarly acquired possessions without their consent.

- It enables people to express generosity through gift-giving.

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19 For a similar list, see, *eg*, de Jasay, above n 15. Note that the claim at this point is *only* that it makes sense for there to be rights to physical objects, taking something like the form described, not that there should *not* be rights related to the physical embodiments of abstract objects (under that description). The focus on rights to physical objects elaborates the most basic elements of a property rights regime, with the question left open whether there should be additional rights. But it is worth emphasizing that IP schemes never involve rights to abstract objects as such, but only, rather, to physical embodiments of those objects—physical objects individuated by the particular abstract objects they embody rather than, as in the case of the physical objects to which other property claims are ordinarily made, their physical compositions and histories.

It creates the opportunity for people to be incentivised by having the opportunity to acquire physical objects. Thus, it encourages them to make resources more productive by taking initial steps toward rendering those resources apt for development.

- It creates conflict-reducing, peace-enhancing boundaries.[20]
- It increases the likelihood that assets will be used productively.[21]
- It generates a reliable background structure that enables people to plan, not just their economically productive activities, but their lives more generally, in effective ways.
- It exhibits much greater simplicity than options that assign rights to groups of people or parcel out different aspects of the property-bundle to different people.
- It is marked by the stability to be expected from rules with the potential to emerge as bargaining equilibria.
- It assigns responsibility for particular physical objects in ways that make it more likely that they will be safeguarded for the benefit of anyone with the potential to benefit from them.

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20 The need for such boundaries is particularly crucial in virtue of scarcity. And Scarcity obviously plays a central role in the account of property I seek to offer here: property rights in physical objects make sense in virtue of the objects' relative scarcity and the cost time and effort required to fashion and acquire such objects. If physically objects magically appeared in our hands if others took the ones we already possessed, we would not need the baseline rules (at least where fungible objects were concerned). And if property rules are rooted to a significant degree in the need to resolve the problem of relative scarcity, there is obviously good reason to be skeptical about IP, since rules against copying rooted in putative IP claims actually *create* scarcity. Thanks to Michael Stokes for highlighting the significance of scarcity to the argument.

21 The baseline property rules themselves do not, of course, require productive use in order to warrant property claims. The rules require only possession, and productive use is not a precondition for full-blown possession; after all, I may establish a claim precisely for the purpose of preventing productive use, as when establishing, say, a nature preserve. However, failure to use an asset productively may, absent countervailing evidence, provide good reason to treat the asset as abandoned; and it remains relevant that the rules encourage productive use, since promoting productivity (as by incentivizing individual work and prompting the productive employment of assets) is itself among the underlying justifications for the baseline rules. Thanks to Michael Stokes for emphasizing the need to make this point.

This set of rules does not on its own resolve questions about emergencies, questions about remedies, questions about the ways in which land ought to be treated differently from moveable property. Such questions—like those about the foundational property rules—can be appropriately addressed using the principles of practical reasonableness in light of relevant facts about the human condition. As is true of the foundational rules, regulations designed to answer these sorts of questions may take multiple forms. But the practical principles and the nature of the human condition will severely constrain the range of possible forms.

E. Natural law theory supports baseline property rights

A natural law account of property is rooted in the capacity of property to foster reasonable participation in the various aspects of welfare. Natural law property norms can be derived from the Golden Rule in tandem with basic facts about human beings and their environment. A broad range of overlapping, reinforcing considerations provide support for the affirmation by natural law theory of the baseline property rights: to acquire title to physical objects through meaningful first possession or through voluntary exchange; to control justly acquired property; and to transfer property through voluntary agreement.

III. Common rationales provide little support for an IP exception

A. Introduction

The baseline property rules govern the just use of physical objects, safeguarding people's legal rights to do as they choose with their property. By contrast, positive-law IP protection limits people's choices with respect to their own property. Thus, if IP were justly to be protected by a natural law legal system, it would embody an exception to the treatment of physical property in general. We can thus refer to proposals for IP protection as proposals for an *IP exception* to natural law principles.

The IP exception might be defended on multiple grounds. Two of the most common focus on economic incentives and the interests of creators. Leading natural law theorist Germain Grisez gestures at both when he writes:

> For a long time, copyright laws have provided authors and/or publishers of books, sheet music, records, films, and so on with protection of their interest in receiving a

> fair return for their work and other investment that make such items available to those who can benefit from their use. At least in their general lines, copyright laws surely are reasonable, and fair-minded people recognize that they should be respected.[22]

The most obvious reading of Grisez's claim is that Grisez thinks the provision of 'a fair return' serves the function of incentivising creators so that they will produce for others' benefit; call this the *incentives argument*. But he can also be read as making the separate argument that IP is justified because it ensures that a creator can be justly compensated for her creation; call this the *fair return* argument.

The fact that putative IP rights are inconsistent with the baseline property rights creates a strong presumption against their validity (Section B). And each of the specific arguments considered here provides little or no natural-law support for positive-law IP rights. The incentives argument fails to show, from the standpoint of natural law theory, that the impact of IP rights on the production of innovation would justify using force to override the baseline property rights (Section C). A credible natural law account of fairness in returns on creators' investments in their creations does not support the creation of an IP exception to the baseline property rights (Section D). Natural law theory provides limited support, at best, for an IP exception (Section E).

