

COPYRIGHT AND MORAL NORMS

*Alina Ng**

The role normative principles, such as morality and ethics, play in a legal system is a highly contentious point in jurisprudence and legal theory. Scholars and philosophers have often disagreed on whether laws should reflect and incorporate moral and ethical norms. The idea that there could be a necessary connection between law and objective morality has been forthrightly rejected by some jurists because of the heterogeneity of social views and beliefs about what is right and wrong conduct. This paper challenges the assertion, by legal positivism, that morality cannot be incorporated into legal analysis because they obfuscate analytical thinking about the law. Instead, this paper argues that morality and ethics clarifies the proper role for law and legal institutions in society and deepens one's understanding about the functions of a legal system. For copyright law, incorporating moral or ethical principles into legal analysis would allow one to determine if copyright laws accurately reflect common expectations for the progress of science. This paper then shows that modern day jurisprudence on copyright law does not reflect common expectations of society for the progress of science. It goes on to argue that copyright law should reflect these standards if the progress of science is to be sustained. This paper is divided into three parts. The first part of this paper analyzes literature to draw out the essential premises for the disagreement between legal positivism and natural law. It demonstrates that the incorporation of moral and ethical ideals into legal analysis will lead to greater understanding about the nature and purpose of law. The second part of this paper shows how the social and separability theses, so essential to positivism, affect legal understanding of copyright laws and the role copyright laws play in society. The third part of the paper argues that copyright laws must reflect objective morality - and not economic calculus - for the progress of science to be sustained and looks to environmental law as a model for conserving and preserving the common good in

* Mississippi College School of Law.

copyright. This paper concludes with a preliminary proposal on how the progress of science can be sustained by the incorporation of moral and ethical principles into the law.

I. INTRODUCTION

Chief Justice Hughes stated in *Fox Film Corp. v. Doyal* that the primary purpose of granting copyright in the United States “lie[s] in the general benefits derived by the public from the labors of authors.”¹ From Justice Hughes’s statement, it seems apparent that the American copyright system is intended to serve the public good. The Copyright Clause, which empowers congress to “promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings and Discoveries,”² plainly defines the essential characteristic of copyright law. By protecting creative works for a limited time, the Copyright Clause formed the public domain. By emphasizing the progress of science, the Copyright Clause aimed to promote advancement and dissemination of knowledge. By granting exclusive rights to authors, the Copyright Clause encouraged the production of creative works. The public domain, the advancement and dissemination of knowledge, and the production of creative expressions - all aspirations of the Copyright Clause - ultimately work to benefit society and the common good. These three concomitant aspirations provide sound framework for the structure and content of copyright laws and maintain the integrity of the copyright system.

However, laws that are passed as part of the copyright system may sometimes be disconnected from the intention behind the Copyright Clause. In January 2012, the United States Supreme Court decided that a 1994 law, passed by Congress to fulfill the United States’ trade obligations under TRIPS (Trade Related International Property Rights Agreement) and the Uruguay Round Agreement, was constitutional.³ The law, §514 of the Uruguay Round Agreement Act, restores copyright to works that are in the public domain for reasons other than the expiration of copyright.⁴ The law was passed to fulfill trade

1. 286 U.S. 123, 127 (1932).

2. U.S. CONST. art. I, §8, cl. 8.

3. *Golan v. Holder*, 132 S. Ct. 873 (2012).

4. Works that should be protected by copyright may fall into the public domain in one of three ways - (1) the U.S. did not protect works from the country of origin at the time the work was published; (2) the work is a sound recording that was fixed

obligations under the Uruguay Round Agreement and to perfect the implementation of the Berne Convention;⁵ therefore, because the law served national trade policies rather than the common good, it appeared to be inconsistent with the constitutional purpose of copyright law. When petitioners argued that Congress exceeded its authority to pass the law because the Copyright Clause did not empower Congress to restore copyright to works that are in the public domain or restrict their free speech rights as performers and artists,⁶ the Court rejected their argument and held that Congress's authority under the Copyright Clause included the authority to decide if the adherence to international agreements would expand foreign markets for U.S. works and protect these works from piracy. Ultimately, Congress may pass these laws under the Copyright Clause, which would benefit copyright-intensive industries and encourage greater investment in the creative process.⁷ The Court thought that the means in which Congress promotes the progress of science is through a "rational judgment" that Congress has authority to make.⁸ Nine years earlier in *Eldred v. Ashcroft*,⁹ the Supreme Court upheld the Copyright Term Extension Act, which delayed a work's entry into the public domain by twenty years, as constitutional.¹⁰ The Court decided that Congress was the better judge of what was necessary to encourage "American and other authors to create and disseminate their works in the United States"¹¹ and went on to declare that the courts were "not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be."¹² It was Congress's prerogative to extend the copyright term if the extension would ensure an equal protection of American works in

before the U.S. started protecting sound recordings as a copyrightable work in 1972; and (3) the author of the work had not complied with certain statutory formalities in the U.S., such as the requirement that the work be registered, when the work was produced. In 1994, §514 was codified in the U.S. Copyright Act as 17 U.S.C.A. §104A, which treats restored work as "if the work never entered the public domain in the United States." Uruguay Round Agreement Act of 1994 § 514, 17 U.S.C. §104A (a)(1)(B) (2006).

5. *Golan*, 132 S. Ct. at 877-78.

6. *Id.* at 883.

7. *Id.* at 889.

8. *Id.*

9. 537 U.S. 186 (2003).

10. 17 U.S.C. § 302 (2006).

11. *Eldred*, 537 U.S. at 206-08.

12. *Id.*

Europe and provide incentives for the creation and dissemination of works in the U.S.¹³ In both these cases the Courts decided that Congress had absolute authority under the Copyright Clause to legislate and pass laws that would best promote the progress of science.

Golan v. Holder and *Eldred v. Ashcroft* represent more recent Court decisions treating copyright law as a mean or instrument to an end—the promotion of the progress of science—and they demonstrate that the law’s core content need not be consistent with any objective standard of morality for it to be upheld as valid law. The *Golan* and *Eldred* Courts saw copyright law as a means to an end or as an instrument to further trade or social policies; hence why copyright law did not need to have a core moral or ethical content and is seen as a void receptacle that may be filled with “congressional determinations and policy judgments”¹⁴ however questionable these determinations and judgments may be. The courts have adopted a deferential view towards such determinations and judgments, which this paper argues will result in copyright laws that do not serve the common good, even if they purportedly promote the progress of science. Copyright law that serves the common good by promoting the progress of science must have a core integrity that would determine the proper content of the law and should not be seen as an instrument to pursue trade or social policies that are devoid of an interior morality. This paper argues instead that law is an end in itself. Its purpose is to serve the common good and its content must comprise fundamental principles of right and wrong rather than congressional decisions or determinations of the best means of achieving certain policy goals.

As this paper argues that laws are ends in themselves rather than instruments for policy ends, it presents a view of the law from a classical natural lawyer’s perspective. Laws, in this view, must have essential characteristics that allow them to be properly called “laws” and make them legally binding on society. Particularly, laws must have a core integrity that reflect objective morality, which cannot be deviated from if they are to inspire obedience from society. They cannot be empty vessels that hold indeterminate congressional policies. Laws must also serve the common good by protecting various interests in a heterogeneous

13. *Id.* at 205-06.

14. *Id.* at 208.

society through carefully-defined rules of obligation if they are to be ends in themselves. A non-instrumental or aspirational view of the law is especially important for copyright law because its constitutional purpose may easily be blurred by an instrumentalist view of the law. Copyright law, which attempts to address many divergent interests in creative works, may then be inadvertently used to further congressional policies in favor of particular interest groups over others. This ultimately will be incompatible with the common good, and will likewise be detrimental to the creation and dissemination of knowledge for society's benefit and the progress of science. Part II of this paper explores the notion that laws should encompass an objective morality that protects the common good and shows what copyright law's core integrity, or objective morality, would look like. Part III defines "the common good" for copyright law, and Part IV offers a proposal of how to incorporate objective morality and the idea of the common good into the copyright system through principles of environmental law so that the law ceases to be an instrument for various political, social, and trade policies and is instead viewed as an end in itself.

II: THE CORE CONTENT OF THE LAW

Copyright law, as it exists today, is a complex set of rules that regulates use of creative works. In the U.S., copyright regulation widely ranges from protecting defined categories of creative works,¹⁵ ownership rights,¹⁶ as well as specifying the duration¹⁷ and termination of copyright transfers and licenses,¹⁸ conditions of fair use,¹⁹ and statutory licenses allowing access to works for royalty, to the implementation of a variety of congressional policies on technology, trade, and international relations. However, the jurisprudential basis for copyright is hard to find. Although earlier commentators understood wisely that copyright had its roots in a theory of natural law that rewarded labor and granted possessory rights against plagiarism,²⁰

15. 17 U.S.C. § 102 (2006).

