JOINING OR CHANGING THE CONVERSATION?

CATHOLIC SOCIAL THOUGHT AND INTELLECTUAL PROPERTY♦

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I. INTRODUCTION

Scholars of intellectual property ("IP") participate in many conversations. Influenced by the political and constitutional theory of public reason, we have sought consensus on the best doctrines, regulations, and statutory schemes for promoting innovation and its equitable dissemination.[1] Religious thought has

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both motivated scholarly work and supported an "overlapping consensus" in favor of given policies.

I respect religious thought's extant contribution to these discourses, but I hope to map some alternatives in this paper.[2] Religious thought can inspire new conversations. It may also constructively redirect scholarly debates that gloss over basic moral imperatives.[3]

Sometimes religious beliefs call us to join an extant conversation in the IP academy. For example, in the case of access to lifesaving drugs, Thomas Berg has argued that Catholic Social Thought ("CST") commends a more humanitarian approach than current international legal regimes permit.[4] We can anticipate that the same voices within the Catholic legal academy that favor neoliberal policies generally will eventually contradict Berg, and claim that CST properly understood is perfectly consistent with the status quo.[5]

The debate between the "left" and "right" within the Catholic legal academy will probably play out similarly to debates among scholars of constitutional or human rights law. The former locate "concrete commandments in the Constitution's majestically vague admonitions."[6] The latter apply abstract principles articulated in documents like the Universal Declaration of Human Rights ("UDHR") to concrete dilemmas.[7] Religiously oriented scholars of

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[1] For an overview and critique of the current debate, *see* Gaia Y. Bernstein, *In the Shadow of Innovation*, 31 CARDOZO L. REV. 2257, 2257 (2008) (describing in detail the rise of innovation rhetoric, and "critically examin[ing] this celebration of innovation.").

[2] I follow the example of David Skeel, who has recently illuminated varied "paths of Christian legal scholarship." David A. Skeel, Jr., *Paths of Christian Legal Scholarship*, 12 GREEN BAG 2D 169, 169 (2009).

[3] In the spirit of Paul VI, I consider the audience of this essay to be Catholics, "Other Christians and Believers," and all persons "of good will." *See Populorum Progressio*, *infra* note 68, at ¶¶ 81–83.

[4] Thomas C. Berg, *Intellectual Property and the Preferential Option for the Poor*, 5 J. OF CATHOLIC SOCIAL THOUGHT 193, 193 (2008).

[5] CST is general enough to give ample ammunition to a "devil's advocate" skeptical of compulsory licensing schemes or other proposals for expanding access to drugs. Stephen L. Martin has described in some detail the debate between left and right over CST and economic ethics. STEPHEN L. MARTIN, HEALING AND CREATIVITY IN ECONOMIC ETHICS: THE CONTRIBUTION OF BERNARD LONERGAN'S ECONOMIC THOUGHT TO CATHOLIC SOCIAL TEACHING 41-57 (2008) (contrasting Mary Hobgood's liberationist view of CST with Michael Novak's classical liberal view); *but see* Thomas Storck, *Is the Acton Institute a Genuine Expression of Catholic Social Thought?*, DISTRIBUTIST REVIEW (July 4, 2011), at http://distributistreview.com/mag/2011/07/is-the-acton-institute-a-genuine-expression-of-catholic-social-thought/ (describing some liberal thought that can "hardly be squared with the teaching of the Magisterium.").

[6] LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 7 (1991).

[7] Some have applied these principles to longstanding disputes over intellectual property

IP can learn from both projects of interpretation, application, and specification.[8] Sacred texts themselves could not specifically anticipate today's problems, but they can inform our responses to them.[9]

Vagueness does not render a system of thought irrelevant to social life. Political philosophy and economics depend on polysemic and essentially contested terms, and still have enormous influence over normative accounts of intellectual property. These systems of thought also tend to marginalize culturally distinctive perspectives on the field.[10] The metaphysical and holistic commitments of CST cannot translate easily into the secular individualism of mainstream liberal political philosophy and economics. Economic theory can be particularly incompatible with CST when it aims to maximize output while remaining agnostic about the ultimate composition of goods and services created. CST offers instead a "preferential option for the poor," favoring the production of necessities over luxuries so long as the "least among us" are deprived of a decent life.

CST thus provides a uniquely powerful set of perspectives to bring to bear on current debates over the expansion of access to life-saving drugs. The next section of this article (Part II)

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policy. *See, e.g.*, Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?* 5 MINN. INTELL. PROP. REV. 47, 57-59 (2003); E.S. Nwauche, *Human Rights-Relevant Considerations in Respect of IP and Competition Law*, 2 SCRIPT-ED 467 (2005), *available at* http://www.law.ed.ac.uk/ahrc/script-ed/vol2-4/enyinna.pdf; Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 GA. ST. U. L. REV. 709, 709-15 (2007); Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039 (2007); *but see* Kal Raustiala, *Commentary: Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021, 1037 (2007) (suggesting that substantive review of national policies based on an international view of "rights" could lead in a *Lochner*esque direction).

[8] The language in the Universal Declaration of Human Rights ("UDHR") is even more open ended than many encyclicals. *Compare* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) at 27(1) (Dec. 10, 1948) (guaranteeing both that "[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits" and that "[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.") *with* William J. Byron, S.J., *The Future of Catholic Social Thought*, 42 CATH. U. L. REV. 557, 558 (1993) ("Whatever the question . . . [CST's] answer is usually framed in a few general principles accompanied by several general guidelines for programs consistent with the principles. For a universal teaching church, this is the way it has to be, I suppose. When it comes, however, to the future of Catholic social teaching, I cannot help but wonder whether the times might not require more precision of the Church and its teachers, if Catholic social thought is to have greater, even decisive impact.").

[9] *See* Michele Pistone, *The Devil in the Details: How Specific Should Catholic Social Thought Teaching Be?* (Villanova Univ. Sch. of Law, Working Paper No. 28, 2005), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1028&context=villanovalwps. Pistone carefully proposes the institutional mechanisms and openness to social scientific expertise that would ideally accompany such a process of specification.

[10] As Julie Cohen has demonstrated, "Within the mainstream of copyright scholarship it has been taken as self-evident that a grand theory of the field must be grounded either in a theory of rights or in a theory of economic analysis." Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1155 (2007).

considers the implications of CST for pharmaceutical policy. The work of Catholic scholars, like Thomas Berg, enriches a growing legal literature on the access to knowledge movement. But sometimes our vocation as religious legal scholars will call us not to enter into a current scholarly discourse, but to question its very premise. I take that position with respect to current IP scholarship on the copyrightability of fashion design—virtually all of which presumes that the proliferation of such designs is a worthy goal of IP law. Part III challenges that idea from a Catholic perspective. It proposes alternative targets for IP policy, changing the focus from fashion policy to clothing policy generally. Part IV concludes with reflections on the role of religious thought in the legal academy.

II. ACCESS TO DRUGS AND THE PREFERENTIAL OPTION FOR THE POOR

IP policy aims to balance access to current innovation with incentives for the creation of more works, products, and processes. In the realm of pharmaceuticals, the stakes are especially high. Advocates for the disadvantaged denounce the avoidable death and suffering caused by tight restrictions on the distribution of patented drugs. Defenders of the status quo worry that the drug research will slow if patents are weakened. The prospect of lost innovation in the future continues to cloud policy debates, pitting future innovation against present humanitarianism.

A. *Modern Dilemmas in Pharmaceutical Innovation and Access*

Before suggesting the distinctive contributions that CST might make to debates on access to drugs, I will reflect on three narratives. I turn to these stories to call attention to paradoxes glossed over by rival modes of thought, focused on prediction and control, that now dominate policy-oriented legal scholarship. Even economists "tell stories in their science, which is no complaint."[11] As Nobel Prize winners George A. Akerlof and Robert J. Shiller have argued, "our sense of reality, of who we are and what we are doing, is intertwined with the story of our lives and of the lives of others. The aggregate of such *stories* is a national or international story, which itself plays an important role in the economy."[12] Interpretation of past events is critical to the self-understandings of people and nations.

The debate over access to drugs has so far focused on estimates of the amount of innovation that will occur after a

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11 DONALD N. MCCLOSKEY, IF YOU'RE SO SMART: NARRATIVES OF ECONOMIC EXPERTISE vii (1990).

12 GEORGE A. AKERLOF AND ROBERT J. SHILLER, ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM 6 (2009).

change in legal entitlements. Unfortunately, as David Opderbeck notes of the ever-burgeoning legal literature on net neutrality, this "debate[] about policy tend[s] to founder over unanswerable empirical questions. . . ."[13] Though some economists may ingeniously find "clean identifications" in past data, there is no way to run a controlled experiment on diverging patent regimes.[14] Whatever change in drug innovation that results after a change in policy will likely be over-determined. We might instead seek to reflect on a number of representative stories from the field, and consider what a religious or spiritual response to them must include.[15]

Pandemic Preparedness and the Poor: Worries Over Tamiflu

Consider the controversy over the preemptive manufacture of Tamiflu in poor countries. In 2009, many public health leaders in less developed countries ("LDCs") worried that, if they were suddenly struck with an outbreak of swine flu, they would not have adequate manufacturing capacity to rapidly produce needed drugs.[16] Global markets were also unavailing. A journalist reported that demand for vaccines from rich countries appeared to be displacing orders from poorer ones:

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13 David W. Opderbeck, *Deconstructing Jefferson's Candle: Towards a Critical Realist Approach to Cultural Environmentalism and Information Policy*, 49 JURIMETRICS 203, 234 (2008). *See also* Charles Taylor, *Interpretation and the Sciences of Man, in* PHILOSOPHY AND THE HUMAN SCIENCES 56 (Charles Taylor, ed., reprt. 1999) (1985) ("The success of prediction in the natural sciences is bound up with the fact that all states of the system, past and future, can be described in the same range of concepts, as values, say, of the same variables. Hence all future states of the solar system can be characterized, as past ones are, in the language of Newtonian mechanics. This is far from being a sufficient condition of exact prediction, but it is a necessary one in this sense, that only if past and future are brought under the same conceptual net can one understand the states of the latter as some function of the states of the former, and hence predict. . . . [But if] the epistemological views underlying the science of interpretation are right, such exact prediction [in social science] is radically impossible, for three reasons of ascending order of fundamentalness.").

14 Clean identification can occur in "a situation in which it's easy to discern the causal forces in play." Noam Scheiber, *Freaks and Geeks; How Freakonomics is ruining the dismal science*, NEW REPUBLIC, Apr. 2, 2007, available at http://www.tnr.com/print/article/freaks-and-geeks-how-freakonomics-ruining-the-dismal-science.

15 *See* IAN SHAPIRO, THE FLIGHT FROM REALITY IN THE HUMAN SCIENCES 180 (2005) (expressing a preference for "problem-driven over method-driven approaches to the study of politics," and making "the case for starting with a problem in the world, next coming to grips with previous attempts that have been made to study it, and then defining the research task by reference to the value added."). Shapiro demonstrates that "method-driven research leads to self-serving construction of problems, misuse of data in various ways, and related pathologies summed up in the old adage that if the only tool you have is a hammer everything around you starts to look like a nail." *Id.*

16 *See* Johann Hari, *The Hidden Truth Behind Drug Company Profits*, INDEPENDENT (Aug. 5, 2009), http://www.independent.co.uk/opinion/commentators/johann-hari/johann-hari-the-hidden-truth-behind-drug-company-profits-1767257.html ("[F]actories across the poor world are desperate to start producing their own cheaper Tamiflu to protect their populations–but they are being sternly told not to. Why? So rich drug companies can protect their patents–and profits.").

> A scramble among wealthy nations to guard against a swine-flu pandemic is raising concerns that billions of people in poorer countries could be left without adequate supplies of vaccine. . .. The emerging battle between the haves and have-nots underscores a major weakness in the global health system: Pharmaceutical companies have severely limited capacity to produce flu vaccines in emergencies.[17]

This dispute is the latest installment in an almost decade-long controversy over the interpretation of the Doha Declaration on the TRIPS Agreement and Public Health.[18] This Declaration made explicit WTO members' right to compulsorily license and authorize manufacture of drugs in case of public health emergencies. It did not fully address "emergent" or "potential" emergencies.[19]

As rich countries bid for vaccines, the well off can siphon away resources and opportunities from the poor.[20] These inequalities extend from the manufacture and distribution of present drugs to research on future drugs.[21] If an anti-baldness cure can generate billions of dollars in revenue, while a new therapy for tuberculosis only generates hundreds of millions, for-profit pharmaceutical companies may well have a fiduciary duty to invest scarce research dollars in hair care rather than health care.[22]

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[17] Jeanne Whalen, *Rich Nations Lock In Flu Vaccine as Poor Ones Fret*, WALL ST. J., May 16, 2009, at A12, *available at* http://online.wsj.com/article/SB124243015022925551.html.

[18] *See* World Trade Organization, Ministerial Declaration of 14 November 2001 on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2001) (the TRIPS Agreement "can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all."). As Amy Kapczynski notes, it only "gives developing countries marginally more flexibility to use generic medicines." Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 828 (2008).

[19] *See* Berg, *supra* note 4, at 195–196 (citations omitted) ("A 2003 decision of the TRIPS General Council permitted exports of generic drugs to the poorest nations under compulsory licenses in order to address the grave public health problems. But to many critics, that step was insufficient because the process it implements is too cumbersome and excludes some highly effective drugs. More recently, the application of TRIPS's full IP-protection obligations to India, whose generic industry was the largest, has raised questions of whether sufficient supplies of low-cost drugs will continue to be produced. Finally, the TRIPS mechanisms for authorizing generic drugs have been sidestepped through bilateral agreements under which nations like the U.S. require their poorer trading partners to give stronger, 'TRIPS-plus,' protection to intellectual property.").

[20] *See* Thomas Pogge, *World Poverty and Human Rights*, 19 ETHICS & INT'L AFF. 1, 1 (2005) ("Though constituting 44 percent of the world's population, the 2,735 million people the World Bank counts as living below its . . . $2 per day international poverty line consume only 1.3 percent of the global product. . . . The high-income countries, with 955 million citizens, by contrast, have about 81 percent of the global product.").

[21] *See* Michael R. Reich, *The Global Drug Gap*, 287 SCIENCE 1979, 1980–81 (2000).

[22] *See* Kevin Outterson, *The Vanishing Public Domain: Antibiotic Resistance, Pharmaceutical Innovation and Intellectual Property Law*, 67 U. PITT. L. REV. 67, 123 (2005) (discussing biases created by patent-centered innovation system); *see also* William W. Fisher & Talha Syed, *Global Justice in Healthcare: Developing Drugs for the Developing World*, 40 U.C. DAVIS L. REV. 581 (2007).

Kevin Outterson has written eloquently about the resulting challenges to public health, and Thomas Pogge highlights the self-reinforcing deprivation that can result from these disparities.[23]

Drug companies have a number of justifications and excuses for aggressive assertion of their patents. Spokesmen aver that, far from trying to squeeze blood from a stone, they are only concerned about what would happen to their profit margins if drugs circulated in an uncontrolled manner. They claim that, if poor countries are permitted to manufacture vast quantities of their drugs, those countries may sell them on the black market. That, in turn, would reduce the return on such drugs in the developed world, leaving less money for research in the future.[24] They invoke the familiar economic distinction between static (short-term) and dynamic (long-term) efficiency.