B. The IP exception is inconsistent with baseline property rights

The fundamental problem with positive-law IP rights is their inconsistency with base-line property rights. That is, if there is good reason to acknowledge stable, robust property rights in physical objects, then there is also good reason *not* to create positive-law IP rights. For these IP rights conflict with base-line property rights. For what IP rights *do* is to confer on their putative holders the legal authority to interfere with the property rights others have in physical objects by preventing those others from configuring the physical objects they concededly own in particular patterns.

The multiple, overlapping rationales for the basic property rules create a strong presumption against interference with the control over physical objects those rules are designed to safeguard. What the proponent of positive-law IP rights proposes to do is to carve out an exception within those general property rules: in accordance with this exception, people have the right to do whatever they like with the justly acquired physical objects

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22 Grisez, *Questions*, above n 1, 591.

they own—*except* configure them in certain patterns. It seems clear that a set of property rules that featured this exception would be inferior to one that did not.

C. The incentives argument does not show that the IP exception is necessary or desirable

1. The incentives argument is unpersuasive

The incentives argument attempts to demonstrate that an IP exception is essential if innovation is to occur at an optimal level (Subsection 2). This rationale is unsuccessful. Innovators often respond to non-financial motives (Subsection 3). There is no objectively determinate optimal production level for various creations (Subsection 4), and thus no basis for claiming that innovation levels absent an IP exception would be objectively sub-optimal (Subsection 5). There is no particularly good reason to think that the IP exception is needed to incentivise creators to produce in large quantities. Further, not only is an IP exception not necessary, economic evidence suggests that it is not desirable (Subsection 6). The incentives argument provides little warrant for an IP exception (Subsection 7).

2. The incentive argument seeks to show that innovation will be produced only if rewarded by monopoly privileges

A plausible version of the incentives argument can be understood as proceeding, roughly, as follows:

1. It is not profitable to produce a good or service unless people pay for it.

2. People will not pay for a good or service unless access to it can be limited to those willing to pay for it.

3. If it is not profitable to produce a good or service, it will be produced, if at all, at a sub-optimal level.

4. Access to artistic and technological creations cannot be limited to those willing to pay for them without intellectual property rights created by positive law.

5. It is crucial that artistic and technological creations be produced at optimal levels.

6. It is therefore crucial that intellectual property rights be created by positive law.

3. Production may not depend on profitability

Natural law theory as such has nothing in particular to say about (1) and (2), though it is worth noting that both claims seem fairly obviously to be false. It is clearly possible to render the production of a good or service profitable even if people don't pay for the good or service itself—as, for instance, by bundling it with something else for which they will pay. And people's motives for paying for things are diverse enough that the notion that people might pay for things even were they able to obtain these things for free—they might act, say, out of gratitude or duty—cannot, at any rate, be ruled out in advance. (Natural law theory is perhaps germane here in some broad sense, since it assumes that people can and do act for a range of reasons and can, indeed, accept and choose in light of *moral* reasons in particular.)

4. The idea of an optimal overall state of affairs is generally vacuous

By contrast, natural law theory has something quite definite to say about (3). And that is that the notion of an optimal overall state of affairs is vacuous. As a general rule, there is no way of giving sense to the claim that more value is embodied in one global state of affairs than another, and thus no way of comparing possible states of affairs in the sort of way in which they would need to be compared to judge one possibility as optimal and another as sub-optimal.[23]

This is not because value is subjective, though this claim is sometimes advanced by some economists. The confusion here is a probably unavoidable consequence of cross-disciplinary equivocation about the use of the world *value*. For a typical economist, the value of a product is whatever it is about an actor's psyche in virtue of which she is disposed to pay whatever it is she is, in fact, disposed to pay for the product in a market transaction.[24] Economic value, in this sense, is obviously subjective: what

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[23] See, *eg*, Chartier, *Justice*, above n 1, 10-3.

[24] This would often be framed in counterfactual terms, so that the focus would be on whatever it is that explains what she would be *willing* to pay under particular circumstances. There are two related problems with this formulation from the perspective of natural law theory. (*i*) The use of 'explains' might be thought to amount to an appeal to a sufficient condition for the actor's behavior. But natural law theory is committed to a robustly libertarian view of free will, with the result that no factor apart from the agent's free choice itself, at least under ordinary circumstances, will be

plays an explanatory or interpretive role in economic analysis is simply an aspect or set of aspects of each relevant economic actor's motivational set, of her subjectivity.

Natural law theorists and others speaking as moralists may also use the word value, and sometimes they use it in this explanatory or interpretive way. More frequently, however, they use it in an objective sense. In this sense, value is the same as *inherent*, *intrinsic* worth. Real aspects of welfare can be spoken of as 'basic values'; and calling something valuable can be a way of identifying it as an authentic dimension of well-being.

Because the relevant aspects of welfare are incommensurable, there is no fact of the matter about what is or isn't the 'best possible overall state of affairs'.[25] Different states of affairs embody different instances of different aspects of welfare. In this sense, then, there may be many different, incommensurably valuable states of affairs. It is true that there is no one optimal state, but this is not because value, in the sense in which natural law theorists are concerned with it here, is subjective. It is because there is almost never a meaningful way of aggregating the various objective values realised in a given situation, and there is never a way of doing so when the situation is a large-scale one. Incommensurability rules out the appeal to optimality. If the consequences of making a given policy choice give us reason to prefer that policy choice over others, it cannot be because the quantum of value brought about by the adoption of that choice is superior to the alternatives.