16. 17 U.S.C. § 106 (2006).

17. 17 U.S.C. § 302 (2006).

18. 17 U.S.C. § 203 (2006).

19. 17 U.S.C. § 107 (2006).

20. RICHARD R. BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW 4 (1912) (pointing out that authors own their work as property and do not lose their right just because the privilege to copy the work may be assigned and stating that "[t]he theory that by permitting copies to be made, an author dedicates his writing to the public,

contemporary writers have made an injudicious shift toward economic efficiency, utility, and wealth maximization as normative values that should dictate the content and purpose of copyright.²¹ But the imbalance between private control and public access to creative works affecting national and international copyright systems today cannot be remedied if laws are continuously used as a vial for governmental policies that may promote the progress of science (as a means to an end) instead of a necessary ingredient that, because of its inherent moral qualities, will promote the progress of science (as an end in itself).

A. The Inherent Qualities of Law

Classical natural law theories about the nature of law understand rightly that the law has essential moral force that cannot be deviated from if a rule is to be properly called a law. Law, by definition, is concerned with the common good of society and must have its community's well being as its primary interest. It does not pursue a larger goal because the good of society is its purpose. St. Thomas Aquinas, thus, understood law as "an ordination of reason for the common good."²² Laws must be in accordance with right reason to be proper laws and laws that are not are a distorted form of law; "an unjust law"²³ that "does not have the character of law but rather that of an act of violence"²⁴ does not have the proper quality of a law.²⁵ St. Augustine goes a step further to deny an unjust rule the status of law; he asserts,

as an owner of land dedicates a road to the public by permitting public use of it for twenty-one years, overlooks the fact that in so doing the author only conveys to each holder of his book the right to individual use, and not the right to multiply copies . . . [t]he owner of a right does not forfeit a right by selling a privilege").

21. As information and culture are characterized as "public goods," copyright law is often used as an instrument to encourage production of information and cultural products because individuals and corporations will only produce with the assurance that their works will be paid for. As far as economic reasoning goes, stronger copyright laws will produce more creativity. But scholars have questioned this reasoning. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 38 (2006) (criticizing this view and stating that "[t]he efficiency of regulating information, knowledge, and cultural production through strong copyright . . . is not only theoretically ambiguous, it also lacks empirical basis").

22. ST. THOMAS AQUINAS ON POLITICS AND ETHICS 46 (Paul E. Sigmund ed., & trans., W. W. Norton & Co., Inc. 1998) (1259-64).

23. *Id.* at 48.

24. *Id.*

25. *Id.*

“a law that is unjust is considered to be no law at all.”²⁶ Justice, therefore, is an essential component of law. Morality is also an essential component of law, and good morals, when established by right reason in men, will compel men to act for the common good. Laws passed as a result will reflect virtues of justice and morality and are therefore good laws.²⁷ Contemporary natural lawyers have advocated a similar but broader conception of morality and justice for the law. They present their position from a more secular vantage point that does not rely on the divine as a benchmark. Lon Fuller, for example, has argued that all legal systems must reflect a “utopia of legality”²⁸ or an “inner morality,”²⁹ which would ensure that rules passed by the system are good laws that will bind its subjects.³⁰ John Finnis has also suggested that the law must uphold moral values and principles.³¹ However, instead of being derivative of an eternal law, they are identified through “objective [or practical] reasonableness,”³² and chosen as a good to ultimately support humanity’s well-being.³³

The insight that law must contain essential characteristics of morality, justice, and goodness has become buried wisdom crucial to society today. Law is more commonly understood as instrumental in nature. Therefore, the contents of law need not reflect any particular idea of goodness, morality, and right reason. This began with classical legal positivism’s rejection of the critical connection between law and morality. Jeremy Bentham, father of utilitarian thought, remarked that the idea of natural law and natural rights were “nonsense upon stilts”³⁴ and John Austin, equally famous for his statement that the “merits

26. *Id.* at 53 (citing St. Augustine, ON FREE CHOICE, I, 5).

27. *Id.* at 58 (“Since human moral conduct is directed by reason which is the basic principle of human action, those moral actions that are in accord with reason are called good, and those that depart from reason are called evil.”).

28. LON L. FULLER, THE MORALITY OF LAW 41 (1964).

29. *Id.* at 42.

30. *Id.* at 39-42.

31. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 290 (1980).

32. *Id.*

33. *Id.* at 100-03.

34. Bentham was known to have been skeptical about the notion of natural rights that formed the basis for the American constitution calling it “nonsense upon stilts.” C.K.Ogden, *Introduction* to JEREMY BENTHAM, THE THEORY OF LEGISLATION ix, xxi (Routledge & Kegan Paul Ltd. 1960) (1931).

and demerits”³⁵ of a law did not have an effect on its existence as law, represent hard-line views that reject all possible connection between law and morality.³⁶ But regardless of how uncompromising legal positivism’s views are on the essential connection between law and morals, it is somehow difficult, if not impossible, to completely divest law of its inherent moral qualities. Herbert Hart, one of the most prominent legal positivists of contemporary jurisprudence, has also been unyielding in his views regarding the separation of law and morals.³⁷ However, Hart did acknowledge that conventional morality could have an effect on legal development. The ideals of social groups and individuals’ morality, for example, may have strong influences on the content of the law and legal outcomes.³⁸ Having admitted that though, Hart was then adamant to state that the criteria for legal validity did not have to include, tacitly or explicitly, any reference to morality or justice.³⁹ “[N]othing,” as Hart said, “can be profitably singled out for study as the relation between [law and morals].”⁴⁰ Hart’s former student Joseph Raz has also echoed the positivist’s position on the separation of law and morals. “[T]he identification of the law and of the duties and rights it gives rise to is a matter of social fact,”⁴¹ Raz explains. “The question of [the law’s] value is a further and separate question.”⁴²

Positivism’s commitment to the separation of law and morals presents a semantic thesis that finds a law is justified when its subjects regard it as binding authority and give it allegiance.⁴³ Laws are not justified by referring to a standard of morality but instead lay claim to legitimacy because of its existence. As Raz explains, “[t]he law presents itself as justified and demands not

35. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 278 (University of London 1832).

36. Scholars usually understand classical legal positivists, such as Bentham and Austin, to connect law with certain “social facts about power, practice, and command” and “insist on a very sharp distinction between the social facts about law as it is, and moral facts or moral opinions about law as it ought to be.” See, e.g., Jeremy Waldron, “*Transcendental Nonsense and System in the Law*,” 100 COLUM. L. REV. 16, 30-31 (2000).

37. H.L.A. HART, *THE CONCEPT OF LAW* 181-89 (1961).

38. *Id.* at 181.

39. *Id.*

40. *Id.*

41. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 158 (1979).

42. *Id.*

43. *Id.*

only the obedience but the allegiance of its subjects.”⁴⁴ Removing morality as an essential part of the identity and content of law, as legal positivism urges, has severe repercussions on a society to which a law applies for three reasons. First, the inherent immorality or iniquity of a law may not be immediately recognizable if the sole criteria for legal validity is that individuals in the legal system accept those laws as legitimate authority. Laws that are inherently immoral, such as laws secretly supporting racial discrimination and segregation, have been passed and enforced in the South after the Supreme Court’s decision in *Brown v. Board of Education*⁴⁵ to systematically prevent the integration of races.⁴⁶ Despite their unethical aims, such laws would be justified and considered valid by legal positivism solely because society complies with them and shows obedience; the inherent immorality of such laws would not be apparent or questioned, especially when such laws were propagated as being instrumental to moral reform.⁴⁷ Second, grounding the validity of laws on observable social facts rather than their actual content removes all bases for questioning the law’s moral legitimacy and authority. It would be impossible to tell, from the vantage point of an external observer of the legal system, the moral worth of a law from the fact that its society obeys it. It would also be impossible to determine the moral worth of the law simply from its society’s acceptance and compliance with a law. Professor Robin West has pointed out that acquiescence and obedience to legal authority do not necessarily legitimize a law from a moral standpoint.⁴⁸ Nor do they imply that the law is good.⁴⁹ People may sometimes crave the wrong

44. *Id.*

45. 347 U.S. 483 (1954).

46. Anders Walker, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following Brown v. Board of Education*, 47 DUKE L.J. 399, 404 (1997) (discussing how racially-neutral terms, such as illegitimacy and immoral conduct, were used in the law to perpetuate racial discrimination in the South post-*Brown*).

47. *Id.* at 423.

48. Robin West, *Authority Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 385-91 (1985) (distinguishing Posner’s ideal theoretical world in which mere consent to wealth-maximizing legal, social, and political transactions renders those transactions morally justifiable from the stories of Franz Kafka; to conclude that, “even if those wealth-maximizing transactions do elicit consent, their moral justification has yet to be shown”).