Other unintended consequences could emerge. Compulsory licensing of essential drugs could lead to a diversion of more resources to research on nonessential drugs.[25] No one is pushing for compulsory licensing for baldness cures or pet medications.[26] In 2008, the purchasing power of the average American dog was higher than that of forty percent of the world's population.[27] From a purely business-oriented perspective, why develop drugs subject to compulsory licensing for the bottom forty percent of the globe if drugs for the dogs of the top 10% can fetch a higher profit margin? Just as managed care drove some doctors toward catering

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23 *See* Thomas Pogge, *Why Inequality Matters*, *in* GLOBAL INEQUALITY: PATTERNS AND EXPLANATIONS 132, 143 (David Held & Ayse Kaya, eds., 2007) ("The most affluent understand very well that their future wealth is affected by the social rules. They will therefore generally use their influence on the design of the social rules towards defending and expanding their advantages. The richer the top 10 percent are relative to the rest of the population, the more their interests will differ from the interests of the rest and the greater their influence on the design of the social rules will be relative to the influence of the majority.").

24 *See* E. Anthony Wayne, Assistant Secretary of State for Economic and Business Affairs, *Why Protecting Intellectual Property Rights Matters, in* FOCUS ON INTELLECTUAL PROPERTY 78 (U.S. Dep't of State 2006), *available at* http://www.america.gov/media/pdf/books/iprbook.pdf.

25 *See* RICHARD A. EPSTEIN, OVERDOSE: HOW EXCESSIVE GOVERNMENT REGULATION STIFLES PHARMACEUTICAL INNOVATION 49–52 (2006); *see also* RICHARD A. EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE? 95–96 (2000) (discussing EMTALA, the federal law requiring screening and stabilization at emergency rooms, as a deterrent to constructing or maintaining emergency rooms). The concern here is that pressure to make essential drugs free would drive investors away from companies that made essential drugs. It might also bias pharmaceutical researchers toward producing drugs that would not be subject to price ceilings. The larger question is, of course, whether we should be so heavily reliant on the market for what are essentially public (and quite urgent) drugs.

26 About five percent of Pfizer's $11.1 billion in total sales in 2007 were for non-human drugs. See Jacob Goldstein, *Pfizer Pants over Doggie Drugs*, WALL ST. J. HEALTH BLOG (July 30, 2007, 2:59 PM), http://blogs.wsj.com/health/2007/07/30/pfizer-pants-over-doggie-drugs/.

27 ROBERTO PATRICIO KORZENIEWICZ & TIMOTHY PATRICK MORAN, UNVEILING INEQUALITY xv (2009) ("[I]n 2007–2008 the average yearly expenses associated with owning a dog [in the U.S.] were $1425 . . . above countries such as Paraguay and Egypt. In fact, the income of [American dogs is] above more than 40 percent of the world population.").

to the wealthy via "cash-only" or concierge medical practices, a pharmaceutical research agenda ever more dominated by "take-once-daily" drugs for chronic conditions prevalent in the developed world is a potential unintended consequence of aggressive attempts to make antimicrobials available to all at very low prices.[28]

There is a long-standing tension between the "long-run" view of utilitarian economic thought and deontological ethics' emphasis on the present.[29] CST is often appropriately open-ended when it comes to specific policies because of rapidly changing social conditions.[30] Entities like the Pontifical Academy of Social Sciences should be able to evaluate social developments dynamically.[31] Humility counsels caution before condemning a business model and legal regime that claim to save more lives than they risk. For latter-day Mandevilleans, even private vices can promote public virtue once self-interest is channeled by market forces.[32]

Threatened Denial of Flu Samples

Yet a sharp-elbowed, bargaining mentality must end somewhere. Lacking the cash to demand vaccine production for their own citizens, some countries have taken a more expansive view of "intellectual property" and "traditional knowledge" to demand compensation for their own contributions to the disease-curing process.[33] For example, in 2007, the Indonesian government announced "that it would stop sharing bird flu samples with the WHO unless the agency stopped providing the strains to commercial vaccine makers."[34] Had the impasse

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28 Troyen A. Brennan, *Luxury Primary Care: Market Innovation or Threat to Access?*, 346 NEW ENG. J. MED. 1165 (2002); Sandra J. Carnahan, *Law, Medicine, and Wealth: Does Concierge Medicine Promote Health Care Choice, or Is It a Barrier to Access?,* 17 STAN. L. & POL'Y REV. 121 (2006); Frank A. Pasquale, *The Three Faces of Retainer Care: Crafting a Tailored Regulatory Response*, 7 YALE J. HEALTH POL'Y L. & ETHICS 39, 41 (2007).

29 For a discussion of the utilitarian/deontological divide in technology law, *see* Jerry Kang, *Race.Net Neutrality*, 6 J. ON TELECOMM. & HIGH TECH. L. 1 (2007) (focusing on communications law).

30 Pistone, *supra* note 9, at 15–16 (discussing the church's position on what is often termed "brain drain" immigration). Though encyclicals frequently lamented the emigration of skilled technical workers from poorer to richer countries, Pistone noted that this labor flow can be beneficial for both sending and receiving countries. *Id.* at 16-19. Perhaps in response to work like hers, the latest encyclical (*Caritas in Veritate)* does not appear to be as critical of such labor flows as earlier work. *See infra* note 40.

31 See, e.g., Pontifical Academy of Social Sciences, at http://www.vatican.va/roman_curia/pontifical_academies/acdsoc/.

32 BERNARD MANDEVILLE, THE GRUMBLING HIVE (1705) (*Fable of the Bees)* ("Thus every Part was full of Vice / Yet the whole Mass a Paradice.").

33 *See, e.g.,* SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, BONN GUIDELINES ON ACCESS TO GENETIC RESOURCES AND FAIR AND EQUITABLE SHARING OF BENEFITS ARISING OUT OF THEIR UTILIZATION III-IV (2002) [hereinafter BONN GUIDELINES], *available at* http://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf.

34 Martin Khor, *Indonesia's Move on Bird Flu Samples Highlights Key Access Issues*, THIRD

intensified, inequitable access to drugs may have led to a breakdown in the global public health system.

Most of those who would defend pharmaceutical companies' right to deny licenses to LDCs for prophylactic production of Tamiflu would likely condemn LDCs' decisions to use the samples as bargaining chips. However, the LDCs could offer a parallel, long-term perspective to defend their own actions. [35] They might argue that a more equitable international order is just as important as a thriving system of pharmaceutical research. Extrapolating from the principles of the Convention on Biological Diversity, they could characterize the virus as a type of "biodiversity," and demand "equitable sharing of the benefits" based on the profitability of drugs derived from it.[36] Like those advocating stricter patent laws for India, LDCs might characterize their own diversion of samples to native researchers as an effort to diversify the global supply of pharmaceutical research.

The denial of samples is a "weapon of the weak"[37]—one they might rationally, if not reasonably,[38] deploy if they feel hopelessly marginalized in international decision-making. Psychological research on the "ultimatum game" indicates that individuals are prone to disrupt distributive mechanisms perceived as unjust, even if they harm their own position in the process. Finally, LDCs might point to the US's reaction to the Anthrax scare in 2001—when the Bush Administration, normally a strong promoter of brand pharmaceutical companies' interests at home and abroad, made it very clear to Bayer that it had to produce cut-rate Cipro or risk compulsory licensing.[39] Breaking patents for one's own

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WORLD NETWORK (Feb. 18, 2007), http://www.twnside.org.sg/title2/intellectual_property/info.service/twn.ipr.info.020714.htm ("Up to now, WHO Member States that experience bird flu outbreaks provide samples of the virus isolates to WHO collaborating centres. At these centres, the isolates are used in the process of creating vaccine seed stocks, frequently using patented techniques . . . . But the vaccine producers, say many developing countries, are charging too much for the vaccines. Several countries raised the issue at the World Health Assembly last May.").

35 While most commentators were very worried by the development, some editorialists saw the decision as a good one for Indonesia. *See, e.g., Self-defence Is No Crime*, NEW SCIENTIST, Feb. 17, 2007, at 3 ("Good for Indonesia. . . . The country at the centre of the H5N1 bird flu storm has stopped sending virus samples to the WHO. Though this means that scientists cannot track H5N1's increasingly worrying evolution, which is bad, Indonesia is doing the only thing it can to protect its people. It has also brought an unpalatable truth out into the open. In a fair world, Indonesia would send its virus to the best labs and share in any vaccine made from it. In our world, Indonesia sends off its virus, companies make vaccine from it and sell it to countries that can pay. Indonesia is not one of them, and neither are the other countries suffering badly from H5N1.").

36 BONN GUIDELINES, *supra* note 33.

37 *E.g.*, JAMES C. SCOTT, WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE (1985).

38 *See* Leif Wenar, *Political Liberalism: An Internal Critique*, 106 ETHICS 32, 36–62 (1995) (describing the "five attributes of reasonable persons" in Rawls's work, which contrasts reasonable and merely rational persons).

39 *See* Merrill Goozner, *Medicine as a Luxury*, AMERICAN PROSPECT, Jan. 1, 2002, at A7, *available at* http://www.kff.org/about/goozner1.cfm ("Within a week of NBC anchor and

citizens, while denying that right to those abroad, is hypocritical.

The flu samples story shows the limits of positivism and economic analysis in the case of life-saving drugs. While a modern Mandeville might point out endless examples of privately selfish actions redounding to the benefit of all, sometimes self-interest sparks an arms race of mutually destructive self-regard. As Pope Benedict has recently put it, "Without internal forms of solidarity and mutual trust, the market cannot completely fulfil its proper economic function."[40] All markets rely on background norms of trust and fair dealing.[41]

This dualistic reality recalls a venerable—if now neglected—division in the social sciences. Consider two broad schools of social science: functionalist and conflict-oriented theories.[42] Functionalists are apt to explain how all parts of a given social order fit together, like the organs within a body. Conflict theories emphasize the importance of crisis, change, and exploitation. They emphasize how different classes, professions, ethnic groups, and states challenge one another for scarce material or symbolic resources.

Mainstream economic thought has tended toward functionalism. One of its basic ideas is the prevalence of mutual gains from trade given comparative advantage.[43] As individuals and groups specialize, they become more expert at what they do and more efficient in producing goods and services used by others. Gains from trade become the foundation of an economic order that promises increasing Gross Domestic Product, health status, and comfort.

The functionalist promise of both markets and democracy is an aggregative one—the idea that, in general, these social forms can organize human affairs better than any central planner could. As the Federalist Papers famously put it, the American constitutional system does not presume that "men are angels."[44]

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terror target Tom Brokaw's on-air declaration 'In Cipro we trust,' Health and Human Services Secretary Tommy Thompson . . . began sounding like the minister in charge of Canada's national health service. He threatened to void Bayer's patent for Cipro unless it delivered up to 300 million tablets at cut-rate prices.").

40 Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* ¶ 35 (June 29, 2009), *available at* http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html.

41 *See* DANIEL K. FINN, THE MORAL ECOLOGY OF MARKETS 5 (2006); FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 4 (1995).

42 *See* DENNIS H. WRONG, THE PROBLEM OF ORDER: WHAT UNITES AND DIVIDES SOCIETY 15 (1994); JEFFREY C. ALEXANDER, TWENTY LECTURES: SOCIOLOGICAL THEORY SINCE WORLD WAR II 36, 127, 156 (1987).

43 ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH 61–62 (1977) (describing the origins of the dominant schools of modern economic thought in the *doux commerce* school).

44 THE FEDERALIST NO. 51 (James Madison) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on

Reflecting the optimistic aspect of Enlightenment rationalism, Condorcet's theorem assured that, as long as most voters were more than likely right about a topic, the aggregation of their views should tend toward truth.[45] Adam Smith argued that an invisible hand of self-interest would deliver a general standard of living that good will alone could never generate.[46] Efficient markets promised to organize social life "behind the backs" of citizens and consumers.[47]

This story has broadly described life in much of North America, Western Europe, and Japan over the past sixty years. Wealthier parts of China and India have also experienced a great deal of growth since 1980 and 1990 (respectively). But what happens when critical resources–such as oil, timber, or wheat–are in short supply? Who continues to grow, and who stagnates (or contracts)? Given how quickly general technological superiority can be converted into military superiority, the stakes here are very high.[48] Functionalist social theory can only account for part of international economic dynamics. Legitimate adjudication of conflicts is crucial to orderly economic relations.

Eflornithine & the Many Facets of Buying Power

Religious thought does not only offer concrete exemplars of virtuous behavior. It also bequeaths us a sense of humility, a caution about our ability to shape the affairs of humankind for the better. To give a concrete sense of the unpredictability inherent to the policy enterprise, consider the story ofeflornithine, a drug with multiple uses: "A cure for sleeping sickness, a disease devastating parts of central Africa, may soon be available cheaply because it has a second, profitable use: it eliminates facial hair in women. The drug, eflornithine, is so effective at reviving even comatose patients that it is known as the resurrection drug."[49] As

government would be necessary.").

45 For a critical discussion of Condorcet, see JEREMY WALDRON, LAW AND DISAGREEMENT 136 (1999); CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE 25 (2006).

46 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS I.2.2 (1776) ("It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.").

47 As C. Edwin Baker describes, "Habermas observes that the market system separates [social results] from the 'lifeworld[s]' [prevalent in a society]. Money, rather than communicative action, provides the steering mechanism; when working properly, the market produces 'efficient' results behind the backs of the people in the society. That is, it produces results that are independent of their choices." C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 1006 (1997).

48 MICHAEL T. KLARE, RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT 6 (2001) ("[T]he protection of global resource flows is becoming an increasingly prominent feature of American security policy.").

49 Donald G. McNeil, Jr., *Cosmetic Saves a Cure for Sleeping Sickness*, N.Y. TIMES, Feb. 9, 2001, at A1 ("The Bristol-Myers Squibb Company and the Gillette Company have just introduced eflornithine in a facial cream, Vaniqa, and Bristol-Myers is close to an

Joel Waldfogel explains in *The Tyranny of the Market*, drug companies had ceased to manufacture eflornithine because its original source of demand (those with sleeping sickness) had very little purchasing power.[50] Once its depilatory properties were discovered, there was enough effective demand to make its production profitable.

The story of eflornithine fits into rival narratives about the development of drugs generally. For those who favor a market-based approach to drug research, it is a vindication of *laissez-faire*. Rather than relying on the heavy hand of government to try to direct the research undertaken at pharmaceutical firms, we can expect the "invisible hand" of the market to spin off solutions for everyone's problems—from the richest to the poorest. Innovations eventually filter down from the highest-income individuals to those with fewer resources.[51] When the wealthy spend on health care, it leads to investment in research infrastructure that ultimately redounds to the benefit of all.[52]

Those who favor more government intervention can dismiss the eflornithine story as an anecdote. They note that, of the 1300 compounds tested for safety and effectiveness by major drug companies from 1992–2005, only one percent were directed toward diseases that predominate in the developing world.[53] While the buying power of rich countries has indeed funded an infrastructure for research, that research has increasingly been focused on chronic diseases of the developed world—and has sometimes been diverted to enhancing appearance and sexual

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agreement with the World Health Organization and the medical charity Doctors Without Borders for the companies to make an injectable form to treat human African trypanosomiasis, better known as sleeping sickness.").

[50] JOEL WALDFOGEL, THE TYRANNY OF THE MARKET: WHY YOU CAN'T ALWAYS GET WHAT YOU WANT 41 (2007) ("[W]ealthy, hirsute women benefit poor Africans by helping to make profitable a product they both desire.").

[51] For a general account of this argument, see RICHARD A. EPSTEIN, OVERDOSE: HOW EXCESSIVE GOVERNMENT REGULATION STIFLES PHARMACEUTICAL INNOVATION 12 (2006) (arguing that " a system of strong property rights and clearly enforceable contracts, with minimal regulatory and judicial interference, offers the best hope for the revitalization of the pharmaceutical industry.). Epstein accepts both economic inequality generally and unequal access to health care particularly because he believes that buying power at the top promotes investment in medical advances, including pharmaceutical innovation.