This does not mean, of course, that anything goes—so that, for instance, it would be just as reasonable to choose a system of property rules featuring strong IP rights as to choose a system lacking such rights. For choice among the various aspects of well being is *constrained* choice. It is reasonable to the extent that it is consistent with the principles of practical reasonableness (for present purposes, primarily the Golden Rule). And these principles (especially when the truisms are taken into account)

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sufficient to explain the choice. (*ii*) If the agent's choice is genuinely free, then no claim about what the agent would do or would have done under various envisioned non-actual circumstances will necessarily be true. Natural law theory can reasonably talk about the aspects of a person's motivational set that might dispose her to choose in a certain way, as long as it is clear that the relationship is, roughly, probabilistic, and that disposition is a far cry from necessitation.

25 For natural law critiques of consequentialism rooted in this recognition, see, *eg*, Finnis, *Ethics*, above n 1, 80-108; Finnis, *Law*, above n 1, 111-9; Finnis, Boyle, and Grisez, above n 1, 177-296; Grisez and Shaw, above n 1, 111-4, 131-3; Germain G Grisez, 'Against Consequentialism' (1978) 23 *American Journal of Jurisprudence* 21.

constitute significant limits on what will count as a reasonable choice to participate in any aspect or aspects of well being.

For present purposes, I will accept (4) as written, though I will have more to say about the issue below in the course of exploring a contractual alternative to positive-law intellectual property protection.

The argument as framed takes an essentially consequentialist form. And, since natural law theory leaves no room for globally consequentialist reasoning, the argument cannot succeed in its present form, at least as far as natural law theory is concerned. However, while there is no coherent sense of optimality that would enable (5) in its current form to make sense in natural law terms, it might be recast in either of two ways:

5a. The creation of a positive-law IP exception is *required by* natural law theory.

5b. The creation of a positive-law IP exception is *consistent with* natural law theory.

The strong version, (5a) is indefensible. The weak version, (5b), cannot be ruled out in principle, but support for it is weak at best.

5. Choosing positive-law IP protection for incentival purposes is not required because no state of affairs is ordinarily optimal

From a natural law perspective, someone can reasonably choose one state of affairs over another, as long as the various principles of practical reasonableness are acknowledged. Thus, *incommensurability alone* would be insufficient to prevent a judge or legislator from judging that, were she a creator, she would be unwilling to accept not being given rights over the replication of her creations, and that she was therefore morally *required* to support patent and copyright protection. Similarly, it would be insufficient to prevent her from judging that—were she a would-be replicator of a creation—she would not be willing to accept (even if she might dislike) being prevented from replicating it in the creator's interest, and that she was therefore morally *permitted* to support patent and copyright protection. But the best that can be said on behalf of positive-law intellectual property rights from a natural law perspective, at this point in the argument, is that it *might*, for all we know, be reasonable for those responsible for articulating and upholding laws to judge that they were permitted or required to secure intellectual property rights.

However, where the argument from optimality seeks to derive an inescapable consequentialist conclusion from basic facts about human behaviour, these facts will not lead inescapably to the same conclusion from the perspective of natural law theory. That is, the utilitarian argument for IP I initially sketched treats it as obvious that, once we really understand the consequences of implementing or not implementing patent and copyright protections, it will be obvious that implementing these protections is required. But natural law theory supports the conclusion that understanding various consequences is insufficient to show that a choice that leads to one set of consequences rather than another is necessarily required.

As a general matter, a lawmaker can appropriately judge that supporting IP rights is morally required only if she concludes that she would reasonably be unwilling to accept the failure to support such rights were she among those affected by that failure. Clearly, there is no single right answer to the question whether she would so conclude, since different constituencies will have different attitudes, as will different legislators. It seems clear, however, that if she examines the issue only from the perspective of some content creators and concludes that, because they would be unwilling to accept the non-protection of their interests, she should support laws that would protect those interests, she is acting with just the kind of partiality the Golden Rule precludes. For the interests of other content creators and of consumers surely also matter. It seems, then, that she can reasonably regard the creation of such positive-law rights as required only if she would be unwilling to accept their absence even as a consumer. And, while there is no way of making global judgments about consumer welfare of the sort utilitarian arguments require, it seems clear that consumers might well benefit in multiple ways from the absence of positive-law IP rights.

6. Choosing positive-law IP protection for incentival purposes is not desirable

An IP exception would, in effect, confer a monopolistic privilege. And, in the nature of the case, monopolies harm consumers. Consumers pay more for products offered by monopolies than they would for products offered on the market absent monopolistic privileges. So it stands to reason that consumers of artistic and technological creations would pay less for such works absent the monopolistic privileges conferred by positive-law IP protections.

The remaining question, then, is whether consumers would nonetheless be unwilling to accept the absence of positive-law IP protections because they would have access to fewer artistic and

technological creations or to ones of noticeably lower quality than they would were such protections in place. Assuming, for the moment, that the relevant sorts of counterfactuals have truth-values, it seems clear that artistic and technological productivity do not depend on positive-law IP protection—certainly not, at any rate, in the kind of unequivocal way that would dispose most consumers to be unwilling to accept its absence.