49. *Id.*

that a bad law embodies, but the submission to authority that comes from that craving does not provide a sound basis to establish the law's moral legitimacy.⁵⁰ Third, refusing to evaluate legal content lessens society's ability to make moral judgments about the law and decide for themselves if disobedience or non-compliance is ever justified.⁵¹ If laws are considered valid regardless of their content, men would have no other option but to obey, even when the law's iniquity offends men's rational sense of justice and fairness. Worse still, men may also submit to immoral conditions without taking firm responsibility for their individual, familial, or society's moral well-being and long-term safety.⁵²

However, the fact that men do not blindly accept iniquitous laws or the use of morally neutral laws for iniquitous purposes would suggest that there is a general acceptance that there are essential characteristics that the law must embody. Courts have been clear that property laws, for example, must "serve human values" and cannot be used to cause personal injury to other individuals.⁵³ And when a law perpetuates inequality and hostility towards particular groups of people in society to produce a form of "tiered personhood"⁵⁴ and "tiered citizenship,"⁵⁵ moral

50. West refers to Franz Kafka's "The Problem of Our Laws" to show how individuals crave the governance by authority and this "sustains the illusion of certainty, fairness, generality, and justice" of our legal system. West goes on to suggest that "[i]f Kafka's descriptions ring true—if we would consent when asked, not to those legal imperatives that promote our wealth or self-interest, but to those that satisfy our cravings for judgment and punishment by noble authority—then nothing of moral consequence can follow from the fact of our hypothetical consent . . . [i]f, as Kafka suggests, we are motivationally inclined to submit to authority, we must examine the value of the hierarchical relationships that the act of submission creates. The fact of submission, like the fact of consent, in itself implies nothing." *Id.* at 422-23.

51. Under natural law theory, men are not bound to obey unjust laws that do not seek the common good because such laws are not proper laws that bind. There is no moral obligation to obey them unless disobedience will result in scandal or disorder. Where a law is in direct contradiction to, not just the common good but to divine law, these laws must not be obeyed under any circumstances because it is men's duty to obey God and not men. *See Aquinas, supra* note 22, at 55.

52. Martin Luther King, Jr., for example, identified the white moderate as the greatest stumbling block toward African American freedom. The person who chooses order over justice and who prefers "negative peace" (the absence of tension) to a "positive peace" (the presence of justice) will become a "dangerously structured dam[] that block[s] the flow of social progress." *Letter from Birmingham Jail*, in *PHILOSOPHICAL PROBLEMS IN THE LAW* 81 (Wadsworth 4th ed. 2005).

53. *State v. Shack*, 58 N.J. 297, 303 (1971).

54. *See* Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 *HARV. J. ON RACIAL & ETHNIC JUST.* 163, 171 (2010)

condemnation is quick to follow, as with Arizona's immigration law.⁵⁶ The law, Senate Bill 1070,⁵⁷ which aims to discourage and deter the unlawful entry and presence of illegal immigrants in Arizona, has had severe public backlash.⁵⁸ In the copyright system, the expectation that copyright laws adhere to certain moral standards and encompass a particular set of moral content is less prevalent in academic commentary and judicial decisions in the United States.⁵⁹ Other normative theories, such as law and economics, libertarianism, and consequentialism, have thus far provided evaluative tools, which have allowed for the social value and broad moral worth of copyright laws, but not their inherent qualities and content, to be evaluated.⁶⁰ Thus, in previous

(describing how anti-immigration law today, like Jim Crow laws during the post-Reconstruction era, "can amplify social norms and create a racial caste system that perpetuates tiered personhood based on race, national origin, or ethnicity"). See also Henry L. Chambers, Jr., *Dred Scott: Tiered Citizenship and Tiered Personhood*, 82 CHI.-KENT L. REV. 209 (2007) (discussing the iniquities of allowing different tiers of personhood and citizenship in American society).

55. *Id.* at 183.

56. 2010 Ariz. Sess. Laws 113.

57. *Id.*

58. Andrea Christina Nill, *Latinos and S.B. 1070: Demonization, Dehumanization, and Disenfranchisement*, 14 HARV. LATINO L. REV. 35 (2011) (describing the ill will and toxic atmosphere surrounding the enactment of Senate Bill 1070).

59. The United States, for example, has been reluctant to acknowledge that the author may have a deep personal connection with his expression that goes beyond a pure economic interest. Moral rights that protect an author's personal interest in his expression by prohibiting the mutilation of a work, use of a work without rightful attribution, or public dissemination of a work without the author's consent are not protected as legal rights in the United States. See Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985). Courts have also not questioned the morality of the law's assumption that public welfare will be advanced if creators are encouraged to pursue personal gain as a reward for their creativity. See also *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (stating that "[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'"). However, encouraging expressions through the reward of personal gains would be antithetical to public welfare or the common good if creators produce works to benefit themselves or advance their own agenda rather than to encourage learning and the pursuit of knowledge in society.

60. Some commentaries on copyright have been evaluative and prescriptive. See, e.g., Matthew J. Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 TUL. L. REV. 187 (2006) (using "metric-driven" economics to prescribe the optimal copyright scope); Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799 (2000) (discussing the use of "contractual price discrimination" to redefine the statutory scheme for copyright); Shyamkrishna

writings, I explored the shortcomings of other normative theories in copyright thinking and argued for the need for moral essentials to form the core of copyright law in order to balance the various rights, duties, and liberties of parties in the copyright system.⁶¹ This, in turn, would allow society to progress through the production, dissemination, and use of creative works in an ethical manner. As moral principles guide the conduct of authors, publishers, and users of creative works toward the common good, learning and the pursuit of knowledge in society may therefore be sustained.⁶² The essential characteristics of morality, justice, and goodness, which natural lawyers wisely argue must be at the core of all laws, should also be reflected in copyright laws if a more balanced egalitarian society is to emerge from the creation and dissemination of knowledge, information, and cultural expression. Laws produce the society they govern and good laws that promote the common good will produce a fairer and more humane society.⁶³

B. Relationship Between Law and Morality

Despite positivism's assertion that law and morality must be conceptually separated, the connection between law and morals is difficult to deny. Surely national and international communities cannot perceive state-sanctioned crimes against humanity as legitimate legal rules. Such rules would be morally deficient. Laws that allow recourse to genocide for conflict resolution, as an example, cannot create social obligations to obey and be morally

Balganesh, *Copyright and Free Expression: Analyzing the Convergence of Conflicting Normative Frameworks*, 4 CHI.-KENT J. INTELL. PROP. 45 (2004) (prescribing libertarianism, in the form of free speech, as a balance against the expansion of proprietary copyright); and David McGowan, *Copyright Nonconsequentialism*, 69 MO. L. REV. 1 (2004) (examining consequentialism as a moral theory that justifies copyright laws). Although normative, these commentaries, however, do not provide tools that would inform an individual how to respond to the law, if a particular response to the law would be the right response, or if a law purported to be in the interest of progress actually is for the common good. While they propose possible legal reforms, it is still impossible to tell if the proposed reforms will ultimately be for the common good.

61. ALINA NG, COPYRIGHT LAW AND PROGRESS OF SCIENCE AND THE USEFUL ARTS 32-36 (2011).

62. *Id.* at 37.

63. Aquinas explains this point by stating “[i]f the intention of the legislator is directed at the true good, i.e., the common good, and regulated according to the principles of divine justice, it follows that the law will make men good absolutely.” See Aquinas, *supra* note 22, at 47.

binding on their citizens for want of moral content.⁶⁴ Yet, the separability thesis, integral to legal positivism and analytical jurisprudence, encourages the separation of law from morals to the extent that it would be intellectually possible to separate principles of morality from the existence of valid laws.⁶⁵ When Hart states that “it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so,”⁶⁶ he in effect claims that morals are not a necessary ingredient or condition for legal validity. As Professor Jules Coleman pointed out, under Hart’s formulation of the separability thesis, Hart made allowances for a “logically possible world in which morality is not a condition of legality.”⁶⁷ In such a world, Professor Coleman states, “[i]mmoral laws are not logically impossible.”⁶⁸ But the separability thesis may also apply to a broader claim, such “that there is no necessary connection between morality and governance by law.”⁶⁹ This broader claim is even more difficult to accept. Without some necessary connection between legal governance and morality, the entire legal system would be a sham. It would be comparable to such legal regimes that, lacking the rule of law or a moral aim, have pursued wicked ends. For instance, a prime example is South Africa during its apartheid regime. But governance by law must adhere to those legal principles it wishes to implement before the legitimacy of the legal system can be established. However, if the line between what was legally authorized and what was not becomes blurred in any given regime,⁷⁰ a legal system cannot be said to exist.⁷¹

64. Such as the use of sharia law to massacre citizens who go beyond their limited privileges provided by the law. See, e.g., Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 YALE J. INT’L L. 221 (1989).

65. JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 7 (Cambridge University Press 1988) (“The separability thesis commits positivism to the proposition that there exists at least one conceivable legal system in which the rule of recognition does not specify being a principle of morality among the truth conditions for any proposition of law.”).

66. Hart, *supra* note 37, at 181-82.

67. Jules L. Coleman, *Beyond the Separability Thesis: Moral Semantics and The Methodology of Jurisprudence*, 27 OXFORD J. LEGAL STUD. 581, 583 (2007).

68. *Id.*

69. *Id.* at 584.

70. Such as the South African regime during apartheid. At that time, the South African Parliaments were not subject to judicial review because of the principle of parliamentary sovereignty. Thus, parliamentary members passed some of the most racially oppressive laws, which included “racial registration laws, segregation laws, dispossession laws, removal laws, pass laws, suppression of expression and assembly

While positivism is committed to the separation of morality from legality in the narrow sense, it is nonetheless open to the possibility that legal governance (or legitimacy) exhibits moral virtues. As Professor Coleman explains:

[t]he core idea that Hart emphasized, namely, that the law is one thing, its morality another, is designed primarily to call attention to the need to resist the inference from legality to legitimacy—a warning not to infer the legitimacy of laws from their status as laws. The truth of the claim that the law is one thing, its merit another, is perfectly compatible with governance by law entailing at least some morally desirable features or attributes.⁷²

The broader conception of the separability thesis, that laws need not have moral aims, may be rejected by a positivist without compromising the narrow positivist position that laws need not have moral content. Thus, Hart, while rejecting morals as a necessary component of law, just as Bentham did,⁷³ accepts certain truisms about human nature and “the world in which men live.”⁷⁴ Hart argues that there are certain rules of human conduct that will ensure men’s survival as an end and legal systems must contain such rules if they are to be viable.⁷⁵ To this end, Hart states that a minimum content of natural law is necessary in all laws to “forward the minimum purpose of survival which men have in associating with each other.”⁷⁶ In Hart’s view, the relationship between law and morality is clear: both intersect with each other at the point where law satisfies a moral end.

laws, detention laws, disenfranchisement laws, dis-employment laws, dis-education laws, anti-miscegenation laws, and anti-injunction laws.” The line between “what was legally authorized and what was not” was blurred by the “laws” passed by the legislature. See Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT’L LEGAL PERSP. 73, 114 (2002).

71. Fuller describes eight ingredients that are necessary to create a good legal system. Two of these requirements are the enactment of understandable and non-contradictory rules. Fuller states that “[a] total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all. . .” Fuller, *supra* note 28, at 39.

72. Coleman, *supra* note 67, at 584-85.

73. DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: PATHOLOGIES OF LEGALITY* 2 (2010) (referring to Hart as the “heir and torchbearer” of the legal theory founded by Jeremy Bentham”).

74. Hart, *supra* note 37, at 188.

75. *Id.*

76. *Id.* at 189. For a discussion of the minimum content of natural law, see pp. 189-95.

Although both positivism and natural law recognize the undeniable relationship between law and morality, both schools of thought understand that relationship differently. How that relationship is perceived has tremendous implications for the copyright system as it manages the relationships among authors, publishers, and users of creative works to ultimately promote the progress of science. Positivism's vision of the relationship between law and morality is that law has a moral aim. Law, as Professor Coleman states, "serves morality."⁷⁷ It derives its legitimacy by serving, rather than incorporating, morality. Coleman argues that Raz's statement that law claims to be legitimate authority⁷⁸ is, in fact, an assertion that the law operates as an "instrument in the service of morality."⁷⁹ Coleman also argues that Scott Shapiro's work on law as social plans⁸⁰ presupposes a claim that law has a "moral aim," in that law "aims to respond to or solve a certain category of moral problems" and that "[l]aw's legitimacy depends on its capacity to solve the problems it aims to solve."⁸¹ Coleman makes a bold claim that, contrary to conventional thinking, positivism may actually depend on a necessary connection between law and morality in order to establish the law's legitimacy or "lawfulness."⁸² If this is true, then one important point remains to be made. Moral norms are essential to the law, without exception; but whether individuals in a society have recourse to these norms to determine a rule's validity or legality, their moral and legal obligation to obey the rule, and the best way to conduct their daily activities under that rule depend on whether the views of legal positivism or natural law prevail in that regime.

77. Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L. J. 2, 49 (2011).

78. Raz, *supra* note 41.

79. Coleman, *supra* note 77, at 52.

80. SCOTT SHAPIRO, LEGALITY 195 (2011) ("the exercise of legal authority . . . is an activity of social planning. Legal institutions plan for the communities over whom they claim authority, both by telling their members what they may or may not do and by authorizing some of these members to plan for others").

81. Coleman, *supra* note 77, at 53.

82. Professor Coleman draws a distinction between exclusive positivism (those who insist on the separation of law and morals when determining the content and identity of law only because they accept that at the most fundamental level, law must be in the service of morality) and inclusive positivism (those who allow normative and social facts to be part of the law). Both forms of positivism see a necessary connection between law and morals at different points - the former at law's aim, the later at law's content. *Id.* at 53-54. This distinction does not affect the argument in my paper and I use the words "legal positivism" to encompass both.

In the copyright system, this contrast in viewpoints about the relationship between law and morality has significant implications. Positivism's commitment to the view that law serves morality makes law an instrument for state-defined moral aims. Law becomes a means towards an end rather than an end in itself. However, it does not necessarily follow that moral laws will be created as states pursue moral goals. Laws regulating the immigration of foreign nationals have strong utilitarian goals and moral aims.⁸³ But as discussed earlier in this paper, immigration laws used as means towards moral ends may be inherently immoral in their treatment of illegal immigrants.⁸⁴ Positivism's view that law is legitimate when it serves morality seems to teach society to accept and obey (or at the very least, acquiesce to) inherently bad laws just because they exist to serve a moral end. Arizona's Senate Bill 1070⁸⁵ is a good example. Coleman provides an explanation for why this may be the case, arguing, "in order for law to service morality there must be something of a firewall between law and morality. One is not free to consult the moral principles that justify the law when determining what the law requires. To do so . . . would vitiate the law's claim to authority."⁸⁶ The law's authority to a positivist, therefore, is a matter of social acceptance. If the law pursues a moral aim, there would be no reason to question its actual moral content. However, establishing the law's legitimacy because of its service of a moral goal does not necessarily establish the law's legality. This intellectual leap from legitimacy to legality is an impossible one for a natural lawyer to make. To the natural lawyer, the relationship between law and morality lies in the law's character or identity: its actual content.⁸⁷ Morality "is intrinsic to the

83. *See* *Chae Chan Ping v. U.S.*, 130 U.S. 581, 606 (1889) (stating that the government has the power "to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion. . .").

84. *See* Adam B. Cox & Christina M. Rodriguez, *The President and Immigration Law*, 119 *YALE L.J.* 458, 535 (2009) ("The government might sometimes be pleased that unauthorized immigrants lack lawful status, and so an illegal immigration system might emerge even if the Executive had authority to engage in ex ante admissions. Unauthorized immigrants' lack of status gives the Executive more policy flexibility in determining their future inside the United States. To put it crudely, the Executive can more easily remove illegal immigrants than legal immigrants once those immigrants have served the labor purpose for which they were permitted to enter.").

85. 2010 *Ariz. Sess. Laws* 113.

86. Coleman, *supra* note 77, at 55.

87. *Id.*

nature of the law”⁸⁸ from the vantage point of a natural lawyer. Inherently immoral law cannot be valid or legal. One’s obligation under the law from a natural lawyer’s perspective is determined by the moral principles that justify its existence—one must be able to “see through the law to the principles that justify it”⁸⁹ in trying to decide what the law requires. Unlike positivism, natural law does not see a “firewall between law and morality, [it] takes the law to be translucent - if not transparent - regarding the principles that would justify it.”⁹⁰

Although positivism is the more dominant legal theory today,⁹¹ its instrumentalist view of law and morality has not served the copyright system well. Copyright laws are justified on the basis that they pursue a moral aim however divergent that moral aim may be. Jurists and scholars have found moral justification for copyright laws in their reward for creativity,⁹² increase in social utility,⁹³ facilitation of rights transfer on the market,⁹⁴ or establishment of a civil democratic society⁹⁵ to ultimately promote the progress of science as an end goal. The copyright system as a whole derives its legitimacy from its service of social progress by encouraging the creation and dissemination of knowledge. But despite the legal system’s moral aims, the law in itself appears to lack transparent moral principles that would justify its existence.⁹⁶ This lack of moral principles will make it difficult for individuals to determine their rights and obligations

88. *Id.*

89. *Id.*

90. *Id.*

91. Edward J. Conry & Caryn L. Beck-Dudley, *Meta-Jurisprudence: A Paradigm For Legal Studies*, 33 AM. BUS. L.J. 691, 700-01 (1996) (discussing the emergence of legal positivism as the dominant school of thought on legal theory).

92. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[copyright] is intended to motivate the creative activity of authors and inventors by the provision of a special reward”).

93. *Mazer*, 347 U.S. at 219.

94. Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 4-5 (1995) (the copyright system “uses the economic rewards of the marketplace to stimulate the production and dissemination of new works. The exclusive rights granted to authors by the Copyright Act permit authors to commercialize their works without competition from copycats”).

95. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996).

96. LYMAN R. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 8 (1968) (stating “[t]he modern concept of copyright is difficult, complex, and on the whole, unsatisfactory . . . the basic and continuing weakness of copyright law in this country [is] the absence of fundamental principles for copyright”).

under it and for society to be guided in their use and production of creative works so that the progress of science may be actualized and sustained.

Some areas of copyright law are notoriously ambiguous in their application. For if they were less ambiguous, they would be able to provide clearer guidance to individuals in society on how creative works ought to be used.⁹⁷ Fair use, for example, provides some leeway for the use of copyrighted materials without infringing the rights of the copyright owner.⁹⁸ While it is an affirmative defense in a copyright infringement case, its principles are not consistently applied nor plain enough to provide clear guidance on when and how works can be used fairly. The statutory provision for fair use, as Professor Lloyd Weinreb once pointed out, is “muddled.”⁹⁹ Weinreb goes on to say that “Congress adopted three considerably inconsistent ways of doing nothing [for copyright law]: simple reference to fair use, specification of what is fair use by illustrative examples, and prescription of nonexclusive ‘factors to be considered’ in determining whether a particular use is fair.”¹⁰⁰ In this instance, natural law would teach that the law’s legality may be questioned because of the uncertainty that it creates, despite the legitimacy

97. Copyright laws, because of their lack of specificity, are unable to provide *ex ante* guidance to users of copyrighted works on whether a particular use of a copyrighted work is illegal, legal, or privileged under fair use because provisions of the law are vague and general. Such laws may induce users of creative works to develop informal practices of using creative works around vague rules that may or may not apply to their particular uses of creative works. See Edward Lee, *Warming Up To User-Generated Content*, 2008 U. ILL. L. REV. 1459.

98. 17 U.S.C. §107 (2006) provides that:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

99. Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1139 (1990).

100. *Id.*

of the entire copyright system.¹⁰¹ Individuals cannot be obligated to obey laws that are morally deficient—laws that are morally deficient are not real laws.¹⁰² It then follows that members of society truly do not have any real leeway to use creative works if they are not able to rely on the law to determine when the use of a copyrighted work is fair. The fact that one has to be sued for copyright infringement before the court can decide if the use of a copyrighted work is fair, drives this point home.¹⁰³ One's rights and obligations under the law cannot be known with certainty before an act is done and the law enforced. Positivism, which assumes a law's legitimacy when moral aims are pursued, does not help us see this point - that we could be obeying a morally deficient law without our realizing its moral deficiency and lack of legality.¹⁰⁴ The instrumental view of the law (that law serves morality) blinds individuals to this fact (that morally deficient laws are not proper laws) and prevents society from questioning the legality of the law and the justification for its existence.

C. Modern Theories of Law

Other theories of the law have also deemphasized natural law theory's insistence that morality and law be connected at the law's core. Oliver Wendall Holmes, considered the father of legal realism,¹⁰⁵ understood law as "a body of dogma enclosed within definite limits" that had no room for moral consideration.¹⁰⁶ A law must be understood, Holmes writes in *The Path of the Law*, "not from the vaguer sanctions [of men's] conscience" but from the vantage point of a "bad man, who cares only for the material

101. *Id.*

102. Fuller, *supra* note 28, at 39 ("Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible. . .").

103. Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1872 (2007) (describing how indeterminate the law on fair use is and how the borders for lawful personal use lie is slowly diminishing).

104. Hence, Lynne Henderson has pointed out that legal authority has over the course of history, its "unremitting insistence on obedience and punishment of those who disobey," carried within it the seeds for "blind obedience." Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 401-02 (1991).

105. Morton J. Horwitz, *The Place of Justice Holmes in American Legal Thought*, in *THE LEGACY OF OLIVER WENDELL HOLMES JR.* 31 (Robert Gordon ed., Stanford University Press 1992).

106. Oliver Wendall Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

consequences which such knowledge enables him to predict.”¹⁰⁷ To Holmes, notions of justice, fairness, and reasonableness would appear to have no place in the law or legal reasoning.¹⁰⁸ What was important to the realist movement that followed Holmes’s jurisprudence—led by eminent scholars such as Karl Llewellyn, Jerome Frank, and Felix Cohen in the 1920s and 1930s—was that the law’s indeterminacy prevented any form of antecedent rationalization about what law ought to be and ought to do.¹⁰⁹ The reality that must be embraced, to the realists, is that the life of the law is its practice and that law’s main purpose is to provide formal justification for the conclusions reached about its nature by its practitioners - lawyers and judges.¹¹⁰

Two important schools of thought that are the direct descendants of the realist movement—critical legal studies (CLS) and law and economics¹¹¹—appear to have further diluted natural law’s insistence that law and morality be connected at law’s core. CLS’s criticism against a generally applicable rule of law to protect individual liberty and prevent oppressive forms of government runs in direct opposition to the teachings of natural law.¹¹² In a pluralistic society with divergent view points about morality, ethics, and politics, legal reasoning cannot possibly be independent of the subjective view points of those who have the greatest persuasive power in the law-making process.¹¹³ “Legal reasoning” to critical legal scholars, as Professor Andrew Altman puts it, is “tantamount to deciding which party has the best moral or political argument.”¹¹⁴ In reality, the truth about copyright

107. *Id.*

108. See Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1951); Robin West, *Re-imagining Justice*, 14 YALE J.L. & FEMINISM 333 (2002); Robert P. George, *Holmes on Natural Law*, 48 VILL. L. REV. 1 (2003).

109. These scholars shared a common view that law was in reality made by judges who confront and adjudicate social disputes about the law with their personal view points and hence had a retroactive effect. See generally, Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731 (2009).

110. Jerome Frank, *A Realist View of the Law*, in PHILOSOPHICAL PROBLEMS IN THE LAW 95-99 (Wadsworth, Cengage Learning 2005).

111. Linda A. Schwartzstein, *Austrian Economics and the Current Debate Between Critical Legal Studies and Law and Economics*, 20 HOFSTRA L. REV. 1105 (1992) (“Critical Legal Studies (“CLS”) and Law and Economics both emerged as reactions to legal realism”).

112. For CLS’s attack on the rule of law, see Andrew Altman, *Critical Legal Studies and Liberalism*, in PHILOSOPHICAL PROBLEMS IN THE LAW 107-09 (2005).

113. *Id.*

114. *Id.* at 107.

law-making affirms this view about the law and legal rules. Copyright legislation passed by Congress over the last 100 years, for example, have been a process of intense negotiations at various copyright conferences, where interest holders, absent from the negotiating table, end up being shortchanged in the compromises that were made among larger industrial players with significantly more influence.¹¹⁵ The reality that we observe about copyright law-making, however, should not obscure the wisdom that such “laws” may not carry the essential components necessary for proper laws and, as a result, may not impose morally binding obligations on society.

The notion of economic efficiency, central to law and economics, also blinds society to the wisdom of natural law. The idea that human beings are “rational maximizers of their satisfactions” prevails throughout economic analysis of the law.¹¹⁶ One of the leading commentators in the field, Judge Richard Posner, assumes that legislators, like everyone else, are rational maximizers of their satisfaction, and as a result, “nothing they do [is] motivated by the public interest.”¹¹⁷ Instead, legislation is a “deal” between organized groups of individuals, such as a firm or company, and a legislator that will transfer wealth from unorganized individuals to interest groups.¹¹⁸ Courts in a legal system then interpret these legislative deals and provide “authoritative dispute resolution.”¹¹⁹ Despite the normative value that the concept of efficiency provides legal analysis (the law’s goal is to maximize wealth in society), a lot remains to be said about the law’s actual content and what that content looks like. The pursuit of efficiency, just like any other moral aim, may result in inherently unjust and immoral laws. The doctrine of efficient breach in contract law, for example, encourages a contracting party to terminate a contract when its performance is going to be more costly (and, thus, less efficient) than the damages that would be payable to the innocent party for the intentional breach of the contract.¹²⁰ Contracts, however, are not

115. JESSICA LITMAN, *DIGITAL COPYRIGHT* 46-48 (2001).

116. Richard A. Posner, *The Economic Approach to Law*, in *PHILOSOPHICAL PROBLEMS IN THE LAW* 125 (Wadsworth, Cengage Learning 2005).