[52] *See* Richard A. Epstein, *Epstein vs. Epstein: Drug Price Subsidies*, FACULTY BLOG UNIV. OF CHI. LAW SCH. (May 18, 2007, 7:00 AM), http://uchicagolaw.typepad.com/faculty/2007/05/epstein_vs_epst.html (On May 4, 2007, Richard Epstein debated himself, in an "event billed as *Epstein vs. Epstein*, and the topic was 'Why should the U.S. subsidize the world with our high prescription drug prices?'").

[53] Carl F. Nathan, *Aligning Pharmaceutical Innovation with Medical Need*, 13 NATURE MEDICINE 304 (2007), *available at* http://www.yale.edu/macmillan/igh/files/NathanNature.pdf.pdf ("'Among the 1223 new chemical entities commercialized from 1975 to 1997 . . . only 13 (1%) are specifically for tropical diseases . . . and only 4 (0.3%) may be considered direct results of R&D of the pharmaceutical industry . . .' Much clamor and a Nobel Peace Prize for MSF notwithstanding, the number of new medicines for diseases of types II and III remains proportionately miniscule today.") (citations omitted).

experience rather than curing illness. These trends in drug development will ultimately harm *everyone,* as research into antimicrobials is neglected and we leave ourselves vulnerable to the next plague.

There is no easy way to reconcile the functionalist and conflict-oriented responses to the current tamiflu controversy, the denial of bird flu samples, or the eflornithine phenomenon. Nor is it realistic to try to weigh whether incidents of "innovation redounding to the benefit of all"[54] somehow outweigh the rival narrative of excess buying power among the rich diverting resources from the poor.[55] What is required of policy makers here is less of the types of cost-benefit projections and economic models that are now so popular in the legal academy, and more of what John Keats called a "negative capability"—an ability to bear in mind and comprehend two contradictory ideas or trends. The "both-and" approach of the papal encyclicals on the economy provides one model for coming to terms with complexity.

B. *A Catholic Approach Toward Access to Drugs*

In his article *Intellectual Property and the Preferential Option for the Poor,* Thomas Berg argues that CST, properly understood, counsels in favor of access to life-saving drugs for sick persons in LDCs. After describing the plight of many citizens of these countries, and how the current global system of IP rights prevents them from accessing drugs, Berg marshals evidence that the Catholic Church recognizes that "the full extension of IP rights may harm the poor, and certain limits on those rights are important to benefiting and empowering the poor."[56] He points to concrete interventions by the Vatican in the debate over access to drugs:

> During the public controversy leading to the 2001 Doha declaration, both Pope John Paul II and the Vatican's observer at the WTO emphasized the "social mortgage" on private property, including intellectual property, and the requirement of social justice that essential human needs be met. Since then, Vatican officials have continued to urge greater access to generic drugs and have condemned regional and bilateral "TRIPS plus" agreements that "are more onerous for poor developing countries."[57]

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54 Epstein, *Epstein vs. Epstein*, *supra* note 52.
55 *See* ALASDAIR MACINTYRE, AFTER VIRTUE 95 (1981) (describing the types of "systematic unpredictability" that undermine "generalizations in social science").
56 Thomas C. Berg, *Intellectual Property and the Preferential Option for the Poor*, J. OF CATHOLIC SOCIAL THOUGHT, 193 199, (2008).
57 *Id.* at 197–198 (citations omitted).

Pope Benedict XVI's encyclical *Caritas in Veritate* affirms this line of thought. While CST acknowledges the innovation that capitalism in general (and IP law in particular) sparks, *Caritas in Veritate* judges that "[o]n the part of rich countries there is excessive zeal for protecting knowledge through an unduly rigid assertion of the right to intellectual property, especially in the field of health care."[58]

Given encyclicals' repeated condemnations of inequality, one may wonder about the degree to which concerns expressed in *Caritas in Veritate* about access to drugs are specifically addressing IP, or are instead a more generalized condemnation of inequality. This seminal passage from Pope Leo XIII's *Rerum Novarum* suggests that the central Catholic concern is with the universal destination of essential human goods, such as life-saving medicines:

> Among the many and grave duties of rulers who would do their best for their people, the first and chief is to act with strict justice—with that justice which is called in the schools distributive—toward each and every class. . . . Justice, therefore, demands that the interests of the working classes should be carefully watched over by the administration, so that they who contribute so largely to the advantage of the community may themselves share in the benefits which they create—that being housed, clothed, and bodily fit, they may find their life less hard and more endurable.[59]

Pope Leo XIII's recommendations here pivot on a distinction alien to most contemporary economic thought—between luxury and necessity, *i.e.*, between discretionary consumption and that which reduces pain and suffering.[60] In such a worldview, pharmaceutical research focused on deadly tropical diseases and infections should be a much higher priority than it is today.

The question of immediate access to life-saving drugs may be a more difficult one for CST. As mentioned above, mainstream economic analysis of intellectual property would likely underscore the tensions between the immediate addressing of the needs of

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58 *Caritas in Veritate*, *supra* note 40, at ¶ 22.

59 Pope Leo XIII, Encyclical Letter, *Rerum Novarum* ¶¶ 33, 34 (1891), *available at* http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html. As Donal Dorr notes, "the first of the social encyclicals must be seen as a very significant move of the church towards the side of the poor." DONAL DORR, OPTION FOR THE POOR: A HUNDRED YEARS OF VATICAN SOCIAL TEACHING 15 (Orbis Books 1983) (1983).

60 For historical analysis of the idea of luxury, see CHRISTOPHER J. BERRY, THE IDEA OF LUXURY (Quentin Skinner et al. eds., 1994).

the poorest and the long-term damage that policy interventions could do to the marketplace.[61] This conflict focuses attention on a key question for CST: To what extent does it conflict with traditional economic analysis of law? Can economics complement CST by helping us reconcile the apparent conflict between the interests of the current and future poor? Or is there such a deep tension between CST and economics that the deontological approach common to much religious thought clearly trumps the maximizing consequentialism at the heart of economic analysis?

George Garvey presents what is ultimately a complementarist view in his book chapter, *A Catholic Social Teaching Critique of Law and Economics*. Garvey first turns to Leo XIII's classic *Rerum Novarum,* a work which has been revised and extended in a series of later works issued by the Vatican. Garvey elaborates on several themes of CST in the 20th century.[62] First, "the principle of solidarity applies across national boundaries. The world's wealthiest nations are bound to promote the well-being of impoverished nations."[63] While "the right to private property is essential . . . all property is held in stewardship. The world's resources must be shared and respected."[64]

Even though he observes that "economic analysis and Catholic teachings are quite divergent," Garvey repeatedly recognizes the lasting contributions of economic thought to law. He believes that a "capitalistic, market-based economic order does foster many of the goals identified by Catholic social teaching as desirable," and argues that "economic analysts have shown how the law may best accommodate these goals."[65] For Garvey,

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61 *See, e.g.,* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003).

62 "Catholic social thought has naturally developed since *Rerum Novarum* . . . . Though never providing a universal 'blueprint' for reform, which must reflect the needs and circumstances of individual societies, the church's social teachings continue to make specific, practical recommendations to help resolve the problems that foster social and economic injustice in the world." George E. Garvey, *A Catholic Social Teaching Critique of Law and Economics*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 234 (Michael W. McConnell et al. eds., 2001).

63 *Id.* at 235 (citing PETER J. HENRIOT ET AL., CATHOLIC SOCIAL TEACHING OUR BEST KEPT SECRET (1989)); *see also* DORR, *supra* note 59.

64 Garvey, *supra* note 62, at 235. In *Centesimus Annus,* Pope John Paul II stated that*:* "It is a strict duty of justice and truth not to allow fundamental human needs to remain unsatisfied, and not to allow those burdened by such needs to perish . . . . It is also necessary to help these needy people to acquire expertise, to enter the circle of exchange, and to develop their skills in order to make the best use of their capacities and resources." Pope John Paul II, Encyclical Letter, *Centesimus Annus* 34 (1991), *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991 centesimus-annus_en.html. Thus, John Paul's updating of the tradition does not envision the impoverished persisting as perpetual wards of the wealthier nations, but rather calls for an overall program of development designed to produce not only more equal distribution, but also more equal production.

65 Garvey, *supra* note 62, at 239.

"Catholic social teaching seems to take up where economic analysis ends."[66] CST sets some basic moral requirements for society, but leaves the fundamental shape and direction of commercial life to economists. Focusing on the tension between solidarity and subsidiarity that is acknowledged throughout CST, Garvey's essay is less a "critique" of law and economics from a Catholic perspective than it is a reflection on how a Catholic citizen convinced of the validity and durability of market forces might seek to ameliorate their most negative impacts on the vulnerable.

To his credit, Garvey does not adopt the classic law and economics response to inequality—which is to insist that, whatever redistribution needs to occur, the wisest course is to allocate that function to a system of taxes and subsidies, and to permit "market forces" to govern the generation of wealth.[67] Garvey instead promotes a vision of integral development consistent with *Populorum Progressio*:

> An economic "underclass" cannot be tolerated as a price for the growth of aggregate wealth. The solution is not merely to provide the necessities of life to those who are impoverished, though that is surely a moral imperative. Experience seems to show that endless government payments breed dependency and a sense of alienation as debilitating as the most demeaning jobs. The solution promoted by modern Catholic teaching is to provide individuals with the tools they need to obtain meaningful jobs.[68]

This has become a profound problem as technology has made more workers redundant. This trend is likely to intensify in the future if present market forces continue unabated. Gregory Clark even goes so far as to argue that:

> the economic problems of the future will not be about growth but about something more nettlesome: the ineluctable increase in the number of people with no marketable skills, and

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66 *Id.* *Cf.* FINN, *supra* note 41.

67 For an application of this approach to copyright, see Daniel Benoliel, *Copyright Distributive Injustice* (bepress Legal Series, Working Paper No. 1497, 2006), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=6788&context=expresso ("[I]t is undesirable to instill our egalitarian commitments into copyright law, in which redistribution paradigmatically should remain only a side effect, even if their proposed function in this context is, indeed, rather moderate. In practice, moreover . . . redistribution through the government's tax, welfare and transfer system may be less discriminatory, cheaper and is likely to be more precise.").

68 Pope Paul VI, Encyclical Letter, *Populorum Progressio: Encyclical on the Development of Peoples* (Mar. 26, 1967), *available at* http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_26031967_populorum_en.html.

> technology's role not as the antidote to social conflict, but as its instigator. The battle will be over how to get the economy's winners to pay for an increasingly costly poor.[69]

In other words, if current economic trends continue unabated, the Catholic vision of integral development for all persons, reflected in the dignified experience of useful work, will be chimerical.[70]

That possibility is one reason to explore whether there is a deeper tension between CST and economic thought. If the basic methodology and moral outlook of positivist economics are at odds with the value-laden, "thick description" so common in CST, complementarist approaches like Garvey's may not adequately acknowledge the degree to which policy needs to change. For example, *Caritas in Veritate* contemplates an interventionism that is anathema to most economic analysts:

> Perhaps at one time it was conceivable that first the creation of wealth could be entrusted to the economy, and then the task of distributing it could be assigned to politics. Today that would be more difficult, given that economic activity is no longer circumscribed within territorial limits, while the authority of governments continues to be principally local.[71]

The Pope's insight here stems from his commitment to synthesis in an era of analysis. *Caritas in Veritate* comprehends the

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[69] Gregory Clark, *Tax and Spend, or Face the Consequences*, WASH. POST (Aug. 9, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/08/07/AR2009080702043_pf.html. *But see* JAMES K. GALBRAITH, THE PREDATOR STATE xiii (2008) ("[T]he setting of wages and the control of the distribution of pay and incomes is a social, and not a market, decision. It is not the case that technology dictates what people are worth and should be paid. Rather, society decides what the distribution of pay should be, and technology adjusts to that configuration. Standards–for pay but also for product and occupational safety and for the environment . . . also promote the most rapid and effective forms of technological change, so that there is no trade-off, in a properly designed economic policy, between efficiency and fairness.").

[70] For sustained reflections on the importance of work in human life, see John Paul II, Encyclical Letter, *Laborem Exercens* (1981), *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens_en.html.

[71] *Caritas in Veritate*, *supra* note 40, at ¶ 37. *See also* Chris William Sanchirico, *Exchange: Should Legal Rules Be Used to Redistribute Wealth? Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEG. STUD. 797 (2000) (arguing that "(1) even in the presence of an optimally redistributive tax, any concern for 'equity' dictates that legal rules should deviate from efficient standards in a manner that redistributes toward the less well-off; (2) any showing that differences in taxable attributes such as income or wealth are the dominant components of overall inequality would go only to the *direction* of the proper equity adjustment to legal rules, not to the fact that some adjustment should be made; and (3) the role of equity adjustments to legal rules is not limited to correcting inequalities arising within the legal system but extends to correcting inequalities arising in other areas of the economy.").

economic scene as a whole before prescribing any particular policy for one of its parts. This holistic method leads to discernment that has become rare in an overspecialized academy.[72] CST recognizes that tunnel vision can undermine the very moral commitments and understandings that we use to understand the appropriate scope and intensity of the division of labor.[73]

One hallmark of contemporary economic thought is methodological individualism—an effort to decompose the whole of social relationships into the sum of their parts. Economic analysis also aspires to strictly divide positive from normative questions.[74] CST implicitly rejects both methodological individualism and positivism. There are serious tensions between the maximizing, consequentialist approach of economists and the more holistic vision of a just social order that animates CST.[75]

As Lars Udehn has noted, economics is among the most methodologically individualistic of all the social sciences.[76] Contemporary economists have articulated research programs that methodically divide human endeavor into various compartments, each of which can be investigated by individual researchers. Recently, exponents of the "clean identification" school within economics have pushed the analytic envelope further, questing for rich data sets that permit the identification of direct relationships between variables.[77] This movement has influenced empirical legal scholarship generally, and IP scholarship in particular.

In contrast to these efforts to fragment reality into more tractable units of analysis, a holistic, synthetic vision drives CST.

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72 *See* BILL READINGS, THE UNIVERSITY IN RUINS (1996) (discussing rival conceptions of the university and the rise of content-free "excellence" as a *summum bonum* for the institution); GAYE TUCHMAN, WANNABE U: INSIDE THE CORPORATE UNIVERSITY (2009).

73 *See also* Frank A. Pasquale, *Technology, Competition, and Values*, 8 MINN. J. L., SCI. & TECH. 607, 608 (2007) ("Certain technologies . . . threaten to undermine collective values and perceptions commonly used to evaluate technology.").

74 BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 82 (1984) (describing economics as a "profession caught up in an extreme form of positivism that call[s] into question the meaningfulness of *any* normative judgments.").

75 *See* Garvey, *supra* note 62, at 224.

76 LARS UDEHN, METHODOLOGICAL INDIVIDUALISM: BACKGROUND, HISTORY, AND MEANING 229 (2001) (describing economics as "the individualist science").

77 *See* Robin Moroney, *Did 'Freakonomics' Spoil Economists?*, WALL ST. J. (Mar. 27, 2007, 5:49 PM), http://blogs.wsj.com/informedreader/2007/03/27/did-freakonomics-spoil-economists/ (discussing Noam Scheiber's *Review of Freakonomics*); Barry C. Lynn, *Why Economists Can't See the Economy*, NEW AMERICA FOUNDATION (Apr. 2007), http://www.newamerica.net/publications/articles/2007/why_economists_cant_see_the_economy_5058 (calling for a return of "institutionalists" to economics, who would "would study and model the power of large firms and trace the effects of these concentrations of power on such factors as pricing and employment. This approach implie[s] that markets are, at least indirectly, the products of law acting on or through the corporation and other institutions. It also implie[s] that the concentration of economic power, especially through a public institution like the corporation, transform[s] the affected marketplace into a largely if not entirely political realm.").