'I doubt', Friedrich Hayek wrote in 1988, 'whether wrote there exists a single great work of literature which we would not possess had the author been unable to obtain an exclusive copyright for it . . .'.[26] 'Similarly', Hayek went on,

> recurrent re-examinations of the problem have not demonstrated that the obtainability of patents of invention actually enhances the flow of new technical knowledge rather than leading to wasteful concentration of research on problems whose solution in the near future can be foreseen and where, in consequence of the law, anyone who hits upon a solution a moment before the next gains the right to its exclusive use for a prolonged period.[27]

The notion that the incentives purportedly provided by IP law are not necessary to encourage creative activity is anything but conjectural. There are, in fact, both theoretical support and historical and contemporary evidence for the view that artistic creations could be expected to be produced in large quantities in the absence of IP protection.[28] English authors made money selling books to American publishers in the nineteenth century, for instance, despite the fact that, because they were in England, they enjoyed no protection under US copyright laws.[29] Aggressive news reporting continues despite the minimal protection copyright affords to

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26 F. A. Hayek, *The Fatal Conceit*, (W W Bartley III ed, 1988) 36. Before condemning patents in no uncertain terms, Hayek observes, about copyright: 'it seems to me that the case for copyright must rest almost entirely on the circumstance that such exceedingly useful works as encyclopaedias, dictionaries, textbooks, and other works of reference could not be produced if, once they existed, they could freely be reproduced' (ibid 36-7). Questions about the usefulness of textbooks aside, it is worth wondering whether Jimmy Wales, who reports having been influenced by Hayek, was aware of the claim that encyclopedias could not be produced in the absence of copyright when he founded Wikipedia.

27 Ibid 37.

28 See Michele Boldrin and David K. Levine, *Against Intellectual Monopoly* (2008) 15-41

29 Ibid 22-3.

most news stories.[30] The pornography industry has flourished even thought pornographers are unlikely to take advantage of copyright protections even when they are theoretically entitled to them.[31] And effectively marketed, commercially published versions of government reports—not subject to copyright—have proved profitable despite their availability from multiple, competing publishers and for free in downloadable form on the Internet.[32] Computer software was not patentable in the United States until 1981—but software production flourished before patent protection was available. Software-makers not infrequently renounce conventional copyright protections in order to boost consumer acceptability, and thus sales.[33]

Patents, including those on pharmaceuticals, have not played the role in technological development that their proponents have alleged, either.[34] Significant new developments took place through the nineteenth century, or even, in some cases, the twentieth, in multiple European countries in which patents weren't available.[35] Productivity actually preceded the availability of patent protection.[36] The availability of patents has served as an incentive for potential innovators to focus on consolidating gains from their existing creations by eliminating competition and, indeed, to focus on the suppression of competition to the detriment of genuine innovation.[37] By contrast, leaving an invention unpatented can make possible a useful mix of collaboration and competition as innovators work to improve the design of a particular product type, each contributing to and learning from the developments effected by the others. Thus, for instance, the plant and animal breeding industries proved enormously productive in the years before plant and animal varieties could be patented.[38] While securities became patentable in the United States as of 1998, financial instruments were created in multiple varieties well before patent protection was available, arguably because first movers could reap handy profits despite

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30 Ibid 26-30.

31 Ibid 36-9.

32 Ibid 24-6.

33 Ibid 15-22.

34 Ibid 42-67, 212-42. *Cf* Fritz Machlup, *An Economic Review of the Patent System* (1958); Thomas D Mandeville et al, *Economic Effects of the Australian Patent System: A Commissioned Report to the Industrial Property Advisory Committee* (1982); Renato Mazzolini and Richard R Nelson, 'Economic Theories about the Benefits and Costs of Patents' (1998) 32 *Journal of Economic Issues* 1031. Economic modeling of patent law has tended to be inconclusive—a result that is, at any rate, not inconsistent with the view that patents do not effectively incentivise innovation.

35 Ibid 45.

36 Ibid 46.

37 See, eg, ibid 49-51.

38 Ibid 52-7.

high up-front costs and risks of imitation.[39] Despite the availability of some theoretical legal protections, designs in fields from clothing to architecture are not genuinely patentable, and competitors constantly mimic successful ones; but the lack of effective IP rights has hardly inhibited the occurrence of dramatic innovation in multiple design spaces.[40] Sports leagues have every reason to want to promote profitable innovations, and they could, in theory, require member teams to treat new moves introduced by particular clubs as usable by only those clubs; but they have shown no inclination to do so.[41] The actual behaviour of most businesses gives little evidence that the potential availability of patent protection provides a key incentive for them to create new products.[42]

Copyright term extension did not substantially increase the production of copyrightable material.[43] Instead, it arguably reduced the incentive for media companies to create new content.[44] Over the long term, copyright can tend to keep works off the market, and thus reduce the availability of diverse media content.[45]

There is little or no evidence that IP actually serves to boost the pace and quantity of technological and artistic creation.[46] But the problem with patents extends beyond their uselessness: there is, at any rate, a strong argument to be made for the view that patents have sometimes actually retarded technological innovation, since it may be more efficient for patent-holders to focus their energies on suppressing innovative competitors—thus simultaneously preventing others from making new developments and, if they are the creators of the patents they hold, avoiding the creative work needed to improve their creations.[47]

Like all monopolists, IP holders, with the right to exclude others from the market spaces they occupy, can act in ways that foster their own acquisition of resources at the expense of the public—driving up prices and enjoying the freedom from competitive pressure that prompt them to deliver their products and services at lower costs.[48] The ability to reap monopoly profits from IP may incentivise them both to *avoid* innovating themselves—since it may be less costly to focus on protecting IP than on development

39 Ibid 57-9.
40 Ibid 59-60.
41 Ibid 61.
42 Ibid 62.
43 Ibid 99-100.
44 Ibid 101.
45 Ibid 104-5.
46 Ibid 184-211.
47 Ibid 68-96.
48 Ibid 68-9.