117. *Id.*

118. *Id.* at 126.

119. *Id.*

120. Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 *COLUM. L. REV.* 554 (1997).

only exchanges of resources between contracting parties, but they are also moral promises that should be performed in the absence of extenuating circumstances.¹²¹ A political society will only flourish when individuals in it have some form of certainty that promises entered into can, in fact, be relied upon and feel confident that contractual relationships entered into will actually be performed. Yet, the transparency in the law needed for such relationships to flourish is notably absent when parties to a contract can never be certain if they will be “paid out” by the other party before the contract can be performed. When contracting parties cannot trust a contract to be performed and find it difficult to rely on the integrity (or morality) of a good faith promise to bring about an exchange, the rule of law is severely compromised.¹²²

Although these legal theories can be said to recognize that morality is connected with law,¹²³ that connection seems attenuated. While much has been said about the goals of the law, its actual workings in practice, and what the law ought to aim for, these theories also provide very little guidance on what the specific content of law should be. Natural law’s position that law must contain essential moral components that will make the law work in society’s best interest, provides the guidance needed to determine the specific content of law.¹²⁴ But this insight becomes

121. Seana Shiffrin, *Could Breach of Contract Be Immoral?*, 107 MICH. L. REV. 1551, 1567 (2009) (arguing that “performance, rather than “perform or pay,” is the default content of the moral duty captured in an agreement to perform, and that it may, in some circumstances, be immoral to fail to perform even if one supplies the promisee with expectation damages”).

122. Seana V. Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 749 (2007) (suggesting that stable contractual relationships are essential to the full functioning of a robust political society and stating that “if we invoke promises, directly or indirectly, we have a duty, taking something of the form of a side constraint, not to act or reason in ways that are in tension with the maintenance of a moral culture of promising”).

123. See Harry W. Jones, *Law and Morality in The Perspective of Legal Realism*, 61 COLUM. L. REV. 799 (1961) (arguing that legal realism is closer to natural law than legal positivism because it believes that the reality of legal practice provides leeways in which legal practitioners - judges, lawyers, law officers - are free to make the moral choice about the law and how it is applied to the case before them).

124. The specific content of legal rules is thus guided by the specific “concern of natural law to show that the act of ‘positing’ law is an act which can and should be guided by moral principles and rules” and “that those moral norms are a matter of objective reasonableness, not of whim, convention or mere ‘decision.’” See Daniel Westberg, *The Relation Between Positive and Natural Law in Aquinas*, 11 J.L. & RELIGION 1, 9 (1994-95).

buried wisdom when individuals in society accept rules as law when these rules lack essential ingredients - morality, ethics, certainty - that would help a society thrive and flourish. Natural law's wisdom is particularly important for the copyright system. The normative value for the copyright system is deeply entrenched in the Copyright Clause of the constitution, which has a clearly identifiable moral goal—the progress of science. Yet, there appears to be a disconnect between what the law aims to do and what it actually does.¹²⁵ Arguably, progress becomes elusive when society loses sight of more objective moral values, such as the facilitation of greater access to educational and creative resources or the encouragement of more authentic works of authorship that would have a more positive effect on society. These values unite rather than divide society and conceivably, they would promote society's progress through the creation and dissemination of knowledge more effectively if they form the core content of the laws because they work for the common good or in Aquinas's words, "concern themselves with the happiness of the community."¹²⁶

III. THE COMMON GOOD

While the notion of the common good is integral to natural law, the notion itself is capable of various interpretations.¹²⁷ Catholic social teachings define the common good as "the sum total of social conditions which allow people, either as groups or as individuals, to reach their fulfillment more fully and more easily."¹²⁸ At the center of Catholicism's definition of the common good are the protection of individuals' dignity as human beings and the ability for these individuals to form relationships and

125. See Alina Ng, *The Author's Rights in Literary and Artistic Works*, 9 J. MARSHALL REV. INTELL. PROP. L. 453 (2010) (discussing how the copyright system produces works that are not conducive to progress).

126. Aquinas, *supra* note 22, at 44.

127. Daniel P. Sulmasy, *Four Basic Notions of the Common Good*, 75 ST. JOHN'S L. REV. 303, 303-06 (2001) (identifying the following as basic notions of the common good: "aggregative common good" (the total sum of all goods owned by all individuals in a given social unit), "common common good" (goods that society holds in common and this would include (1) common property and (2) commonly held common good in the teleological sense), the "supersessive common good" (common good imposed by one individual or organization on the rest of the community), and the "integral common good" (good that come from human association and includes (1) good from mutual association and (2) good that comes from being part of a community)).

128. John J. Coughlin, *Sacrifice, The Common Good, and The Catholic Lawyer*, 3 U. ST. THOMAS L.J. 6, 8 (2005).

communities that will flourish and thrive.¹²⁹ From a theological view point, the common good represents divine truth that all men should seek as their final good and, discoverable through practical reason, should form the essence of man-made laws.¹³⁰ Laws directed at the common good will lead men to a virtuous life, or, as Aquinas asserts, will “make men good” because such laws will encompass divine principles of justice and morality, which in turn, will ultimately produce a well-ordered and productive society.¹³¹ From a non-religious view point, the idea of the common good has been defined by Professor Finnis as “a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value[s] for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community.”¹³² The common good in this definition represents the “general welfare” of society or the “public interest” that must be the central concern of any law.¹³³

In thinking about the common good in copyright law, this article adopts the broader definition that the common good means the general welfare of society or the public interest. It suggests that, similar to most laws that affect individual rights and human relationships, copyright law must be concerned with the protection of human dignity and the development of a well-functioning society. On a more narrow theological point, there is also a deeper relationship between authentic creativity and the divine, which Professor Roberta Kwall has explored and written about.¹³⁴ Conceivably, the search for divine inspiration as a

129. Susan J. Stabile, *Catholic Legal Theory*, 44 J. CATH. LEGAL STUD. 421, 424 (2005) (“That individuals have dignity does not lead to the promotion of individualism, but rather to the notion of living and existing in community Understanding this relational aspect is important. Without it, there might be a temptation to think that dignity of the human person feeds an emphasis on the individual instead of the community.”).

130. Such man-made laws, according to Catholic social teachings, would embody justice as a virtue among individuals in society in how individuals treat others and share resources. The common good must grow out of a community to protect the well-being of the entire community and is not to be individually pursued. Vincent D. Rougeau, *Catholic Social Teaching and Global Migration: Bridging the Paradox of Universal Human Rights and Territorial Self-Determination*, 32 SEATTLE U. L. REV. 343, 346 (2009).

131. Aquinas, *supra* note 22, at 47.

132. Finnis, *supra* note 31, at 155.

133. *Id.* at 156.

134. Roberta R. Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the*

stimulus for more authentic and genuine creations should be a common good that moral copyright laws should direct authors and other creators toward. The beauty of the Sistine Chapel may suggest that enduring works of art are produced when an artist is connected with the divine truth that classical natural lawyers believe men ultimately desire to seek. How copyright law would reflect this narrower conception of the common good would have to be explored in another paper although one would be safe in proposing, at this point, that the recognition of moral rights and literary property would be a right step in this direction.¹³⁵

A. Is Objective Morality Possible?

One of the strongest objections to the notion of the common good is that our society is a heterogeneous and diverse one. The common good presupposes that members in a society, which some theories argue are deeply ingrained with moral relativism and value skepticism,¹³⁶ can arrive at an agreement on certain cognitive moral truths about ourselves as individual human beings and of society as a complex communal network of interdependent human relationships. But in a pluralistic society, where individuals hold divergent and sometimes incompatible ethical and political views, the notion of the common good that men should desire on an objective level would seem absurd and autocratic. Professor Heidi Li Feldman has pointed out that there appears to be a “crisis of confidence in the idea of objectivity” and that “many are ready to discontinue talk of objectivity altogether, on the grounds that it has been nothing more than a mask for the oppressive practices of politically and economically privileged groups, promising neutrality where in fact there are only power relations.”¹³⁷ The wariness of these legal scholars has perhaps also been compounded by Judge Posner’s own wariness when he argued in his famous book, *The Problematics of Moral and Legal*

Artistic Soul, 81 NOTRE DAME L. REV. 1945 (2006).

135. I explored this question in some detail in Alina Ng, *Literary Property and Copyright*, NW. J. TECH. & INTELL. PROP. L. (forthcoming Fall 2012).

136. Individualism, for example, advances the idea that moral relativism and value skepticism exists in society. See Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 41 (1990) (arguing that “[i]ndividualism’s moral relativism and value skepticism promote “intellectual irresponsibility” in which private interest is given free rein under the rationalization that the “competition of market” will shed the bad and save the good”).