The encyclicals articulate a vision of *global* justice, based on an account of the nature and destiny of humankind as a whole. As *Caritas in Veritate* puts it:

> In an increasingly globalized society, the common good and the effort to obtain it cannot fail to assume the dimensions of the whole human family, that is to say, the community of peoples and nations, in such a way as to shape the *earthly city* in unity and peace, rendering it to some degree an anticipation and a prefiguration of the undivided *city of God*.[78]

Traditional economic goals of maximizing efficiency (at the micro-level) and gross domestic product (at the macro-level) do not necessarily create an "earthly city in unity and peace." While contemporary economists resort to complex mathematics to model production, CST is concerned with the basic conditions for human dignity and flourishing. Since its inception, it has been willing to challenge economic precepts in order to advance that vision.[79]

Admittedly, CST has many strands. Free market-oriented Catholic scholars, like Michael Novak and Stephen Bainbridge, have seized upon the principle of subsidiarity to discredit many government programs.[80] There is a litany of rationales for being cautious about government intervention: displacement of voluntary action by involuntary taxation; fears that, in an age of globalization, efforts to help the poor may actually end up making them less competitive; cultures of dependence and hopelessness softened by the dole.

All of these warnings must be heeded in the course of policymaking. But the realms of intellectual property and health care are more amenable to state action than other areas of the economy. The basic contours of "real property" are less malleable than the quicksilver matrix of intellectual property rights.[81] Epic battles over the scope of patent rights in the U.S. are routinely

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[78] *Caritas in Veritate*, *supra* note 40, at ¶ 7. As Paul VI wrote, "What we hold important is man, each man and each group of men, and we even include the whole of humanity." *Id.* at ¶ 43.

[79] As one commentator observes, the first social encyclical, *Rerum Novarum*, "challenged the current assumption that the 'laws' of economics should be treated as though they were laws of nature. . . . Pope Leo issued this challenge at the most obvious point of all, which is the most sensitive point: he questioned the sacrosanctness of the wage contract. He rejected the assumption that the employer's obligations in justice can be taken to have been fulfilled once the agreed wage has been paid." DORR, *supra* note 59, at 15–16.

[80] MICHAEL NOVAK, THE CATHOLIC ETHIC AND THE SPIRIT OF CAPITALISM (Free Press, 1993); Stephen Bainbridge, *Law & Economics: An Apologia*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael McConnell et al. eds., 2001).

[81] *See* William W. Fisher, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the U.S.*, *in* INTELLECTUAL PROPERTY RIGHTS: CRITICAL CONCEPTS IN LAW 72 (David Vaver ed., 2006), *available at* http://cyber.law.harvard.edu/people/tfisher/iphistory.pdf.

fought in the U.S. Congress. The U.S. Supreme Court has recently opined on a number of fundamental issues in patent law in rapid succession. Legislation like the Hatch-Waxman Act prescribes a regime of protections and obligations for drug manufacturers that is extraordinarily complex, and continually contested. The FDA is involved in every step of a drug's approval, and significantly constrains its marketing. Medicare Part D legislation also significantly increased the U.S. government's involvement in the pharmaceutical sector, providing an enormous amount of funding for spending on drugs for the elderly. International treaties like TRIPS also play a very important role in the pharmaceutical sector. In short, if there is one sector where state action is not simply a side constraint on "the market," but rather serves to constitute it, that sector is the pharmaceutical industry.[82]

Given the extensive extant involvement of the U.S. government both in the domestic pharmaceutical industry and in the international negotiations determining its powers and duties abroad, there is a special moral obligation for U.S. citizens and politicians to assure the widespread and equitable distribution of lifesaving drugs. The foremost challenge is to resist the naturalization of current pricing regimes as something inevitable that cannot be changed by legislation or negotiation. As *Caritas in Veritate* puts it:

> Sometimes *globalization* is viewed in fatalistic terms, as if the dynamics involved were the product of anonymous impersonal forces or structures independent of the human will. In this regard it is useful to remember that while globalization should certainly be understood as a socio-economic process, this is not its only dimension.[83]

Here, *Caritas in Veritate* has much in common with critiques of the U.S. productive process that are too fundamental to be welcome in mainstream economic analysis. While such approaches will likely be vigorously resisted in many quarters, they are becoming inevitable in health economics.

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[82] For broader questioning of the market/state divide, see Julie Cohen, Lochner *in Cyberspace: The New Economic Orthodoxy of 'Rights Management,'* 97 MICH. L. REV. 462 (1998) (discussing market and state divide); BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998); Duncan Kennedy, *The Stakes of Law, or, Hale and Foucault!,* 15 LEGAL STUDIES F. 327 (1991); BERNARD HARCOURT, THE ILLUSION OF FREE MARKETS (2010).

[83] *Caritas in Veritate*, *supra* note 40, at ¶ 21 ("Underneath the more visible process, humanity itself is becoming increasingly interconnected; it is made up of individuals and peoples to whom this process should offer benefits and development, as they assume their respective responsibilities, singly and collectively.").

Even in the famously free market of the U.S., the health sector is dependent on government subvention.[84] In exchange for massive subsidies, the government imposes myriad conditions on providers in order to assure certain outcomes. The extent of regulation has raised valid concerns about capture.[85] But in health care in general, and pharmaceuticals in particular, it is very difficult to seriously envision a completely free market system. A "coalition of relentless opponents of the regulatory framework on which public purpose depends" may well reduce their own obligations under law, but are unlikely to commensurately cut the subsidies they receive.[86] Mainstream health economists have already recognized the need for extensive state involvement in the sector.[87]

The key to further development of this line of thought is concentration on the concept of basic human needs.[88] One innovative proposal, the Health Impact Fund, proposes new policy levers in patent law and health care financing to promote more research on diseases prevalent in less developed countries.[89] The Access to Knowledge movement also concentrates on changing the law in order to relieve human suffering.

Conservative Catholic commentators may take umbrage at efforts to integrate the insights of health economics with key terms of CST, such as the "social mortgage," the "universal destination of human goods," and solidarity.[90] The proper balance between

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84 Steffie Woolhander & David U. Himmelstein, *Paying for National Health Insurance – and Not Getting It*, 21 HEALTH AFF. 88, 91 (2002).

85 Dean Baker, *Malpractice*, 34 BOSTON REVIEW 14 (2009), *available at* http://www.cepr.net/index.php/op-eds-&-columns/op-eds-&-columns/malpractice ("The pharmaceutical industry always invests heavily in political campaigns: no surprise, since governmental actions directly affect its profitability. For example, the Medicare Modernization Act, which created the Medicare prescription drug benefit, was largely crafted to meet the needs of the pharmaceutical industry. Almost immediately after the passage of the bill, Representative Billy Tauzin, who was Chair of the House Energy and Commerce Committee, became president of the Pharmaceutical Research and Manufacturers of America, the industry lobbying group . . . .").

86 JAMES K. GALBRAITH, THE PREDATOR STATE: HOW CONSERVATIVES ABANDONED THE FREE MARKET AND WHY LIBERALS SHOULD TOO 131 (2008).

87 *Geoffrey M. Hodgson*, Towards an Alternative Economics of Health Care, 4 HEALTH ECON., POL'Y & L. 99, 100 (2009) ("Leading mainstream health economists suggest that health care has special features that make it different from other domains of application, posing restrictions on the appropriateness of some neoclassical assumptions . . . . [T]he literature points to the presence in health care of externalities, information asymmetries, uncertainty, supplier-induced demand, and derived demand . . . .").

88 *Id.* ("I . . . identify the peculiarities of health care systems by building on the neglected but vital concept of need. By contrast, mainstream economics starts from the subjective satisfaction or utility of the individual. Modern mainstream economics rejects or ignores the concept of need, but many leading economists from Adam Smith to Alfred Marshall have acknowledged objective needs as well as subjective satisfactions.").

89 AIDAN HOLLIS & THOMAS POGGE, THE HEALTH IMPACT FUND: MAKING NEW MEDICINES ACCESSIBLE TO ALL 34 (2009).

90 Pope John Paul II has defined solidarity as the "firm and persevering determination to commit oneself to the common good . . . because we are all really responsible for all." Pope John Paul II, Encyclical Letter, *Sollicitudo Rei Socialis* ¶ 38 (Dec. 30, 1987), *available at*

market, state, and civil society will always be contestable. However, in the realm of pharmaceuticals, the "market" in question is so permeated by state action that traditional concerns about government smothering free enterprise are misplaced. To an extent much greater than the rest of the economy, we as citizens are directly and politically responsible for our health care system. Catholics are obliged to consider whether its outcomes are consistent with the vision of the common good so frequently and forcefully articulated in the social encyclicals.

III. CHANGING THE CONVERSATION: FROM FASHION POLICY TO CLOTHING POLICY

Do not judge according to appearance, but judge with righteous judgment.

—John, 7:24

Copyright protection for fashion design is a hot topic.[91] Designers have complained that knock-offs appear in cheap "flash fashion" retailers before they have a chance to sell originals in high-end stores. Fashion houses have asked courts to recognize distinctive "trade dress" as source-indicative, and therefore worthy of protection. The industry has also lobbied Congress for help. Convinced that current copyright and trademark law offers inadequate protection, it has proposed legislation to outlaw "design piracy." That campaign has led to a spirited debate on the wisdom of expanding intellectual property protection for fashion design.

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http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis_en.html. There is a tension in CST between the principle of solidarity, and a commitment to subsidiarity—i.e., to optimal governmental noninterference with units of the social order capable of conducting their own affairs. *See, e.g.*, Steven Bainbridge, *The Totalitarianism of Social Solidarity*, PROFESSORBAINBRIDGE.COM (Sept. 3, 2007, 1:59 PM), http://www.professorbainbridge.com/professorbainbridgecom/2007/09/the-totalitarianism-of-social-solidarity.html ("Social solidarity is yet another left-liberal rationale for paternalism.").

91 Fashion design is generally not protected by copyright because clothing is functional, and copyright only protects nonfunctional expression. As Sprigman and Raustiala explain, "Although trademarks protect famous fashion industry marks (Gucci, Prada, etc.), copyright protection has been withheld in the U.S. from virtually all fashion *designs* due to the 'useful articles' rule in U.S. copyright law. Copyright does not protect the aesthetic components of useful articles like apparel unless a particular garment's aesthetic appeal is somehow 'separable' from its usefulness in covering the human form." Kal Raustiala & Christopher Sprigman, *Where IP Isn't,* VA. L. REV. IN BRIEF (Jan. 22, 2007), http://www.virginialawreview.org/inbrief.php?s=inbrief&p=2007/01/22/raustialasprigman.

A. *Relativism in Defense of Fashion as a Vice*

There are several economic and moral arguments for protecting fashion design. Susan Scafidi, fashion law expert and author of the popular blog *Counterfeit Chic*, laments the plight of beginning designers whose works are copied by more established fashion houses.[92] She advocates protection for the "sketches, samples, fittings, patterns, models, hair, makeup, stylists, presentation space, photographers" necessary for true creativity in fashion.[93] Commentators like Scafidi consider the three years of protection proposed in the Design Piracy Prohibition Act ("DPPA") a small price for society to pay in order to fairly reward designers and ensure they continue to create.[94] For Scafidi, the DPPA would both deter the unjust enrichment of copyists, more justly reward original designers, and encourage the creation of more designs in the future.

Law professors Christopher Sprigman and Kal Raustiala also value fashion, but believe that a DPPA would do more harm than good. Sprigman and Raustiala observe that copyright and trademark law has grown enormously over the past few decades.[95] Some copyright holders exert control over even fragments of works.[96] Trademark owners can protect not only their marks, but also aspects of the packaging and design of their products.[97]

Intellectual property expansionists have claimed that strong rights are needed to maximize (or optimize) investment in music, books, marks, or other easily copied expression and source indication. Sprigman and Raustiala respond that, whatever its merits elsewhere, intellectual property protection is not necessary in the fashion industry. In couture, "[c]opying is rampant. . .[yet]

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92 Felix Salmon, *Susan Scafidi on Copyrighting Fashion*, PORTFOLIO.COM (Sept. 19. 2007, 12:00 AM) http://www.portfolio.com/views/blogs/market-movers/2007/09/19/susan-scafidi-on-copyrighting-fashion ("The designers who suffer from copying are the little guys–those whose designs are copied . . . ."); *see also* Susan Scafidi, *F.I.T.: Fashion as Information Technology*, 59 SYR. L. REV. 69, 71 (2008) (endorsing an expansive sense of fashion's value and importance).

93 Salmon, *supra* note 92.

94 Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007); Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007); *Design Piracy Prohibition Act: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. (2006).

95 Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006); *see also* Amy Kapzcynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L. J. 804, 806 (2008).

96 Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 580 (2005) (discussing "blatant efforts to propertize very small pieces of copyrightable material and cases in which courts have suggested that extremely fine-grained res, i.e., microworks, can enjoy independent copyright protection"); Thomas F. Cotter, *Memes in Copyright,* 80 TUL. L. REV. 331, 409 n.3 (2005) (discussing dispute over whether the shape of Barbie's nose is copyrightable).

97 *See* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 776 (1992).

innovation[] and investment. . .remain vibrant."[98] The authors attempt to solve this "piracy paradox" by describing how the "snob utility" of high fashion is preserved via "induced obsolescence."[99] As a design gets copied, its value falls precipitously—driving early adopters to buy newer designs. *The Piracy Paradox* is part of a larger genre of projects to examine innovation "where IP isn't"—the many areas of life where creativity and intellectual production appear to be incentivized by norms and motivations outside the combination of legal rights and market forces associated with traditional intellectual property protections.[100]

Sprigman and Raustiala's work follows in the footsteps of Robert Ellickson's careful attention to norms in *Order Without Law*,[101] and Lawrence Lessig's typology of markets, norms, and architecture as modalities of influencing behavior complementary to law.[102] It is cutting-edge, counterintuitive, and elegantly expressed. But it sidesteps some normative questions about induced obsolescence that point to new directions for IP scholarship—including recognition of wisdom traditions that disclose moral guidance beyond consumer preferences.

Couture is often a positional good—that is, its value depends at least in part on how it compares with other designs, apart from qualities inherent in the design itself. Economist Robert H. Frank has exhaustively studied the wasteful spending associated with positional goods, in both economics and law journals.[103] Over twenty years ago, Frank's groundbreaking *Choosing the Right Pond*[104] focused on the importance of status in everyday life, eloquently documenting subjective dissatisfaction beyond the familiar

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98 Raustiala & Sprigman, *supra* note 95, at 1689. Other scholars claim that past innovation in fashion is no guarantee of future innovation. Scafidi, *supra* note 92, at 88–89.

99 Raustiala & Sprigman, *supra* note 95, at 1718, 1718 n.60.

100 Sprigman has also examined the norms of stand-up comedy (where jokes are not protected). Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1789 (2008). MIT professor Eric von Hippel has examined the norms of creativity prevailing among French chefs. Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008). A 2008 conference at Fordham Law School, *Worlds Colliding*, examined the interaction between market and non-market forces in creating incentives—or frameworks for cultural support—for immaterial production.

101 ROBERT C. ELLICKSON, ORDER WITHOUT LAW 45 (1991).

102 LAWRENCE LESSIG, CODE 34 (1996).

103 While economists usually model personal preferences as independent of the preferences of others, relative preferences for status or regard exist only in the context of some hierarchical scale. Such preferences give rise to the phenomenon of the "positional good," "whose value depends in significant part on how it compares with goods in the same class consumed by others." Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. CHI. L. REV. 323, 337 (2001). For example, one might buy a custom-made suit for a job interview, not merely in order to conform to a dress code and to look good (objective goods), but to look *better than* other applicants (a positional good).