new products and services—and to try to limit innovation by others.[49] Holders of monopolistic IP rights may actually produce products of lower quality and greater cost—ones featuring built-in copy protections, for instance, which inconvenience users and add to prices, since they require innovative effort to create and install—in order to reduce the competitive pressures they face.[50] Substantial resources are invested in acquiring and protecting patents, including patents designed primarily to serve as leverage to be used to secure licenses from other patent-holders.[51] Patents are frequently used to block new market entrants, a practice that can hardly be seen as contributing to the emergence of innovative products and services.[52] By raising start-up costs and conferring monopoly rights in previously public-domain items, seed patents keep poorer farmers from entering global agricultural markets and substantially limit their ability to use existing resources.[53] The profitability of patents enables 'patenting . . . to . . . [serve as] a substitute for research and development'.[54] *Contra* IP defenders, we would not be dependent on the pure good-will of creators if we wanted to enjoy technological and artistic creations in an IP-free world: in reality, there would be multiple incentives for creative work in such a world, just as there are multiple incentives in our world for people not protected by monopolies to innovate and serve consumers.[55] (Monopolies are not known to encourage consumer-friendly behaviour.)

The impact on consumers of not supporting the monopolistic privileges conferred by positive-law IP rights renders essentially inescapable the conclusion that a lawmaker could not regard the creation of such rights as *required*. She still might judge, however, that it was *permitted*. Again, for this judgment to be correct, she would need to conclude that she would be willing to accept—even if she disliked—the positive-law protection of IP rights were she affected by them. And given that an IP exception does not seem necessary and that it would have obvious negative consequences, there *would* certainly be good reason for her to be unwilling to accept its imposition. In principle, she might find some reason to support an IP exception and some reason to be willing to accept its imposition. There is no basis in natural law theory for maintaining that it would be unequivocally wrong for her to support an IP exception to the baseline property rules. However, the value of preserving the baseline property rules, the non-necessity of an IP exception, and the considerations

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49 Ibid 69.
50 Ibid 71.
51 Ibid 73-7.
52 Ibid 77-8.
53 Ibid 80.
54 Ibid 83.
55 Ibid 123-48.

rendering such an exception undesirable should give her good, whether or not absolutely decisive, reason to avoid implementing the exception.

7. The incentives argument provides very little support for an IP exception from the perspective of natural law theory

The incentives argument is designed to show that the level of innovation would inadequate without an IP exception to the baseline property rules. But the argument is unsuccessful. It depends on dubious assumptions about people's motives for creation and about the possibility of objectively measuring overall adequacy. Even apart from these assumptions, however, it fails to convince. Empirical evidence and theoretical considerations both suggest that there would be incentives for content creators to produce artistic and technological innovations in the absence of IP protection. No doubt some information patterns would not be embodied in physical objects without the particular incentives provided by IP protection. But it is not clear how many would not be, nor is it clear that we ought to be overly concerned. Certainly, there is little reason to think an IP exception would be desirable as a means of fostering innovation, and none to think it would be necessary. There would thus be little reason for someone to support the creation of a positive-law IP exception on natural law grounds. The incentives argument fails.

D. An IP exception would not be justified by its putative contribution to securing 'fair returns' for creators

1. Introduction

The notion that an IP exception is justified because it would secure an innovator a fair return on her investment of time and energy (Subsection 2) is unpersuasive. As a general rule, a fair return will be the return resulting from transactions conducted in accordance with the baseline property rules (Subsection 3). Provided background rules are fair, it is not clear that there is a consistent, non-arbitrary way of identifying a fair return apart from purchasers' revealed preferences (Subsection 4). While a transaction may be unfair despite the fairness of the background rules, a judgment about unfairness should either be incorporated into the rules themselves or else treated as an exception of which the legal system cannot be expected to take account (Subsection 5). There is good reason not to incorporate an IP exception into the baseline property rules, and the putative desirability of

ensuring fair returns to creators does not alter the relevant calculus (Subsection 6).

2. Grisez maintains that IP is necessary to ensure fair returns for creators

While it seems likely that Grisez does have the incentive argument in mind, he also refers to the importance of providing creators with 'a fair return for their work and other investment'.[56] Perhaps he means to suggest that the need to provide a fair return serves as a further, independent justification for the IP exception. But it is clear neither that the rules embodied in the IP exception are necessary to ensure fairness nor that, if they were, this would warrant incorporating them into positive law.

3. Judgments about the fairness of transactions depend on judgments about background rules governing the transactions

As an individual actor, I need to judge the fairness of my choices as I make them. There's a sense in which fairness is unavoidably determined on a case-by-case basis. Thus, for instance, someone's behaviour in a given market transaction is unfair if she would be unwilling to accept the behaviour were her role and that of her trading partner reversed. But what I am willing, or unwilling, to accept is in part a function of my background judgments, not only about relevant natural facts but also about entitlements, about moral requirements, about justice.

There are good, general reasons for someone to opt, in light of the Golden Rule and the associated truisms, for the baseline property rules and so to regard the outcomes of transactions conducted in accordance with these rules as fair. At least in the vast majority of cases, it would make no sense for someone to judge that the baseline rules were fair and worth supporting—as natural law theory as I have interpreted it suggests that most or all people should do—while maintaining that the outcome of a given exchange consistent with those rules was not fair. That's because my judgments about the fairness of the baseline rules themselves should enter into my judgments about whether I am willing to accept particular choices or outcomes in a given case. I can hardly be unwilling to accept choices leading to a particular outcome outcome to the extent that the outcome occurs because the rules function as they are supposed to function.[57]

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56 Grisez, *Questions*, above n 1, 591.