137. Heidi Li Feldman, *Objectivity in Legal Judgement*, 92 MICH. L. REV. 1187, 1187 (1994).

Theory, that moral universals are useless in helping us solve social concerns because they cannot possibly be known: “[t]here are so many unsolved old moral dilemmas.”¹³⁸

However, it would be a mistake to assume that a claim asserting that the common good is universal morality, which should be the essential content of law, also claims that universal morality is patently obvious and easily recognized by all as objective truths. One would not be as naive as to suggest that moral truths are plainly self-evident, or that they are immediately accessible or ascertainable by the rational mind. In fact, moral truths that could solve the ethical dilemmas society faces are not always clear and easily discernible. Sometimes, the difficulty in identifying these universally accepted truths might even be overwhelming, as when addressing intensely controversial questions about when human life begins and ends.¹³⁹ In different situations, other less palpable factors, such as prejudice, selfishness, ignorance, or pride, may, on a subconscious level, prevent individuals from recognizing certain self-evident moral truths about human beings and their environment.¹⁴⁰ But the fact that moral questions are indeed difficult should not, however, imply that there are no right answers or moral truths that may guide conduct towards the right solution. “Even reasonable disagreement” as Professor Robert P. George states, “does not indicate an absence of objective truth.”¹⁴¹ More importantly, disagreement about the right solution to social and ethical problems faced, as well as the difficulty in identifying universal acceptance for what would be in the common good and advantageous for long-term public welfare, should not deter the consistent inquiry into what would ultimately promote a healthy thriving community and society.

138. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 63 (Harvard University Press 2002).

139. Jed Rubenfeld, *On the Legal Status of the Proposition that “Life Begins at Conception,”* 43 *STAN. L. REV.* 599 (1991) (discussing the difficulties in determining when a fetus achieves personhood status) and compared with Lois Shepherd, *Terri Schiavo: Unsettling the Settled*, 37 *LOY. U. CHI. L.J.* 297 (2006) (discussing ethical issues that arise with end-of-life decision making).

140. Sanford Levinson, *Self-Evident Truths in the Declaration of Independence*, 57 *TEX. L. REV.* 847, 851 (1979) (stating that John Locke believed inferior intellectual abilities may also prevent an individual from recognizing self-evident truths: “it is altogether possible that any particular mind could lack the intellectual acumen to recognize even these most overwhelming truths”).

141. Robert P. George, *Law Democracy, and Moral Disagreement*, 110 *HARV. L. REV.* 1388, 1390 (1997).

Literature on the copyright system illustrates the existence of reasonable disagreement about the right solution to moral dilemmas.¹⁴² Three of the more contentious areas of copyright—the effects of copyright on free speech, protection of creative expressions as private property, and nature of copyright as an economic right—spur passionate commentary about the proper role of the law and how far it should reach.¹⁴³ On the effects of copyright on free speech, views differ widely on whether the economic functions of copyright laws actually promote or restrict an individual’s fundamental right to free speech.¹⁴⁴ To the Supreme Court in *Harper & Row Publishers, Inc. v. Nation Enterprises, Inc.*, the economic incentives in copyright law support free speech by securing fair market return for the creation and dissemination of individual expression and should therefore be protected.¹⁴⁵ Justice Brennan’s dissent in *Harper & Row* presents an opposing view that copyright enables its owner to restrict use of the work by others, thereby placing undue

142. Members of the Copyright Principles Project, which aimed to propose some reforms to the copyright system by introducing a set of principles that would make copyright laws more efficient and fair, prepared an article authored by Pamela Samuelson, which elaborated on these principles. It was clear from the article that while all participants in the project shared a common desire to provide some clear idea of how copyright laws should be structured in the technological age, there was significant disagreement what the solutions would be. See Pamela Samuelson, *Members of the CPP, The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1179 (2010).

143. See Marc H. Greenberg, *Reason or Madness: A Defense of Copyright’s Growing Pains*, 7 J. MARSHALL REV. INTELL. PROP. L. 2 (2007) (discussing how scholars view the expansion of copyright as an abridgment of free speech liberties); David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 140 (2009) (discussing the resistance of some copyright scholars to the expansion of property rights in creative works as an infringement on the freedom to use such works that are in the public domain); Diane L. Zimmerman, *Copyright as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29 (2011) (questioning if the economic rationale for the grant of exclusive rights to creators of creative works is truly justified given the non-economic incentives for creativity among creators).

144. See Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has In Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1 (2000) (discussing how copyright laws may restrict speech by providing the copyright owner with the ability to restrict speech by exercising the right to prevent the reproduction and distribution of substantially similar expressions and how copyright laws may at the same time facilitate greater freedom of speech by “establishing a marketable right to use one’s expression”).

145. 471 U.S. 539, 558 (1985).

burden on other individual's right to free speech.¹⁴⁶ To Justice Brennan, copyright cannot be used to defeat a defense of fair use when an individual uses materials of public interest to generate political debate.¹⁴⁷ There are also diverging views about whether creative expressions should be private property. While some scholars consider creative expressions to be private property,¹⁴⁸ other scholars see the increasing commoditization of creative works as a private enclosure of intellectual expression that should rightfully be common property.¹⁴⁹ Still, other viewpoints advance the idea that copyright is a government-granted privilege or monopoly right that must be limited in its application.¹⁵⁰ Scholars are also divided on the nature of copyright. Fundamentally, its role as an economic incentive for creativity has, unsurprisingly, led to the conclusion that it is an economic right that provides the exclusivity necessary to prevent the free-riding of positive spillovers from the creation and dissemination of a work.¹⁵¹ But scholars have also proposed that copyright be understood as a natural right that concerns itself not

146. Justice Brennan thought that the "zealous defense of the copyright owner's prerogative will . . . stifle the broad dissemination of ideas and information [that] copyright is intended to nurture" and that the "progress of arts and sciences and the robust public debate essential to an enlightened citizenry [will be] ill served by [a] constricted reading of the fair use doctrine." *Id.* at 580.

147. *Id.* at 582.

148. Roberta R. Kwall, *Governmental Use of Copyrighted Property: The Sovereign's Prerogative*, 67 TEX. L. REV. 685 (1989) (arguing that copyrighted works are private property that may be subject to government eminent domain powers); see also *Smith v. Goguen*, 415 U.S. 566, 602-03 (1974) (recognizing that "the Government may create private proprietary interests in written work and in musical and theatrical performances by virtue of copyright laws").

149. James Boyle, *The Second Enclosure Movement and The Construction of the Public Domain*, 66-SPG LAW & CONTEMP. PROBS. 33, 34 (2003).

150. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) ("every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright"); see also Alina Ng, *Rights, Privileges, and Access to Information*, 42 LOY. U. CHI. L.J. 89 (2010) (In this article, I argued that copyright is an economic privilege granted by the government to regulate use of informational resources; it does not provide copyright owners with an absolute property right to exclude socially beneficial uses of informational works).

151. Wendy J. Gordon, *Copyright as Tort Law's Mirror Image: "Harms," "Benefits," and the Uses and Limits of Analogy*, 34 MCGEORGE L. REV. 533, 535 (2003) (to encourage creative production, "copyright law allows people to capture benefits they generate"). See also Stephen Breyer, *The Uneasy Case For Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 307 (1970) (recognizing that spillover benefits of certain "texts and other scientific, professional, or technical books and articles" should not be discouraged).

only with the rights of the author but also with the rights of the public as a “source of affirmative protection for free speech interests.”¹⁵² The divergence of views about the purpose, context, and nature of copyright would lead one to the conclusion that there is no, as Professor Catherine Seville points out, “inevitable or pre-determined direction for copyright law.”¹⁵³

Nonetheless, when stripped down to their bare essence, it would seem that proponents of these different point of views would agree that copyright law should, as a bare minimum, protect the individual creator’s dignity and build a healthy thriving society if it is to serve the common good. The freedom of speech that permeates much of copyright jurisprudence affirms the dignity of human beings by enabling ideas, thoughts, and experiences to be expressed without fear of censorship or misappropriation. But protecting the value of free speech through copyright also ensures that society’s right to hear and read,¹⁵⁴ an equally important tenet of the First Amendment and essential to a healthy flourishing society, is not compromised by the inability of an author to reach his or her audience through lack of finances or for fear of unauthorized copying. Fundamentally, it would be difficult to deny that the encouragement of a wide variety of expressions would be for the common good as the dignity of those expressing themselves are affirmed and as society grows and flourishes from the exposure to not just political ideas but also to the wide assortment of cultural expression.¹⁵⁵ Scholars critical of copyright expansion take the position that rights must be limited because of an implicit recognition that far-reaching rights affect human dignity and society’s well-being when rights are used to prevent legitimate uses of works.¹⁵⁶ Scholars divided on the

152. Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535 (1993).