104 ROBERT H. FRANK, CHOOSING THE RIGHT POND 25 (2007); ROBERT H. FRANK, THE DARWIN ECONOMY (2011).

"hidden injuries of class."[105] Drawing on the economic theory of auctions, he demonstrates that individuals can waste time and money in positional "arms races;" as they strive for status via observable goods, they end up with "longer commutes, larger debts, and more stress."[106] Frank's *Luxury Fever* chronicled the disastrous effects of "spending cascades" unleashed by increasing levels of inequality. As the near-rich strived to emulate the ever-wealthier rich, the middle class strived to emulate the near-rich, leading to extraordinary levels of indebtedness.[107] Consequent consumer deleveraging is undermining economic recovery to this day. Frank followed a line of social critics who decried the wasteful race for goods that are valued primarily to the extent others are denied them.

Frank's work is a short step away from more substantive critiques of consumerism, including those encountered in papal encyclicals.[108] Criticized as unsustainable in green circles, waste has been characterized as sinful in Catholic thought. For example, Pope Paul VI offers one of the most urgent critiques of consumerism in his encyclical *Populorum Progressio*. He asks:

> What are less than human conditions? The material poverty of those who lack the bare necessities of life, and the moral poverty of those who are crushed under the weight of their own self-love . . . No one may appropriate surplus goods solely for his own private use when others lack the bare necessities of life.[109]

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105 RICHARD SENNETT & JONATHAN COBB, THE HIDDEN INJURIES OF CLASS (1972).

106 ROBERT H. FRANK, LUXURY FEVER (2000); Robert H. Frank, *The Demand for Unobservable and Other Nonpositional Goods*, 75 AM. ECON. REV. 101, 102–03 (1985).

107 *See* Elizabeth Warren, *The Middle Class on the Precipice*, HARV. MAG., Jan.-Feb. 2006, *available at* http://www.harvardmagazine.com/on-line/010682.html. Benedict XVI has directly criticized the "Promethean presumption" evidenced in ever-growing debt-fueled consumption. *Caritas in Veritate*, *supra* note 40, ¶¶ 45, 68.

108 *Caritas in Veritate*, *supra* note 40, ¶ 34 ("*Charity in truth* places man before the astonishing experience of gift. Gratuitousness is present in our lives in many different forms, which often go unrecognized because of a purely consumerist and utilitarian view of life."); *The Papacy: Populorom Progressio*, TIME, Apr. 7, 1967, *available at* http://www.time.com/time/magazine/article/0,9171,843548,00.html ("He renewed his call, made during his 1964 visit to Bombay, for a world fund made up of a portion of the money now spent on armaments to 'relieve the most destitute of this world.' Whatever the channels, he declared, 'superfluous wealth of rich countries should be placed at the service of poor nations.' Otherwise, he predicted, the 'continued greed' of the rich nations 'will certainly call down upon them the judgment of God and the wrath of the poor, with consequences no one can foretell.'").

109 *Populorum Progressio*, *supra* note 68, at ¶¶ 21; 23. Paul VI deftly shifts from individual to collective prescriptions. *Id.* at ¶¶ 40, 45 ("Christ's question is directed to nations also: 'What does it profit a man, if he gains the whole world but suffer the loss of his own soul?' . . . . 'If a brother or a sister be naked and in want of daily food,' says St. James, 'and one of you say to them, "Go in peace, be warm and filled," yet you do not give them what is necessary for the body, what does it profit?'").

Positional competition in appearance not only wastes resources in the present, but also encourages an arms race that draws others into vanity. Having witnessed crushing poverty in his trips abroad, Paul VI concluded that "superfluous goods of wealthier nations ought to be placed at the disposal of poorer nations."[110] Pope John Paul II declared that excessive spending not only wastes resources, but also harms the soul of the spender.[111] In *Caritas in Veritate*, Pope Benedict XVI renews this call, inviting "contemporary society" to a "serious review of its life-style, which, in many parts of the world, is prone to hedonism and consumerism, regardless of their harmful consequences."[112] The encyclical warns of the "Promethean presumption" evidenced in reliance upon the "'wonders' of finance in order to sustain unnatural and consumerist growth."[113]

For these pontiffs, shopping enthusiasts are not merely confused about the psychology of satisfaction.[114] They participate in a culture that is sinful—in the etymological sense of our "falling short" of that which God calls us to be. Secular value systems also support this condemnation of waste. For example, James Grimmelmann and Wendy Gordon offer criticism of status competition in their posts on *The Piracy Paradox* on the University of Chicago Faculty Blog. Grimmelmann complains that Sprigman and Raustiala avoid "any discussion of whether society in general is better or worse off because copyright doesn't seriously protect fashion designs."[115] Grimmelmann feels that this failure to engage with first principles is a problem for Sprigman and Raustiala because "their analysis of induced obsolescence seems to fit nicely

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110 *Id. at* ¶ 49. *See also* RAYMOND TALLIS, HUNGER 137 (2008) ("The question then arises as to how, individually and collectively, we may manage our hungers: individually so that we are not perpetually eaten from within by what we feel are unmet needs, by lacks, by ever-proliferating wants and wants arising out of wants; and collectively so that we shall not destroy each other, in a competition for resources to fuel spiraling needs and support a rising curve of consumption, thereby leaching the planet of the sum total of its beneficence.").

111 CST has repeatedly, and passionately, complained about social inequality. On its terms, inequality not only harms the poor, but also its ostensible beneficiaries, the affluent. Excessive earnings tempt the wealthy to trivial, surface-oriented spending. In discussing the "phenomenon of consumerism" in *Centesimus Annus* (written on the hundredth anniversary of *Rerum Novarum*), Pope John Paul II stated "It is not wrong to want to live better; what is wrong is a style of life which is presumed to be better when it is directed towards 'having' rather than 'being,' and which wants to have more, not in order to be more but in order to spend life in enjoyment as an end in itself." *Centesimus Annus*, *supra* note 64, at ¶ 36.

112 *Caritas in Veritate*, *supra* note 40, at ¶ 51.

113 *Id.* at ¶ 68.

114 Such critiques are compiled by Avner Offer. AVNER OFFER, THE CHALLENGE OF AFFLUENCE 371 (2006) ("a genuine culture of service to others, a sense of humility and proportion is worth restoring as an ideal to strive for, to delegitimize the destructive (and ultimately self-defeating) pursuit of self-interest, power, dominance, status.") .

115 James Grimmelmann, *Is Fashion a Bad?*, U. CHI. LAW SCH. FAC. BLOG (Nov. 14, 2006, 10:14 AM), http://uchicagolaw.typepad.com/faculty/2006/11/is_fashion_a_ba.html.

into another classic theme in political economy: how an industry can sometimes arrange its market to its own benefit but to the detriment of society."[116]

Sprigman and Raustiala cite to Thorstein Veblen's "norm of conspicuous waste" to support their own argument about the benefits of the fashion cycle *for designers*, but are less willing to engage the larger question of whether fashion is good for society.[117] This is troubling because theorists like Nicholas Xenos and Pierre Bourdieu have characterized processes celebrated by Sprigman and Raustiala as naked social exclusion:

> [Often] the first function of fashionable objects . . . [is] to distinguish "us" from "them"—it is a negative identity (we are not them) transmitted through an affirmative judgment (the sharing of good taste) . . . . [G]ood taste requires the abandonment of fashionable new objects once they have become common currency, and hence no longer marks of distinction–though it sometimes happens that the fashionable set, accustomed to the rapid changes in style necessitated by its precarious social lead, moves on to new styles without the old ones filtering down . . . .[118]

Xenos characterizes fashion as a font of social stratification and resentment.[119]

Through an online symposium, Sprigman offers a few responses to such substantive critiques. Appealing to the fashionable metanarratives of evolutionary biology, he states that his "working hypothesis is that humans are status-hungry, and that this hunger is a basic part of our biological heritage."[120] What the religious might find a form of original sin is here rechristened and legitimized as biological drive. He also speculates that any policy effort to short-circuit a status arms race in one arena of human endeavor will just lead to more intense striving in another, equally irrelevant one.[121]

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116 *Id.*
117 Sprigman & Raustiala, *supra* note 95, at 1727.
118 NICHOLAS XENOS, SCARCITY AND MODERNITY 18 (1989).
119 *See id.* at 21 ("Chasing an image of what we would like to be like, we are less likely to be satisfied with what we are at any moment. We resent those whom we cannot catch and those whom we perceive as trying to catch us. Consuming is the activity of a democracy of signs; resentment is its final judgment.").
120 Christopher Sprigman, *Bad Fashion, Bad Marks–Bad Genes?*, U. CHI. LAW SCH. FAC. BLOG (NOV. 14, 2006, 2:34 PM), http://uchicagolaw.typepad.com/faculty/2006/11/bad_fashion_bad.html. *See also* Brian Leiter & Michael Weisberg, *Why Evolutionary Biology Is (So Far) Irrelevant to the Law* (U. of Tex. Law Sch. Pub. Law, Research Paper No. 89, 2007).
121 *See* Sprigman, *Bad Fashion, supra* note 120 ("If humans are incorrigible status competitors, then regulating one status race is likely to shift status-racing demand to another forum. Big houses. Fancy cars. More opulent churches. Too much post-graduate education. None of this sounds any better to me than positional consumption

The gulf between those with an objective account of human flourishing, and liberal relativists, cannot be easily bridged. Rather, it brings to mind these words from Catholic philosopher Charles Taylor:

> We can speak here not only of error, but of illusion. We speak of "illusion" when we are dealing with something of greater substance than error, error which in a sense builds a counterfeit reality of its own. But errors of interpretation of meaning, which are also self-definitions of those who interpret and hence inform their lives, are more than errors in this sense: they are sustained by certain practices of which they are constitutive.[122]

We are all familiar with the practices sustaining contemporary ironists: a sophisticated distance from questions of ultimate value; a self-deprecating irony about recommending any given way of life as better than others.[123] They have good company; John Rawls has defended from criticism the life plan of a hypothetical person whose only aspiration was counting blades of grass.[124] Those skeptical of such a thin philosophical anthropology must propose a more substantive and hopeful account of the nature and destiny of man.[125]

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of fashion."). This "pushpin as good as poetry" approach reminds one of Bernard Lonergan's tragic sense of cultural decline: "The better educated become a class closed in upon themselves with no task proportionate to their training. They become effete. The less educated and uneducated find themselves with a tradition that is beyond their means. They cannot maintain it. They lack the genius to transform it into some simpler vital and intelligible whole. It degenerates. The meaning and values of human living are impoverished. The will to achieve both slackens and narrows. Where once there were joys and sorrows, now there are just pleasures and pains." BERNARD LONERGAN, METHOD IN THEOLOGY 99 (1972).

122 Taylor, *supra* note 13, at 54–55 ("[I]n the sciences of man in so far as they are hermeneutical there can be a valid response to 'I don't understand' which takes the form, not only 'develop your intuitions,' but more radically 'change yourself.' This puts an end to any aspiration to a value-free or 'ideology-free' science of man. A study of the science of man is inseparable from an examination of the options between which men must choose.").

123 For reflections on the corrosive effect of irony, *see* JEDEDIAH PURDY, FOR COMMON THINGS: IRONY, TRUST, AND COMMITMENT IN AMERICAN LIFE 212 (2000) (describing "detachment that avoids taking anything or anyone all that seriously" as a "dogmatic skepticism").

124 JOHN RAWLS, A THEORY OF JUSTICE 372-83 (rev. ed. 1999) (1971); *Populorum Progressio*, *supra* note 68, at ¶ 32-33; NATURAL LAW, LIBERALISM, AND MORALITY: CONTEMPORARY ESSAYS 61 (Robert P. George ed., 1994); THOMAS NAGEL, THE VIEW FROM NOWHERE 209 (1986) ("[I]f we continue along the path that leads from personal inclination to objective values and ethics, we may fall into nihilism. . . . We may reach a standpoint so removed from the perspective of human life that all we can do is to observe: nothing seems to have value of the kind it appears to have from inside, and all we can see is . . . human *valuing* as an activity or condition.").

125 For an example of scholarship willing to engage with these more substantive questions by "advanc[ing] a substantive conception of a just and attractive intellectual culture," see William W. Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1746 (1988) (offering, in one part, a "utopian analysis" of copyright policymaking which "proceeds from the propositions, sometimes associated with the Aristotelian tradition of moral philosophy, that there exists such a thing as human nature, which is mysterious and complex but nevertheless stable and discoverable, that people's nature causes them to

In Sprigman's view, we cannot rise far above our animal nature: "[i]f status competition (via clothing or something else) is hard-wired into our brains, legal rules discouraging fashion status races – whether relaxed trademark dilution rules or firmed-up copyright doctrine – is spitting into the wind."[126] This is a rather dark view of human nature upon which to base policy recommendations. To the extent that social theories have a tendency to become self-fulfilling prophecies, we should be particularly wary about accepting it.[127] Eschewing value judgments, Sprigman and Raustiala do not attempt to find intrinsic meaning in fashion, even going so far as to quote Jean Cocteau's observation that "[a]rt produces ugly things which frequently become more beautiful with time. Fashion . . . produces beautiful things which always become ugly with time."[128] But why should anyone care about the ideal innovation regime for such a frivolous or even harmful area of human endeavor?[129]

This "so what" gap is symptomatic of a larger problem in the legal study of incentives. Brilliant scholars have promoted rival methods of promoting new clothing design. But many remain agnostic about the ultimate value of such creativity.[130] Like contemporary economists, they have sought the authority of science, not morality, for their pronouncements.[131] As

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flourish more under some conditions than others, and that social and political institutions should be organized to facilitate that flourishing"). As Fisher argues, "it makes sense to reflect upon the sort of life we would most like to live and the society that would most conduce to its widespread attainment, and then to determine how a field of law could be reshaped to bring us closer to those ideals." *Id.* at 1795.

126 Sprigman, *Bad Fashion*, *supra* note 120.

127 *See* Iris Murdoch, *Metaphysics and Ethics*, in Peter Conradi (ed.), EXISTENTIALISTS AND MYSTICS: IRIS MURDOCH'S WRITINGS ON PHILOSOPHY AND LITERATURE ("Man is a creature who makes pictures of himself and then comes to resemble the picture. This is the process which moral philosophy must attempt to describe and analyse."). *See also* DONALD MACKENZIE, AN ENGINE, NOT A CAMERA: HOW FINANCIAL MODELS SHAPE MARKETS (2006) (describing how economic theorists of finance helped create modern derivative markets); Joel Isaac, *Tangled Loops: Theory, History, and the Human Sciences in Modern America*, 6 MODERN INTELL. HIST. 397, 420 (2009) (quoting Marion Fourcade, *Theories of Markets and Theories of Society*, 50 AM. BEHAV. SCIENTIST 1015, 1025 (2007)) ("[S]cholars are rejecting the traditional notion that economics attempts to create freestanding representations of market processes (which economic sociologists must then insist leaves out power, or cultural context, or the fullness of human agency). Advocates of the performative approach 'recognize economics not as a (misguided) science of capitalism but as its technology, that is, as one of the active ingredients in the production and reproduction of the market order.'").

128 Raustiala & Sprigman, *supra* note 95, at 1719.

129 For an inventive take on this problem, *see* Christopher A. Cotropia & James Gibson, *The Upside of Intellectual Property's Downside*, 57 UCLA L. REV. 921, 922-24 (suggesting that excessive IP protection, which impedes innovation, may be ideal for harmful types of IP, including tax patents, pornography, and fashion.).