57 See, *eg*, Chartier, *Justice*, above n 1, 57-8.

General rules are, among other things, simple, reliable, and autonomy-enhancing, and a legal system made up of such rules is worth supporting precisely because the rules have these characteristics. But the fact of generality does mean that, in principle, it is possible that, even after taking into account the merits of a given rule and agreeing that it is just the sort of general rule that ought to be in place, I might still judge that, in a particular instance, an action consistent with the rule would be unfair. Consistency with the baseline rules doesn't *ensure* fairness.

Nonetheless, even if it could be shown that a given transaction involving the physical embodiment of a given pattern was unfair to the pattern's creator, it obviously wouldn't follow that a just legal system should embody the IP exception. For there might be—as I think, in fact, there are—good reasons for endorsing and upholding the baseline rules, and good reason not to incorporate *ad hoc* exceptions to them in the legal system.

4. It is difficult to specify what counts as a 'fair return' apart from what purchasers actually want

These general points about the relationship between general legal rules and particular cases aside, however, the question persists whether there is any particular means of specifying what counts as 'a fair return for . . . work [on] and other investment' in a given creative project. Obviously, no creator is entitled to any compensation at all *just* for creating something, for it may be that no one in a position to compensate her can use her creation or chooses to compensate her in exchange for access to the creation. Compensation for something is a reflection of its valuation by the person doing the compensating.

But suppose someone does want to use her creation, and *could* compensate her for doing so. It still does not follow that the user owes her anything. What, exactly, is supposed to count as a fair return? How much someone is willing to pay for something is a function of its importance to her. If it's trivially important, there is no obvious reason the user should be compelled to pay a great deal for it simply because its production was costly for the seller. Whether the user owes the seller anything will depend on just what the seller is entitled to with respect to her creation. If she is entitled to control the physical embodiment of the pattern she has created, then someone who uses that pattern without her permission doubtless owes her something. But the nature of her entitlements has to be sorted out before the question of fair return can be resolved; there seems to be no sensible way of specifying what will count as a fair return apart from the fairness of the legal system's background rules. And, as regards the legal system, I

have suggested that there are good, if not quite overwhelming, reasons why a just legal system should feature the baseline property rules and should not feature the IP exception.

5. Judgments about ad hoc exceptions cannot readily be incorporated into baseline rules

It is certainly possible that unfair conduct might be consistent with the baseline rules. But to claim that conduct that failed to treat creators as having property rights was *consistently* unfair would be tantamount to arguing that a legal system ought to incorporate the IP exception. And since it is certainly the case that a legal system need not incorporate the IP exception, and since there is good reason to think it definitely should not do so,[58] it seems that fairness does not require, as a general matter, that creators be treated as entitled to control over the physical embodiment of the information patterns they create. And, if this is so, then it seems that, absent a particular agreement with someone regarding her provision of access to an information pattern she has created, a creator is not entitled to any particular payment from someone else for performing her work. In turn, if she is not entitled to any return, she cannot, absent a contract, be entitled to a putatively fair return (unless, of course, it is understood that a zero return may count as a fair return—but I think this is fairly obviously not what Grisez has in mind).[59]

6. Conclusion

As a general rule, transactions conducted in accordance with background rules shaped in accordance with the requirement of fairness embodied in the Golden Rule will themselves be fair: if they weren't, it would be odd to say that the rules themselves were fair. And, in order to serve the interests that underlie a just property system, there will typically be good reason not to justify *ad hoc* exceptions to the rules *from within the legal system*, even though such exceptions may be morally warranted in particular cases. Ordinarily, a return resulting from market transactions conducted in

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58 I defend these claims in Section B above.

59 This approach does not simply omit or ignore the perspective of the creator. Rather, this perspective is taken into account in two ways. First, the creator is assumed also to be a consumer, and thus to benefit from a general scheme of property rights that is consistent with the Golden Rule, even if she does not benefit as she might like from any particular transaction. Second, the baseline rules *do* provide multiple opportunities for creators to profit from their work in the absence of positive-law IP rights; the rules simply don't offer creators the monopolistic privileges conferred by existing positive-law IP regimes.

accordance with fair rules will be a fair return. And if those rules do not make room for IP, this suggests that conferring monopolistic IP privileges isn't required by fairness.

E. There is little reason to support a positive-law IP exception from the standpoint of natural law theory

Natural law theory does contain some very specific, exceptionless prohibitions—as, for instance, on purposeful killing. In general, however, it is consistent with a range of positive-law possibilities. The Golden Rule and the truisms about human agents that, taken together with the Rule, underlie a just property regime do not require positive-law IP protection, and they provide good reason for someone whose reasoning is guided by the Golden Rule to avoid supporting an IP exception. Such an exception would not be a necessary or desirable means of prompting innovation. It would not be an appropriate means of securing a putatively fair return for creators on their investments in their creations. And it could not be justified as a means of securing artists' control over their creations.

Some of the rationales that ground the baseline property rules clearly count against the IP exception.

- The proposed exception would involve more extensive restrictions on people's autonomy than would the base-line rules.
- Because it introduced limits on people's use of their own property, it would make it harder for property rules to serve as conflict-reducing boundary markers.
- Justly acquired physical objects may be less likely to be put to productive use if their owners are prevented from configuring them in accordance with certain patterns.
- Similarly, the IP exception to the baseline property rules would reduce the reliability of property rights, since people could be prevented from controlling their own justly acquired property.
- Rules incorporating the IP exception would be less simple than those without it.

Some of the other rationales would not count directly against the exception, but provide no particular support for it.