130 As Weber might put it: "For of the last stage of this cultural development, it might well be truly said: 'Specialists without spirit, sensualists without heart; this nullity imagines that it has attained a level of civilization never before achieved.'" MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 182 (Talcott Parsons trans., Routledge 1992) (1930).

131 JAMES R. HACKNEY, JR. UNDER COVER OF SCIENCE: AMERICAN LEGAL-ECONOMIC THEORY

practitioners of a methodologically individualistic social science, "most economists believe that the core of economics can be developed with no assumptions at all about what an economy should aim to provide."[132] Many practitioners of law and economics have also aspired to value-neutrality, leaving an opening for other public intellectuals to argue for the substantive importance of fashion.[133]

For example, Virginia Postrel has attempted to defuse the "wasteful status competition" critique by developing an account of the positive aspects of fashion (and design generally) beyond its status-conferring function.[134] Postrel argues for social recognition of the pleasures—be they refined or simple—that good design affords. Speaking lyrically of "goods' intrinsic sensory appeal," she observes that:

> [p]eople pet Armani clothes because the fabrics feel so good. Those clothes attract us as visual, tactile creatures, not because they are "rich in meaning" but because they are rich in pleasure. The garments' utility includes the way they look and feel.[135]

Postrel turns the critique of luxury fashion back on itself, imputing both Puritanism and Philistinism to its purveyors. Those who do not appreciate fashion are imposing their own subjective value judgments on others. Alternatively, they fail to appreciate the pleasures it brings—they are anhedonic, or their own sense of style is underdeveloped or gauche.

Unfortunately for Postrel, the Puritan/Philistine line of

AND THE QUEST FOR OBJECTIVITY xvi (2006) ("Legal-economic theory has historically been enthralled by scientism. By cloaking legal-economic theory (an enterprise that is shot-through with wealth distribution politics) in science, theorists act to legitimate their preferred political-economic systems.").

132 John Dupre & Regenia Gagnier, *The Ends of Economics*, *in* THE NEW ECONOMIC CRITICISM: STUDIES AT THE INTERSECTION OF LITERATURE AND ECONOMICS 149 (Martha Woodmansee ed., 1999).

133 As Elizabeth Anderson has argued, "To value or care about something in a particular way involves a complex of standards for perception, emotion, deliberation, desire, and conduct that express and thereby communicate one's regard for the object's importance." ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 11 (1993). It is often difficult or impossible to express such "perception, emotion, deliberation, desire, and conduct" in monetary terms. *Id.*

134 VIRGINIA POSTREL, THE SUBSTANCE OF STYLE: HOW THE RISE OF AESTHETIC VALUE IS REMAKING COMMERCE, CULTURE, AND CONSCIOUSNESS 78 (2003) ("The status critique sees only two possible sources of value: function and meaning; and it reduces meaning to a single idea: 'I'm better than you.' It denies the existence or importance of aesthetic pleasure and the many meanings and associations that can flow from that pleasure. Luxuries, in this view, offer no intrinsic appeal beyond their social signals. But only superficial people, filled with status-anxiety and insecure about their own worth, would care about those meanings. By circular reasoning, then, to be attracted to such goods is to be a superficial person.").

135 *Id.* at 77.

attack is internally unstable. Though an old bromide (and a famous article) warn us *de gustibus non est disputandum*, engagement with fashion's critics requires its defenders to promote their own, presumably refined tastes.[136] Neutrality is impossible, particularly when we are called upon to revise the established subject matter of copyright in order to protect clothing designs. To call fashion's critics Puritanical is to arrogate for oneself the benign, nonjudgmental mantle of liberal neutrality. The argument for the positive good of fashion necessarily involves a judgment of taste—that fashion's critics somehow do not understand or appreciate its importance, while its promoters do.

B. *Rescuing Virtue and Equality*

Nevertheless, two of Sprigman and Raustiala's leading critics—Scott Hemphill and Jeannie Suk—try to pursue both sides of the Puritan/Philistine critique in their promotion of fashion.[137] Their account of the "the law, culture, and economics of fashion" not only offers a positive account of the worth of fashion, but also accuses those who oppose design protection for fashion of unfairly discriminating against a valuable form of innovation.

In a section entitled "Why Promote Innovation in Fashion?," Hemphill and Suk address those who believe "we would be better off if fashion did not exist and if clothing were used only for the literal purpose of covering the body or keeping warm."[138] Hemphill and Suk recognize the spiritual roots of such concerns, including "religious traditions from Christianity to Buddhism [which] reject[] luxury spending on garments and promote[] plain garb."[139] But rather than engaging with those traditions, they retreat to a series of rhetorical moves implicitly rejecting their relevance not merely to fashion law, but to intellectual property policy generally. Hemphill and Suk integrate cultural accounts into their account of fashion selectively, refusing to address religious aspects of culture.

Instead, Hemphill and Suk embrace revealed preferences as the ultimate touchstone of value.[140] Their explanation here is

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136 Gary S. Becker & George J. Stigler, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76, 78 (1977).

137 Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147 (2009).

138 *Id.* at 1161.

139 *Id.* at 1162.

140 This is an unsurprising retreat, given the state of the field. As Julie Cohen has noted, "[T]he purported advantage of rights theories and economic theories is neither precisely that they are normative nor precisely that they are scientific, but that they do normative work in a scientific way. Their normative heft derives from a small number of formal principles and purports to concern questions that are a step or two removed from the

worth quoting in full because it explicitly articulates assumptions that remain tacit in most similar work:

> It is no more logical to denigrate the value fashion choices confer upon consumers than to denigrate the value of the best-selling thriller many are reading or the hit song many are listening to . . . The choice to purchase these goods is, on our welfare account, evidence of value, and that is unrelated to the quality or merits of particular cultural products or genres of cultural production. Indeed it is the only evidence that can be measured, short of a separate normative assessment of whether people are wise to desire the things they do. Here we assume the desirability of investments in creative goods and in fashion as a creative good.[141]

Money is a universal solvent here: "choice to purchase" is a revealed preference that translates liberal neutrality into the language of economics. Though this method will barely capture (if at all) what is valued by those without the ability (or inclination) to purchase much, it is presented as the best form of analysis available.[142]

But this revealed preference reasoning supports Sprigman and Raustiala (who suggest that the fashion industry is thriving as

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particular question of policy to be decided. . . . These theories manifest a quasi-scientific neutrality as to copyright law that consists precisely in the high degree of abstraction with which they facilitate thinking about processes of cultural transmission." Cohen, *supra* note 10, at 1157. Charles Taylor has frequently argued that good social science need not be measured by the degree to which it mirrors experiment in the natural sciences—or, in Cohen's terms, the degree to which it "do[es] normative work in a scientific way." *Id. See* Taylor, *supra* note 13, at 45.

141 Hemphill & Suk, *supra* note 137, at 1162–63. Hemphill and Suk echo the sentiments of Christopher Yoo in the network neutrality debate; namely, that any noneconomic value must be translated into some measurable quantity before it can influence the policy process. Yoo has demanded this kind of accounting in the context of net neutrality. Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J. L. & TECH. 1, 54 (2005) ("There is nothing incoherent about imposing regulation to promote values other than economic welfare. [But unless they] trump[] all other values, such a theory must provide a basis for quantifying the noneconomic benefits and for determining when those benefits justify the economic costs."). *But see* LISA HEINZERLING & FRANK ACKERMAN, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 8 (2006) ("The basic problem with narrow economic analysis of health and environmental protection is that human life, health, and nature cannot be described meaningfully in monetary terms; they are priceless.").

142 Hemphill and Suk do acknowledge residual concerns about the relative value of various forms of cultural production. Hemphill & Suk, *supra* note 137, at 1162–63 ("We may of course engage in value judgments about, say, the artistic value of Grisham relative to Proust, of pop music relative to Bach–and of fashion relative to literature and music. But that kind of hierarchical value distinction among cultural products is not to be confused with the notion of value on which we rely here."). But they refuse to incorporate those concerns in their work, opting instead to concentrate on the observable. This approach recalls the "thinking lampooned in a standard joke: A drunk man rationalizes searching for his keys under the lamppost, even though he lost the keys somewhere else, by insisting that it makes sense to search where the light is good." Paul Pierson, *Public Policies as Institutions, in* RETHINKING POLITICAL INSTITUTIONS: THE ART OF THE STATE 120 (Ian Shapiro *et al.*, eds., 2006).

it stands, as consumers are choosing to buy its current products) as much as it advances Hemphill & Suk's argument. Would a DPPA spark new or different forms of creativity? Even if that is the case, how can Hemphill & Suk jump from the "is" of current legal treatment of books, movies, and music to the "ought" of how fashion policy should made?[143] The fact-value distinction is a formidable barrier for a revealed preference framework.

Hemphill and Suk attempt to sidestep these difficulties by treating "fashion consumption the same way we would ordinarily treat the consumption of other nonharmful goods that have creative and expressive components, such as books, music, films, and art."[144] Given Robert H. Frank's work on the harms arising out of positional competition[145] (and documented evidence of the orthopedic problems caused by high heels),[146] fashion's status as "nonharmful" is not uncontroversial.[147] They claim that it is "difficult to see how the argument about wastefulness or immorality of spending on a coveted suit or dress would be different in kind from paying a sum for a work by a highly regarded painter."[148] But the rarefied expenditures of the art world's elite bear little resemblance to the strapped middle class's efforts to keep up with the fashion treadmill of planned obsolescence and resulting expenditure cascades.[149]

Hemphill and Suk posit a status function in several different forms of expression. They argue that:

> Signals of status are undeniably present in all these goods (just think of the high-end art market, high-brow literary fiction, or

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143 Such questions naturally arise when we step away from the satisfaction of preferences as a policy goal and consider the conditions for their formation. As Daniel Weinstock observes, "One of [Charles] Taylor's principal philosophical achievements has been to discredit a view of human agency according to which action can be understood solely in terms of agents' preferences and of their efforts to satisfy those preferences, and to suggest the greater plausibility of a model emphasizing agents' second order reflection upon such preferences, and the evaluative frameworks which make such second-order reasoning possible." Daniel M. Weinstock, *The Political Theory of Strong Evaluation, in* PHILOSOPHY IN AN AGE OF PLURALISM 171 (James Tully ed., 1994).

144 Hemphill & Suk, *supra* note 137, at 1162.

145 Robert H. Frank, *Positional Externalities Cause Large and Preventable Welfare Losses*, 95 AM. ECON. REV. 137 (2005).

146 Brenna Maloney, *The Effects of High Heels on the Body*, WASH. POST (May 8, 2007), http://static.record-eagle.com/2007/may/23shoe.pdf (discussing Morton's neuroma, hammertoes, bunions, metatarsalgia, and many other potential ailments).

147 For discussion of Robert Frank, see Robert H. Frank, *Positional Externalities Cause Large and Preventable Welfare Losses*, 95 AM. ECON. REV. 137 (2005). For details on the orthopedic harms from high heels, see Brenna Maloney, *The Effects of High Heels on the Body*, WASH. POST (May 8, 2007), http://static.record-eagle.com/2007/may/23shoe.pdf (discussing Morton's neuroma, hammertoes, bunions, metatarsalgia, and many other potential ailments).

148 Hemphill & Suk, *supra* note 137, at 1162; *see also* Francie Ostrower, *The Arts as Cultural Capital Among Elites: Bourdieu's Theory Reconsidered*, 26 POETICS 43 (1998).

149 For more on art world spending, *see* DON THOMPSON, THE $12 MILLION STUFFED SHARK: THE CURIOUS ECONOMICS OF CONTEMPORARY ART (2008).

> opera performance), but so too—and more importantly—are means of expression. Our view that innovation in fashion is socially desirable rests on assumptions that are shared with the assumption that in general the creation of new novels and new songs is socially desirable.[150]

They do not attempt to assess the *degree* of status-based consumption of these works. True, only a rarefied stratum of U.S. consumers can hope to attend operas at the Met, or bid on art at Sotheby's. But virtually anyone can check out a recording of *Parsifal* at his or her local library (or on YouTube), or pick up a used copy of Janson's *History of Art* on Amazon. Fashion, by contrast, is uniquely designed to fit and flatter its buyer's body. Economists have developed a "vindex" (or visibility index) of goods that ranks them according to their conspicuousness.[151] Ori Heffetz has demonstrated that goods with high visibility are more likely to be purchased due to status-seeking than other, less visible goods. Fashion is more subject to status-seeking than the other forms of expression mentioned by Hemphill and Suk.[152]

Admittedly, Hemphill and Suk's relativistic approach has a robust antecedent in *Bleistein v. Donaldson Lithography*.[153] In that case, Justice Holmes ruled that judges' aesthetic standards have no place in deciding the copyrightability of a particular work.[154] A Holmesian way to bridge the "fact/value" divide is to appeal to neutrality at another level of abstraction—to treat similarly creative works similarly in law. This strategy is not availing for

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150 Hemphill & Suk, *supra* note 137, at 1163–64.

151 ROBERT H. FRANK, FALLING BEHIND 68 (2007) ("In a 2004 paper, Ori Heffetz attempted to test the hypothesis that the observability of an expenditure category predicts the extent to which valuations in that category are positional. On the basis of a detailed telephone survey, Heffetz assigned a visibility index, or 'vindex,' to more than thirty categories of expenditure recorded by the Consumer Expenditure Survey. Categories with the highest vindex values included cars, jewelry, *and clothing*; those with the lowest visibility included car insurance, life insurance, and household utilities. Heffetz found that the more visible a good is, the more likely it is to be positional.") (emphasis added). *See also* Frank, *supra* note 145, at 138.

152 Even the most highbrow literary snob would look silly ostentatiously reading a copy of Eliot's *Middlemarch* in order to impress others at a dinner party. But fashion can be instantly and constantly admired by all attendees.

153 Timothy R. Holbrook, *The Expressive Impact of Patents*, 84 WASH. U. L.REV. 573, 606-08 (2006) (observing the general decline of the "moral utility" doctrine in patent law, but noting that "[a] recent rejection at the PTO office [that] suggests use of morality may yet resurface at the PTO"). The "scandalous marks" doctrine in trademark law does recognize the moral repugnance of some proposed associations. Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601, 1602 (2010) ("Even though most scholars and judges treat intellectual property law as a predominantly content-neutral phenomenon, each area of law–patents, copyright, and trademarks–contains statutory and common law presumptions that are indelibly rooted in content-based considerations.").

154 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 248 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

Hemphill & Suk, however, because the core rationale for *not* protecting fashion is its all-pervasive functionality—a functionality not shared by most literature, art, and music.

A growing body of intellectual property scholarship questions uniform treatment of different forms of copyrightable expression and patentable innovation. This literature has two branches—one focusing on the 1) *different conditions of production* of diverse forms of IP, and another focusing on the 2) diverse value of a) different forms of IP and b) aggregate levels of IP. The first branch is a relatively uncontroversial and well-received aspect of IP theory, encapsulated well in Michael Carroll's account of uniformity costs.[155] Scholars concerned about uniformity costs might, for instance, propose the tailoring of patent doctrines to take into account diverse conditions of innovation in various industries.[156]

More controversially, some scholars have argued that there can be *overproduction* of IP-protected works. In my article *Copyright in an Era of Information Overload*, I described how a proliferation of copyrighted works could interfere with both consumers' and producers' utility, by raising search costs and by corroding the irreducibly social good of common consumption and understanding of a shared sphere of works.[157] This was part of a larger scholarly movement to promote the *optimization,* rather than maximization, of expression.[158] This paradigm is already embraced in environmental policy, where concepts of optimal sustainable yield have, in some legislation and regulation, supplanted the old regulatory guideline of maximum sustainable yield.