Rules incorporating the exception would not improve the coordinative function of a market-based price system.

- They would not meaningfully enhance the capacity of the baseline rules to foster generosity.

- They seem no more likely to exhibit game-theoretic stability than the baseline rules—and would arguably be less stable because they are less simple and productive of tension with rules protecting control over physical objects than are the baseline rules.

- They do not seem likely to increase stewardship of physical objects, and abstract patterns capable of being embodied in physical objects are not scarce resources capable of benefiting from stewardship.

Only two of the rationales might be thought to count in favour of the exception: *incentivisation* and *desert*. But incentivisation does not seem to weigh heavily in favour of an IP exception—not only because there is no objective means of determining the impact of an IP exception on innovation or weighing that impact against other factors, but also because it seems quite likely that there *would* be significant incentives for innovation in the absence of IP. And the bulk of desert-based claims for the IP exception seem to depend—causally if not logically—on people's expectations regarding IP rights and to presuppose the notion that people are systematically entitled to compensation at levels higher than those at which others choose to pay them.

Judging the fairness of a given legal rule one might opt to enact as a lawmaker means taking all of the relevant facts into consideration and asking oneself whether one would be unwilling to accept the imposition of the rule—or, for that matter, its non-imposition—were one affected by it in one way or another. Taking all of the relevant considerations into account, it would be quite reasonable for someone to be willing to accept a property law regime that incorporated the baseline rules but not the IP exception, and, indeed, for someone to be unwilling to accept a regime that did incorporate the IP exception. If just property norms emerge from the Golden Rule in tandem with the various truisms about the human situation, there seems little reason to accept as legitimate an IP exception to the baseline property rules.

IV. The efficacy of contractual alternatives to positive-law IP protection is limited

A. Absent a positive-law IP exception, creators might seek to secure IP-like benefits using contracts

Natural law theory roots contractual requirements in the promissory obligations derived from the Golden Rule and in the rights people have to dispose freely of their physical property. And in the absence of a positive-law IP exception, people *could* achieve some of the effects of such an exception contractually. They could seek to accomplish by contract results that could not justly be mandated by positive law.[60] However, contract could not secure the monopolistic protection the IP exception would afford. Imposing a limit on the sale of an item would not allow a seller to treat the copying buyer as a thief (Section B). While sale contracts could certainly feature liquidated damages clauses triggered by copying, such clauses would be difficult, at best, to enforce, and would not be efficacious against all copiers (Section C). Further, industry practices could make it hard to enforce some sales contracts not resulting from negotiation (Section D). Thus, contract would not—fortunately—prove a perfect substitute for IP (Section E).

B. The right to copy cannot be excluded from the bundle of rights associated with title to a particular physical embodiment of an idea

One contractual approach to copyright protection involves the supposition that the bundle of rights associated with a given physical object includes the right to copy the object, and so that transfer of title to the object could involve the transfer of all the items in the bundle except this one. On this view, if someone wishes to secure copyright protection for a given work, she need simply sell it *minus* the right to copy it.[61] Because the purchaser would not obtain the putative right to copy, she could not pass on that right to her successors in title.

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60 To be sure, people currently engage in contractual transactions that build on existing positive-law IP rights. But the model envisioned in the text is not one that *presupposes* such rights, but rather a contractually created alternative to them.

61 This contractual approach is defended by Murray N Rothbard, *The Ethics of Liberty* (1982) 123.

But this view seems clearly mistaken. The right to copy a given creation is the right to embody an abstract pattern in new material. To prohibit copying is to prohibit the use of this abstract pattern in a particular way. However, I could exclude the right to use this abstract pattern in the relevant way in the course of selling a physical object that embodied the pattern only if I already had the right to control the use of the pattern, and whether I do is precisely the point at issue. The notion that I can exclude the right to copy an object from the rights I sell when I transfer title to the object appears to be question-begging.

C. A liquidated damages clause in a sale contract could provide a creator with some, but not all, the benefits afforded by an IP exception

This does not mean that a more straightforward contractual approach could not be used to provide some copyright protection.[62] The contract I employed to sell you a given physical object could embody a set of provisions something like these:

> 1. If Buyer copies Creation, Buyer will pay Seller damages in the amount of £X for each instance of copying, as well as all reasonable costs associated with recovering these damages.
>
> 2. If anyone to whom Buyer transfers title to Creation through gift or sale, or anyone who acquires Creation in virtue of Buyer's negligence or abandonment, copies Creation, Buyer will pay Seller damages in the amount of £X for each instance of copying, as well as all reasonable costs associated with recovering these damages.

Here, there is no reference to question-begging duplication rights; instead, the buyer simply agrees to pay liquidated damages in a given amount should she copy the creation, and to impose a similar requirement on others. Since in principle one can agree to do anything not otherwise illegal in a contract,[63] one could perfectly well agree to pay damages if one walked past a yellow sign, or sang 'God Save the Queen' above a certain volume. So, without any appeal to 'the right to copy', one could obligate

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62 For a general account and critique of such contractual approaches, *see* N. Stephan Kinsella, *Against Intellectual Property* (2008) 45-7. For further discussions of these approaches, *see* Kinsella 45-6 nn. 80-2.

63 This is, at any rate, an implication of the natural law transfer rules sketched above.

oneself to pay damages if one copied a given creation or if someone else did so.