Sprigman, Raustiala, Hemphill, and Suk stick with copyright's traditional focus on maximizing works, with concomitant agnosticism toward their quality. They believe that more design is

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155 Michael W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. U. L. REV. 845, 848–49 (2006) ("Building on . . . prior work, this Article generalizes the problem [of uniformity cost] to include copyright law and advances an analytical, a descriptive, and a normative claim with respect to the problem of uniformity cost . . . . [F]lexible standards that define rights to promote context-sensitive application of the law [help reduce these costs].").

156 To Hemphill and Suk's credit, they do recognize this trend in IP scholarship, endorsing a tailored regime of IP protection that would only protect designs for three years, rather than the much longer terms common in copyright. Hemphill & Suk, *supra* note 137, at 1189.

157 Frank A. Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135 (2007).

158 *See also* Note, *Rethinking Copyright for Advertisements*, 119 HARV. L. REV. 2486, 2496 (2006) ("[A] vast literature argues that the general phenomenon of advertising is the source of an array of detriments, including the distortion of social values via excessive consumerism, the dilution of the arts, and the commercialization and 'dumbing down' of politics. Although the extent of such harms is debatable, and it is advertising generally (not its copyrightability) that is the root cause, these harms nonetheless add to skepticism regarding the government's endorsement of the industry by treating ads as presumptively copyrightable.").

better. Hemphill and Suk in particular offer a broad definition of fashion that equates it with innovation:

> [I]t is hard to imagine a locus of social life—whether in the arts, the sciences, politics, academia, entertainment, business, or even law or morality—that does not exhibit fashion in some way. People flock to ideas, styles, methods, and practices that seem new and exciting, and then eventually the intensity of that collective fascination subsides, when the newer and hence more exciting emerge on the scene. Participants of social practices that value innovation are driven to partake of what is "original," "cutting edge," "fresh," "leading," or "hot." But with time, those qualities are attributed to others, and another trend takes shape. This is fashion.[159]

Though their article focuses on the role of fashion in clothing design, this positivist definition of the ubiquity of fashion foreshadows problems that later emerge in the piece. Defined this broadly, fashion seems to refer to any *temporarily* popular or important facet of life. In our "Present Age,"[160] celebrity fads may be fashion's distilled essence.[161] By contrast, spiritual traditions attempt to identify the enduring truths, forms of beauty, and institutions of justice that contribute to human flourishing.[162] While Hemphill and Suk attempt to rehabilitate fashion, their positivist definition concedes its potential to degenerate into trivia and distraction.

After describing Veblen's and Simmel's critical theories of fashion (stories of status-seeking and conspicuous consumption we are all familiar with), Hemphill and Suk describe an alternative, "zeitgeist" theory of fashion: "people follow fashion because they desire to be in fashion . . . . [They] want to associate themselves with things that are new, innovative, and state of the art."[163] One could be forgiven for interpreting this as a tautology—on first glance it appears to be about as useful as the "dormitive account" of soporifics that Moliere satirized.[164] But the statement "people

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159 Hemphill & Suk, *supra* note 137, at 1163.

160 SØREN KIERKEGAARD, THE PRESENT AGE AND OF THE DIFFERENCE BETWEEN A GENIUS AND AN APOSTLE 33 (Alexander Dru trans., Harper Torchbooks 1962) (1846) ("[The present] age is . . . one of understanding and reflection, without passion, momentarily bursting into enthusiasm for a moment, and shrewdly relapsing into repose.").

161 *See* LEO BRAUDY, THE FRENZY OF RENOWN: FAME AND ITS HISTORY (Vintage Books 1997) (1986); David R. Shumway, *The Star System in Literary Studies*, 112 PMLA 85, 85–100 (1997).

162 *See* JACQUES MARITAIN, CREATIVE INTUITION IN ART AND POETRY 5 (1953).

163 Hemphill & Suk, *supra* note 137, at 1158.

164 *See* Friedrich Nietzsche, BEYOND GOOD AND EVIL 18–19 (Walter Kaufmann trans., Vintage Books 1966) (1886) (discussing a Moliere comedy that featured the "*virtus dormitiva*" as a satire of tautological explanation; characters had "explained" an opiate's tendency to cause sleep by calling it sleep-inducing).

follow fashion because they desire to be in fashion" does have some semantic content, minimizing the likelihood that social pressures force individuals to try to be fashionable.

Hemphill and Suk aspire to an interpretive account of fashion that respects its own autonomy. Rather than being epiphenomenal, one more sad aspect of status anxiety, fashion to Hemphill and Suk is an authentic expression of a broader dialectic of individual self-creation: to both conform to social norms and to distinguish oneself from them. Christening these impulses "flocking" and "differentiation" (respectively), Hemphill and Suk see fashion as not merely an economic phenomenon, but a cultural one, reflecting deep-seated human needs.

Hemphill and Suk's recharacterization of fashion runs into two difficulties. First, they do not offer empirical psychological evidence parsing the individual motivation to follow fashion. It is unclear how one could measure the degree to which clothing is purchased purely for its own sake, rather than as an indicator of the status and sophistication of its purchaser. The specter of what Pope Benedict XVI calls "superdevelopment" remains:

> *The world's wealth is growing in absolute terms, but inequalities are on the increase*. In rich countries, new sectors of society are succumbing to poverty and new forms of poverty are emerging. In poorer areas some groups enjoy a sort of "superdevelopment" of a wasteful and consumerist kind which forms an unacceptable contrast with the ongoing situations of dehumanizing deprivation.[165]

There is little in Hemphill and Suk's work to respond to the basic moral imperative, repeatedly articulated in papal encyclicals, to divert some of the nonessential spending in developed countries (especially in their wealthier segments) to the poor among us and around the world.[166]

Rather than engage with religious arguments against vanity and inequality, Hemphill and Suk associate them with paternalism and Marxism. As a representative opponent of fashion, they mention Chairman Mao, who, "in the pursuit of egalitarianism and Marxist rejection of surplus value, dictated that a billion

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165 *Caritas in Veritate*, *supra* note 40, at ¶ 22.

166 *See* Garvey, *supra* note 62, at 231 ("Pope Leo . . . recognized that the central problem of the day was the extraordinary gap between the opulent lifestyles of the wealthy and the crushing poverty of the working class. There would be no peace in society until this extreme gap was narrowed."). This gap has continued to widen. CITIGROUP, REVISITING PLUTONOMY: THE RICH GETTING RICHER 16 (2006) ("[T]he rich continue to account for a disproportionately large share of income and wealth in the US economy: the richest 10% of Americans account for 43% of income, and 57% of net worth.").

people should wear an identical unadorned outfit."[167] Why associate critics of fashion with the type of totalitarian impulses that brought famine to peasants and socialist realism to art? They suggest that the rejection of fashion sets us on a slippery slope toward the resentment-fueled, *Harrison Bergeron*-style leveling commonly used to discredit egalitarianism generally.[168]

Hemphill and Suk too quickly lump together virtue-oriented religious thought with paternalism and theories of false consciousness.[169] Critiquing those who "view fashion consumption as a product of social pressure," Hemphill and Suk argue that "adults' decisions may be construed as voluntary and therefore as a desirable pursuit of their life plans."[170] It is unclear whether, on this account, even the behavioral economists' "nudge" of individuals toward self-protecting decisions is a proper goal of social policy.[171]

But even those who denounce theories of false consciousness should be able to assent to a basic insight of religious thought—that lives can be led in better and worse ways.[172] Imagine two men—Brian, who devotes virtually all his time to buying and selling Birkin bags in order to fund his own luxury purchases, and Chris, who works as middle manager and devotes most of his free time and discretionary income to tutoring poor children, donating to charities that serve the most disadvantaged, and engaging in prayer and reflection.[173] We have little difficulty in recognizing at least some aspects of Chris's life as exemplifying higher goals than those pursued by Brian. (Think back, for instance, to public outcry over the media's initial neglect of Mother Teresa's funeral in comparison with Princess Diana's.) To make this comparison, we do not need a theory of Brian's false consciousness, imputing to him deeper, higher ends than he is

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167 Hemphill & Suk, *supra* note 137, at 1162.

168 *See* Kurt Vonnegut, Jr., *Harrison Bergeron, in* WELCOME TO THE MONKEY HOUSE (1968), *available at* http://www.tnellen.com/westside/harrison.pdf (short story set in 2081 satirizing a Procrusteanly egalitarian future, where any particularly excellent person is forced to wear a "handicap" to avoid outshining others).

169 False consciousness has long been a discredited aspect of Marxist theory. JACK BALKIN, CULTURAL SOFTWARE 45 (1998); MICHAEL ROSEN, ON VOLUNTARY SERVITUDE: FALSE CONSCIOUSNESS AND THE THEORY OF IDEOLOGY 25 (1996).

170 Hemphill & Suk, *supra* note 137, at 1163.

171 *See* RICHARD THALER & CASS SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

172 *See* JOHN KEKES, THE ART OF LIFE (2002); *see also* JOSEPH RAZ, THE MORALITY OF FREEDOM 370 (1986) (focusing on the adequacy of options as a precondition for autonomy).

173 *See* MICHAEL TONELLO, BRINGING HOME THE BIRKIN (2008). For an example of frivolous lives led by law professor "ideal types," *see* Paul Campos, *Shame*, 17 J. CONTEMP. LEGAL ISSUES 15 (2008) (depicting "several fictional yet all-too-familiar legal academic characters. With one exception these characters are imaginary - yet their name is legion. You already know them . . . ").

actually pursuing. We may not even need metaphysics.[174] Rather, Chris' virtue consists of his relief of suffering and the pursuit of ends beyond his own vanity.

A critique of vanity is not necessarily sectarian or judgmental. Excessive attention to personal appearance diverts significant social resources away from productive ends.[175] As Deborah Rhode argues:

> the extent of [concern about appearance] is striking. In one representative survey, three-quarters of women ranked appearance as one of the top five qualities affecting their self-image, and a third ranked it as the most important quality, above job performance and intelligence. Almost 90% consider how they look either "very important" or "somewhat important" to "feelings about who they are." Over half of young women report that they would prefer to be hit by a truck than be fat, and two-thirds would rather be mean or stupid.[176]

Fashion may be one step removed from the pernicious overconcern for body image reflected in these statistics. However, it can easily reinforce the obsession with image so corrosive in our society. Near-anorexic models and punishing sizing send a cruel message to many ordinary individuals: you fit neither our clothes nor our ideals of attractiveness.

Hemphill and Suk's concentration on individual consumption decisions also obscures the *social* context of fashion. Developed countries face paradoxical problems of affluence.[177] Garbage overwhelms the capacity of developed countries' landfills, leading to toxic dumping abroad.[178] In the United States, obesity

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174 I will here sidestep ultimate questions. *But see* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 410 (reprt. 2005) (1980) ("Play . . . is to be contrasted with business, with responsibilities, with the serious things of life. But, in the last analysis, there is a play that is the *only* really serious matter. In such a 'final analysis,' in which we seek an understanding going beyond our feelings, the 'serious things of life,' even atrocious miseries, are really serious only to the extent that they contribute to or are caught up into a good play of the game of the God who creates and favours human good.").

175 *See* Frank A. Pasquale, *Access to Medicine in an Era of Fractal Inequality*, 19 ANNALS HEALTH L. 269 (2010) (describing diversion of dermatologists and dentists from poor and middle class patients to wealthy patrons seeking to enhance their appearance).

176 Deborah L. Rhode, *The Injustice of Appearance*, 61 STANFORD L. REV. 1033, 1040 (2009). *See also* Frank A. Pasquale, *Decomposing Pulchritude's Perks*, MADISONIAN.NET (Nov. 9, 2006), http://madisonian.net/2006/11/09/decomposing-pulchritudes-perks/ (describing "beauty premium" in employment); Frank A. Pasquale, *Vanity Taxes vs. Worthless Competitions*, CONCURRING OPINIONS (June 6, 2007 1:39 PM), http://www.concurringopinions.com/archives/2007/06/vanity_tax_vs_w.html.

177 *See, e.g.*, JULIET B. SCHOR, THE OVERSPENT AMERICAN (1998) (describing "affluenza"); GREG CRITSER, FAT LAND: HOW AMERICANS BECAME THE FATTEST PEOPLE IN THE WORLD (2003).

178 *See, e.g.*, Pieter Hugo, *Permanent Error*, PIETER HUGO, http://www.pieterhugo.com/ (last visited Oct. 28, 2011).

is a major public health concern.[179] Its causes include not merely lack of exercise and an abundance of cheap, energy-dense food, but also the photo-shopped and starved fashion models whose ubiquity fuels unrealistic ideals of beauty and the anxiety and eating disorders associated with these ideals.[180] Psychologists have reported increasing consumer fatigue at proliferating brands of goods, retirement planning options, and medical care choices.[181] Spiritual leaders have echoed longstanding complaints about the consumer culture all these choices create.[182]

In the "battle for mindshare" that we experience daily, the siren call of fashion can be one more distraction from truly meaningful actions and human relationships.[183] Lamenting the declining influence of literature in culture, Sven Birkerts observed readers "awed and intimidated by the availability of texts, faced with the all but impossible task of discriminating among them, [tending] to move across surfaces, skimming, hastening from one site to the next without allowing the words to resonate inwardly."[184] This rapid cycling between bedazzlement and boredom could just as accurately characterize fashion trends as Hemphill & Suk's effort to ennoble "flocking" and "differentiation" as components of authentic self-expression. Even if we accept Hemphill and Suk's observation that "[p]articipation in fashion seems to be

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179 *See, e.g.*, David Cutler et al., *Why Have Americans Become More Obese?*, Nat'l Bureau of Econ. Research, Working Paper No. 9446, 2003), *available at* http://www.nber.org/papers/w9446.pdf ("Americans have become considerably more obese over the past 25 years. This increase is primarily the result of consuming more calories.").

180 *See* Jessica Bennett et al., *Weighty Matters*, NEWSWEEK (Feb. 7, 2007), http://www.newsweek.com/id/113689 ("[I]t's not as if skinny models have inspired an epidemic of slimness. In fact, the real danger may be that the contrast between the girls on the catwalks and the girls at the mall is creating an atmosphere ripe for binge dieting and the kind of unhealthy eating habits that ultimately result in weight gain, not loss. 'You always [have to] look at the discrepancy between the real and the ideal,' says Cynthia Bulik, a clinical psychologist who heads the eating-disorders program at the University of North Carolina at Chapel Hill. 'If [kids] see themselves gaining weight and then they see these ultra-thin models, the discrepancy between how they see themselves in the mirror and how they feel they have to look is bigger. And that can prompt more extreme behaviors.'"). Some might characterize this as a tenuous account of causation. However, to the extent one is skeptical of the chains of causation proposed in analyses like Bulik's, one may well be drawn to the blunt and direct account of virtue apparent in many encyclicals.

181 *See generally*, BARRY SCHWARTZ, THE PARADOX OF CHOICE (2004) (discussing cognitive psychology documenting costs of excessive choice); *see also* GREGG EASTERBROOK, THE PROGRESS PARADOX (2003) (discussing the correlation between increasing consumer choice and stagnant or declining perceptions of well-being in advanced industrial societies); BILL MCKIBBEN, ENOUGH (2003) (discussing the perils of untrammeled technological advance).

182 *See* Pope Benedict XVI, *Christmas Message*, Dec. 25, 2005 *available at*, http://www.vatican.va/holy_father/benedict_xvi/messages/urbi/documents/hf_ben-xvi_mes_20051225_urbi_en.html ("[T]he men and women in our technological age risk becoming victims of their own intellectual and technical achievements, ending up in spiritual barrenness and emptiness of heart.").

183 *See* Hannibal Travis, *The Battle for Mindshare*, 10 VA. J. L. & TECH. 3 (2005).