While this sort of contractual arrangement could provide creators with some of the privileges currently conferred on them by the copyright and patent regimes, it is clear that it would often be difficult to assert claims. The most fundamental problem is that a creator would not ordinarily enjoy privity of contract with end-users. The copier's legal relationship would almost certainly be with someone else—a retailer, say, or a friend. Thus, the creator would need to identify the ultimate buyer whose purchase provides a contractual link with the copier. Doing so could obviously be costly and time-consuming. The possibility of being sued by a creator would obviously encourage initial buyers to impose indemnification requirements on successive purchasers, all the way to the end user. Tracking purchases and enforcing indemnification requirements would also be costly—and frequently impossible.

Under the envisioned contractual regime, those seeking to obtain payments when people copied creations covered by the regime would be forced to internalise the regime's administrative and enforcement costs. And it is reasonable to think that these costs would discourage creators and participants in the relevant supply chain from supporting the envisioned contractual regime. Retailers, in particular, might be expected to be resistant. To avoid covering indemnification costs, they would need to require purchasers of inexpensive consumer items to agree to detailed contracts; the purchasers' likely objections could have severe effects on sales. So retailers might be expected to resist the indemnification requirements, with consequences all along the supply chain.

Of course, a good deal of copying need not involve direct access to any physical item transferred along the supply chain. An item need not be sold, given away, or abandoned in order to be copied. A patentable device might need only to be observed in operation. Reviews or a friend's description might provide all the information needed to replicate a film or a musical performance. An overheard conversation about a book might prompt a knock-off. A broadcast television program can be received, and so copied, without implicating any sort of contract. These possibilities all limit the efficacy of attempted contractual alternatives to IP.

D. Industry practices could limit the effectiveness of attempts to replicate the effects of an IP exception contractually

Effects to achieve the same results as those made possible by an IP exception to the baseline property rules by means of contract would also be hampered if the mechanism chosen were not a personally negotiated contract, or even a form contract the buyer's review of which could be verified in person by a seller representative, but rather a 'shrink-wrap' or 'click-wrap' contract. A shrink-wrap contract is a putative agreement, consent to which is supposed to be inferable from a customer's willingness to break the shrink-wrap covering of a disk containing digital information. A click-wrap contract is a similar agreement: consent in this case is supposed to be inferable from the customer's clicking a button that says, or is adjacent to, text that says something like, 'I have read and agreed to the contractual requirements governing access to the software I am about to download'.

The general legal principle that contracting parties' past behaviour will govern a court's interpretation of their contractual rights and duties is perfectly consistent with natural law contract theory rooted in the Golden Rule. And that principle has the potential to make click-wrap and shrink-wrap contracts unenforceable in many cases. To the extent, at any rate, that sellers know that wrappings will be broken and buttons pushed by consumers who do not read contractual terms and nonetheless accept the sellers' purchases without challenging the terms, it seems to follow that enforcement of any but the most obvious terms will presumably not be possible.[64]

E. A contract-based alternative would not replicate the protections offered by an IP exception

Natural law theory might make possible a cumbersome contractual alternative to patent and copyright. But the costs of the alternative would often make employing it prohibitive. Even when it was available, identifying responsible parties would be much more difficult than under a regime in which copiers were directly liable to creators. And the alternative would not provide any sort of protection against copying by people outside the chain of contract linking a copied work with its creator.

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64 Thanks to Kevin Carson and Stephan Kinsella for highlighting the need to make this point.

V. Natural law theory is inhospitable to IP

Natural law theory features an understanding of property rights as designed to facilitate participation in the varied aspects of well being. In principle, support for varied property norms could be consistent with the most obviously relevant principal of practical reasonableness, the Golden Rule. And the most common variants of contemporary natural law theory are statist, building on the assumption that positive law can be created with relative freedom by states within the confines of natural law morality. However, basic features of the human condition underlie a set of overlapping, mutually reinforcing considerations that together provide strong support for what I've called the baseline property rules, enabling acquisition of title to physical objects by substantive first possession; full control over justly acquired physical objects; and free disposition of justly acquired physical objects. Protecting IP would amount to carving out a substantial exception to the baseline property rules.

IP proponents sometimes see themselves as defending a worker's right to the product of her labour. But what labour produces is never an abstract object as such, but rather a physical embodiment of such an object. IP advocates seem to want a labourer who produces a physical embodiment of a given abstract object to control any transaction involving other physical embodiments of that object. There does not seem to be a reasonable way to control transactions in abstract objects as such—a way of doing so that does not amount to the creation of a disruptive, *ad hoc* exception to the baseline rules.

Making such an exception seems neither necessary nor particularly useful as a way of ensuring an optimal level of innovation—not only because there is no objective measure of optimality but also because incentives for innovation would certainly obtain in a world free of IP. The incentives argument for an IP exception is thus unsuccessful. But so, too, is the fair return argument, which is built on a notion of fairness in exchange that cannot achieve useful specificity apart from the preferences of actual traders.

In principle, natural law theory leaves open the possibility that an innovator might be able to achieve something resembling IP protection by contract. It is clear, however, that the relevant sorts of contracts would not generate legal claims in all of the cases in which they're made possible by IP protection and that enforcing them would, in any event, be relatively costly.

I have ignored here the question whether—and, if so, under what circumstances—positive law may justly be created and enforced. It is certainly worth asking whether natural law theory in fact, provides the support for the authority of the state to legislate which many of its prominent expositors seem to suppose it does. But even assuming that some sorts of positive legal enactments are defensible, natural law theory provides little justification for an IP exception to the baseline property rules and little space for contractual alternatives designed to achieve the same goals as an exception. An account of property rights rooted in natural law theory is at best uncongenial to IP.