184 BIRKERTS, THE GUTENBERG ELEGIES 72 (rev. ed. 2006) (1994).

freely chosen by consumers," they cannot give a deep account of the *value* of those choices.[185] Without such an account, any decline in design (or the number of designs generated) that would follow a failure to adopt their program could itself be viewed as a more optimal level of fashion consumption and production.

C. *A New Focus for Fashion Law: Just Wages Throughout the Supply Chain*

Despite these problems, there is important insight in Hemphill and Suk's article. They believe that "small designers" are too often "ripped off" by those who are unjustly enriched by copying. To the extent the fashion industry does make money, it seems only just to apportion that value fairly. Like minimum wage law, much of intellectual property law can be characterized as a state effort to assure the appropriability of various inputs to productive processes that would otherwise be un- or undercompensated.[186] It does not always succeed in this goal—the unfair treatment of groups ranging from practitioners of medicine based on traditional knowledge to African American artists is well-documented.[187] But the idea of fairly compensating and giving credit to creators is near the moral core of intellectual property law.

Once we understand the broader context of fashion protection, many more serious problems emerge than the plight of young, unknown designers. Conditions for workers in less developed countries are often extremely unfavorable.[188] Intellectual property law could help improve their lot.

Of course, Hemphill and Suk might respond that their piece only addresses a narrow policy problem (whether to give design protection to fashion) by advancing a novel theory of innovation. Their theory, the type of elegant and memorable account sought out by elite law journals, is a model for its genre. Yet should we seek to reallocate resources to "struggling designers" if we do not know where the funds will ultimately come from? If successful

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185 Hemphill & Suk, *supra* note 137, at 1163.

186 *See* Tom W. Bell, *Author's Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 231 (2003).

187 *See* Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 550 (2006) (collecting past examples of this scholarship, and extending the tradition).

188 *See* ALEXANDRA HARNEY, THE CHINA PRICE: THE TRUE COST OF CHINESE COMPETITIVE ADVANTAGE (2008); JILL ESBENSHADE, MONITORING SWEATSHOPS 4 (2004); MARSHA A. DICKSON, ET AL., SOCIAL RESPONSIBILITY IN THE GLOBAL APPAREL INDUSTRY 11 (2009); ELLEN RUPPEL SHELL, CHEAP: THE HIGH COST OF DISCOUNT CULTURE 192–93 (2009); AMNESTY INTERNATIONAL, INTERNAL MIGRANTS: DISCRIMINATION AND ABUSE: THE HUMAN COST OF AN ECONOMIC 'MIRACLE' (2007); U.S. DEPT. OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, CHINA (2006).

fashion houses must pay designers more, we cannot assume that their customers will pick up the entire tab. Rather, there may be a redistribution from seamstresses, cloth manufacturers, and fabric makers in less developed countries, to designers in developed countries. The incidence of the increased cost involved in compensating designers is difficult to estimate in advance.

Disturbing reports of working conditions in the garment trade raise the specter of further exploitation. Dana Thomas notes that, "[i]n Bangladesh, workers at International Knitwear and Apparel who demanded better working conditions were fired, beaten, and told they'd be killed if they joined a union."[189] The 2005 *Annual Survey of Trade Union Rights Violations* revealed that "[f]oreign employers in the industrial zones, mainly textile groups from South Africa, Hong Kong, and Taiwan . . . pay wages below the statutory minimum . . . [and refuse to pay] sickness benefits and make unilateral deductions from their employees' pay packets . . . . The government turns a blind eye [to these infringements]."[190] Thomas describes a globalization that drives down wages in region after region. Factory owners tend to desert any zone of workers capable of organizing or passing legislation designed to protect their interests.

CST puts these concerns at the core of a theory of justice. A narrow emphasis on the plight of designers obscures the penury endured by many workers charged with executing the designs. As a holistic epistemology, CST insists on seeing every social question within a broad perspective—both globally, as an expression of the universalist aspirations of a "worldwide, Catholic, and apostolic Church," and *sub species aeternitate,* in view of the nature and destiny of man.

Could Hemphill and Suk's proposal be modified in order to help *both* young and unrecognized designers and the workers who make and sew the materials to be used in fashion? Following the types of "green certifications" offered for development projects in LDCs, perhaps the Copyright Office could condition design protection on applicants' contractors' meeting certain fair labor standards and practices. A symbol for protected designs could then reflect a verified judgment that the designer's licensee respects certain wage and labor standards. IP protections could be combined and leveraged to reflect the social values of those concerned about the exploitation of the poor, just as they now reflect the social values of those concerned about the exploitation of the copied.

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189 DANA THOMAS, DELUXE: HOW LUXURY LOST ITS LUSTER 231 (2007).
190 INT'L CONFEDERATION OF FREE TRADE UNIONS, ANNUAL SURVEY OF VIOLATIONS OF TRADE UNION RIGHTS 2005, 44 (2006).

Less ambitiously, strategic use of certification marks could help individuals make more moral spending decisions. For example, the Catholic Church could begin endorsing certain exemplary companies for their commitments to respecting the dignity of their workers and paying a living wage. Catholic institutions should try to audit janitorial and kitchen staff providers to assure that employees have adequate health insurance coverage, time off, and some elementary forms of job security. Groups within (or allied with) the Catholic Church can certify, rank, or rate businesses.

Catholic universities have the social scientific and legal expertise to work with independent auditors of fair labor and business practices. They can help devise a fair "green audit" process that is both independently verifiable and not subject to misuse. A "black box" certification depends too much on the reliability of the certifier. On the other hand, an uncontrolled rating system, released to the public generally, could be unscrupulously deployed by "certifiers" who claim to be using it, but in fact let rated entities "slide" along any number of variables. A "CST-ratings system"—employing the best aspects of intellectual property protection, while open to audit, critique, and refinement—would enable more responsible consumption generally.[191]

Personal, charitable efforts to remedy injustice will always have an important place in religious institutions. However, data-driven institutional assessments of corporate performance based on Catholic ideals should complement the "third sector" by holding the market to minimum standards of moral conduct. As Doug Kysar has argued, consumers are increasingly expressing preferences for better processes of product creation.[192] The Catholic Church can creatively deploy techniques of economics and business practice while maintaining its cultivation of the ineffable sources of moral action.

Whereas proponents of CST have already joined in current debates on expanding access to life-saving drugs and pharmaceutical innovation, they might find fashion policy too insignificant to address. That would be a mistake, because CST's concern with personal virtue and the plight of the poorest has

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191 For further reflections on "qualified transparency" in such rating systems, see Frank A. Pasquale, *Beyond Innovation and Competition: The Need for Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105 (2010); Frank A. Pasquale, *Reputation Regulation*, *in* THE OFFENSIVE INTERNET: PRIVACY, FREE SPEECH, AND REPUTATION (Saul Levmore & Martha Nussbaum eds. 2010).

192 *See* Douglas Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 529 (2004) ("[C]onsumer preferences may be heavily influenced by information regarding the manner in which goods are produced.").

direct bearing on the economics of clothing. Indeed, the core CST contribution could be to change the conversation from "fashion policy" to "clothing policy;" from a narrow concern about designers' just deserts to a broader ambition of humane working conditions throughout the design, manufacture, distribution, and retail stages of the supply chain. In this new, broader debate, the focus might constructively shift from copyright to trademark law. CST-based certification marks would help conscientious consumers better identify socially responsible producers, and might lead a shift from conspicuous to responsible consumption.

IV. CONCLUSION

> *Another Christian concept . . . has passed even more deeply into the tissue of modernity: the concept of the "equality of souls before God." This concept furnishes the prototype of all theories of equal rights: mankind was first taught to stammer the proposition of the quality in a religious context, and only later was it made into morality: no wonder that man ended by taking it seriously, taking it practically!—That is to say, politically, democratically, socialistically.*
>
> *Friedrich Nietzsche*[193]

I have focused on CST's "option for the poor" as a touchstone for changing the IP conversation about fashion policy to a broader concern for clothing policy. It is unwise to devote many resources to promoting clothing design innovation if we fundamentally disagree on the nature and value of such innovation. It is better to focus on a certification system that will help us understand the real conditions that enable our consumption—particularly, the living standards of the worst-paid workers in the clothing supply chain.

The deadly serious matter of how to increase access to life-saving pharmaceuticals in less developed countries also deserves more attention from religious legal theorists. While a spiritual perspective may not bear directly on questions like the effect of compulsory licensing on future innovation, whether drugs, if compulsorily licensed, would actually be distributed well, and how to avoid arbitrage between rich and poor countries, it can aid in reconciling conflicting social values and spurring action to relieve suffering.[194]

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193 FRIEDRICH NIETZSCHE, THE WILL TO POWER (Walter Kauffmann & R. J. Hollingdale trans.) 401 (1967).

194 For a powerful example of this type of advocacy in the field of access to drugs, see PAUL FARMER, INFECTIONS AND INEQUALITIES: THE MODERN PLAGUES 267 (1999) ("[I]nside health bureaucracies . . . one hears plenty of reasons why universal access to combination therapy is deemed 'unrealistic,' 'impractical.' . . . Because failure to treat is regarded by many as medical injustice, the 'justifications' for inequalities of access can become rather baroque . . . . In this manner, the burden of responsibility for poor

The secular legal academy tends to prefer a lasting dialogue based on certain shared presuppositions over the type of questioning of foundational premises suggested in Part III of this paper, or the insistence on immediate social justice in the conclusion of the section on access to drugs (Part II).[195] Nevertheless, questioning the foundational premises of the secular academy, and denouncing injustice, both have a place in intellectual property scholarship—or at least in a community of intellectual property scholars who are dedicated to working out its ultimate priorities and purposes with one another, and who then advocate for those ends with whatever rhetorical tools are most effective in the current intellectual environment.

This two-tiered engagement may well result in a dual identity for religious legal scholars.[196] We are in, but not of, the economic, political, and cultural discourses that now function as *linguae francae* in legal scholarship. A Straussian strategy—resorting to esoteric meaning understood among those with shared spiritual concerns—may be a tempting template for religious legal theory generally.[197] Such a strategy also promises to unify—or at least fruitfully sequence—the vocations of science and politics, analysis and advocacy, that many American legal academics struggle to reconcile.[198]

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outcomes may more easily be laid at the feet of the untreated than on the shoulders of those who manufacture, sell, or prescribe therapies.").

195 For a skeptical account of this preference, *see* Daniel R. Ortiz, *Nice Legal Studies* (Univ. of Va. Sch. of Law Pub. Law and Legal Theory Res., Working Paper No. 2009-12, 2009) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474402 ("Unlike contemporary po litics, much of our recent legal theory urges us to 'make nice,' that is, to minimize social conflict and economize on disagreement whenever possible. By focusing our attention and energy on what we can agree on, it claims to privatize animosity and promote productive social action . . . . This essay criticizes both the theorists and jurists who advocate this view for concealing the deep and controversial politics their calls entail."). For a more hopeful view of the effort to "keep dialogue going" based on shared presuppositions (albeit in another field), *see* RANDALL COLLINS, THE SOCIOLOGY OF PHILOSOPHIES: A GLOBAL THEORY OF INTELLECTUAL CHANGE (1998).

196 This duality is not unknown to the Church itself, according to Stuart Hampshire. STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 174 (1989) ("The [Catholic] Church has lived through innumerable wars, periods of exile, negotiations, unwanted compromises, embarrassing alliances, distressing manoeuvres, and secret betrayals . . . [It embraces] political activity and famously requires something of the 'cunning of the serpent,' the ingenuity of worldly wisdom, which Aristotle claimed that both rogues and statesmen need."). Anthony Kronman has described the virtues of the "statesman" as a model for attorneys as well. ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1995).

197 For more on the esoteric and exoteric distinction as a response to the tensions between "philosophy and law," *see* DANIEL TANGUAY, LEO STRAUSS: AN INTELLECTUAL BIOGRAPHY 6–7 (2007). As pluralism advances, this strategy may well be the only option. *See, e.g.*, JEFFREY STOUT, ETHICS AFTER BABEL (1988); ALASDAIR MACINTYRE, AFTER VIRTUE (1984) (describing a hopelessly fragmented moral landscape); JURGEN HABERMAS, II THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM, A CRITIQUE OF FUNCTIONALIST REASON (T. McCarthy, trans., 1985) (describing the fragmentation and colonization of the lifeworld).

198 *See, e.g.*, LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996)

However, the Straussian approach may bring immediate strategic victories at the cost of larger cultural change. The holistic and spiritual vision at the heart of CST, or any spiritual tradition's prescriptions for souls and society, cannot be translated without remainder into the dominant justificatory frameworks of our age. Two additional tasks remain.

First, those devoted to studying religious social thought need to engage more directly with current social conditions, and to be more open to input from those working "on the ground" to understand and relieve human suffering. The intellectual property literature has already provided a model here in the growing number of studies translating human rights principles into concrete policy prescriptions designed to guarantee access to knowledge.[199] If the capacious and open-ended language of the United Nations Declaration on Human Rights can be translated into proposed statutes and regulations, so too can the ideals animating CST.

Second, we will need to convince fellow academics to learn something about the traditions that guide our own thought. Robert Kiely has eloquently advocated for the teaching of the Bible in primary and secondary school.[200] Its relevance extends well beyond these institutions. Those entering the legal academy must know something of law and economics, jurisprudence, and other elements of a basic (if unwritten) canon of academic legal thought. Familiarity with religious thought is not presently part of such a canon, and no force or fiat can make it be so. If we hope to have a stronger cultural impact, we will have to rely on our own capacity to interest others, and on their kindness toward us.[201] Though it is "unwise to be too sure of one's own wisdom," as Gandhi put it, it would be a shame to hide our collective wisdom

(discussing the interrelationships between the political and scientific aspirations of leading legal academics).

199 *See, e.g.*, Amy Kapczynski, *Access to Knowledge: A Conceptual Genealogy*, in Amy Kapczynski & Gaelle Krikorian, eds., ACCESS TO KNOWLEDGE IN AN ERA OF INTELLECTUAL PROPERTY 37–38 (2010) (describing a demand for access that emanates "from the language of human rights.").

200 *See* Marie Wachlin & Byron R. Johnson, BIBLE LITERACY REPORT II: WHAT UNIVERSITY PROFESSORS SAY INCOMING STUDENTS NEED TO KNOW (2006), *available at* http://www.bibleliteracy.org/bibcdocs/BibleLiteracyReport2006.pdf; William R. Mattox, Jr., *Teach the Bible? Of Course*, USA TODAY, Aug. 17, 2009 ("'If a student doesn't know any Bible literature, he or she will simply not understand whole elements of Shakespeare, Sidney, Spenser, Milton, Pope, Wordsworth. One could go on and on and on,' Kiely told Concordia professor Marie Wachlin and her research team. 'Knowledge of the Bible can be a key to unlocking other subjects . . . especially literature, art, music and social studies,' say Chuck Stetson, co-editor of the visually stunning high school textbook *The Bible and Its Influence.*").

201 As Adam Phillips and Barbara Taylor have written, "Acts of kindness involve us in different kinds of conversations; our resistance to these conversations suggests that we may be more interested in them, may in fact want much more from them, than we let ourselves know." ADAM PHILLIPS & BARBARA TAYLOR, ON KINDNESS 114 (2009).

traditions under a bushel basket.[202]

[202] One leading legal thinker who has increasingly engaged with religious traditions is Martha Nussbaum. *See* MARTHA C. NUSSBAUM, THE CLASH WITHIN: DEMOCRACY, RELIGIOUS VIOLENCE, AND INDIA'S FUTURE ix (2007) ("[T]he thesis of this book is the Gandhian claim that the real struggle that democracy must wage is a struggle within the individual self, between the urge to dominate and defile the other and a willingness to live respectfully on terms of compassion and equality.").