153. CATHERINE SEVILLE, *THE INTERNALISATION OF COPYRIGHT LAW: BOOKS, BUCCANEERS AND THE BLACK FLAG IN THE NINETEENTH CENTURY* 18 (2006).

154. *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943).

155. Paul Goldstein, *Copyright and The First Amendment*, 70 COLUM. L. REV. 983, 989 (1970) (stating that a “prime functional need in a society of free choice is that its members be broadly educated in the ideas which bear upon their political decisions. Wise and independent political choices are not the outgrowth of exposure to political ideas alone. Essential, too, is exposure to the varieties of cultural experience—philosophy, science, the written, visual, and musical arts—which conduce to individual growth and freedom.”).

156. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

nature of copyright would probably agree that they are advocating for the protection of human dignity (by securing economic rewards or rewarding labor) and the flourishing of society (by facilitating the creation of diverse forms of expression) at the end of the day regardless of whether copyright is perceived as an economic incentive or a natural right. Thus, the important point to be made here is that objective morality is a realistic standard that is achievable. Even in a society where views on highly controversial subjects are widely divergent, the common good is identifiable and discoverable and the law should, as a matter of propriety, encompass such universal morality. The difficulty of finding a common standard of morality should not be a reason for us to refuse to search for it or, worse still, blind ourselves to right solutions to moral and social problems before us.

B. The Nature of Legal Rights

Protecting individuals' rights would be the central purpose of copyright if, in seeking the common good, it also sought to affirm the dignity of the individual while enabling society to thrive and flourish. Natural rights of individuals, that are integral to natural law, must therefore be protected if the law is committed to the dignity of the human person. Rights to life, expression, health, and safety are prime examples of natural rights that affirm the individual. In organized society, these universal and inalienable rights, which men have in their natural state, must be distinguished from legal or acquired rights that are state granted. Rights that exist in the state of nature, a state where men have, as John Locke says it, "perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of Nature, without asking leave or depending upon the will of any other man,"¹⁵⁷ are dignity-affirming rights, which support an individual's freedom to choose and determine the best course of action for their lives without state interference. In Locke's state of nature, the product of a man's labor becomes private property.¹⁵⁸

Although the product of labor that would become property in Locke's mind was a mixture of physical labor (such as the

157. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 4 (J.W. Gough ed., Oxford 1946).

158. *Id.* at 15.

gathering of food) with tangible objects in the commons (such as acorns under an oak or apples plucked from a tree), Locke's vision for the acquisition of property from labor mixed with things in the commons have been applied to justify property rights in creative works that are the product of an authors intellectual labor which he mixed with idea and inspirations found in the commons.¹⁵⁹ The idea that authors have natural property rights over their creations is essential to copyright law. It affirms the dignity of individual authors by recognizing the special connection between the individual who creates and the work that is created.¹⁶⁰ It also encourages authenticity in expression by individuals who realize that a created work represents who they are as individual human beings because their identity as authors and creators are so closely connected to the work. Copyright law's protection of the author's right to first publication¹⁶¹ and of moral rights for visual arts,¹⁶² would be explicit affirmations of the dignity of the creator of a work as an individual. It is unfortunate, however, that the author's natural rights over creative works in general have not been recognized by the courts¹⁶³ because, conceivably, the disconnect created between the author and the work could undermine authorial dignity, social responsibility, and the need for authenticity in works, which would in the long run be necessary to promote progress of society and the common good.¹⁶⁴

It is particularly important for the copyright system that

159. Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1295-97 (2003) (attributing Locke as the source for the view that copyright is a form of natural right); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535, 1540 (1993) (relying on Lockean principles to approach copyright from a natural law perspective); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L. J. 517, 523 (1990) (relying on Lockean principles to establish a natural law theory for copyright).

160. John Milton, *Areopagitica in PARADISE LOST* 342 (W. W. Norton & Company 2005) (arguing that books are "not absolutely dead things, but do contain a potency of life in them to be as active as that soul was whose progeny they are . . . they . . . preserve as in a vial the purest efficacy and extraction of that living intellect that bred them").

161. *Harper & Row v. Nations Enters.*, 471 U.S. 539, 564 (1985).

162. 17 U.S.C. §106A (2006).

163. *Wheaton v. Peters*, 33 U.S. (Pet. 8) 591, 627-28 (1834) (deciding that the copyright statute was the only source of rights over creative works and that authors did not have natural rights over their work at common law).

164. I have discussed this possibility in a previous work. See Ng, *supra* note 125, at 456.

natural rights be distinguished from acquired and legal rights that are state-granted.¹⁶⁵ Acquired rights, defined by governmental policies and goals, confer specific entitlements that may, but do not necessarily, protect an individual's dignity. This is especially so when acquired rights are granted through compromise to the most influential or strongest interest holder. Rights granted under the Copyright Act are a clear example of such acquired rights. Acquired legal rights, which may lack the essential moral content of natural law, could diminish human dignity or violate the common good. Legal rights granted under the copyright act must be distinguished from natural rights of authors to avoid confusion in how the copyright system is understood from two vantage points. First, the court in *Donaldson v. Beckett* was right in deciding that the statutory privileges acquired by publishers and booksellers under the Statute of Anne were limited in duration and that they were not entitled to claim a perpetual copyright over books, which they alleged was granted by the author.¹⁶⁶ The Statute of Anne clearly protected a temporary monopoly over books.¹⁶⁷ Furthermore, publishers and booksellers were companies that could not claim an individual's natural right to the work—they were not creators with a personal human connection with the work. But whether *Donaldson v. Beckett* can be taken to stand for the proposition that the author's natural right in the work was replaced by statute is a separate question. From a natural law perspective, a statute that takes away an individual's natural right would be illegal because it lacks the essential moral content necessary to be law.

Second, natural rights protect an individual author's dignity by ensuring that a work's creator remains personally connected to the work thereby allowing individual authors and creators to have some autonomy and control over how the work is used by society once disseminated. In addition, by connecting authors

165. Phillip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 922-24 (1993) (acquired rights are "rights that could exist only under civil government" and pointing out that Americans in the 1780s and 1790s were able to distinguish "civil guarantees of natural rights," such as free speech and freedom of press, from "civil guarantees of rights that did not exist in the state of nature[,] such as habeas corpus and jury rights).

166. *Donaldson v. Beckett*, [1774] 1 Eng. Rep. 837 (H.L.).

167. Section I of the act protected published books for twenty-one years from the date of the act and unpublished books for fourteen years from the date of publication. Statute of Anne, (1710) 8 Ann., c. 19 (Gr. Brit.).

with their work and having a work represent its author's personality to society, natural rights also make authors socially responsible for what they produce and disseminate to the public. If natural rights are taken to mean rights that individuals possess in the state of nature before government, as is proposed in this article, the protection of the author's natural rights is not likely to exacerbate copyright expansionism as some scholars fear.¹⁶⁸ Natural rights, by affirming the dignity of individuals, implicitly recognize an individual's moral obligation to be respectful of the equal rights of others to have their dignity protected. "Being equally free," as Professor Hamburger points out, meant that individuals in society "did not have a right to infringe the equal rights of others, and, correctly understood, even self-preservation typically required individuals to cooperate-to avoid doing unto others what they would not have others do unto them."¹⁶⁹ Thus, affirming human dignity of individual authors and creators would also necessitate protecting the dignity of those who have rights to access these works. When individual dignity of members of a community and society are affirmed by the recognition of natural rights, society becomes united and ceases to be divided by conflict of interests. Society becomes divided through the assertion and enforcement of legal rights when such rights are incongruous with the wisdom of natural law: that law encompasses moral principles for the common good. For society to thrive and flourish through the availability of creative works that may be used for learning, education, and the general betterment of its individual members, its copyright laws must unite divergent interests by encouraging the pursuit of a unified vision of the common good before members of society are able to make independent moral choices characterized by surrender and compromise for the well-being of their community and society.¹⁷⁰

168. Carys J. Craig, *Locke, Labour and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law*, 28 *QUEEN'S L.J.* 1, 8 (2002) ("Author-based reasoning compounded by theories of private entitlement gives rise to a rights-based vision of copyright. This emphasis affects both our basic characterization of the copyright regime and the extent of the rights that we expect it to accord . . . notions of reward, desert and natural right give copyright holders' claims a substantial and unmerited normative force that pervades copyright rhetoric, culminates in the overprotection of copyrightable works, and in so doing, threatens to undermine the coherence of the copyright system.")

169. Hamburger, *supra* note 165, at 924.

170. In graver situations, members of society are sometimes willing to trade personal benefit, such as the punishment of a criminal as retribution for his crime,

C. The Purpose of the Common Good

By orienting copyright laws with the common good that affirms individual human dignity and supports the flourishing and thriving of an interconnected relationship-oriented society, a subtle but important shift happens. The copyright economy, with its focus on creative works as marketable commodities and commercially valuable resources that the legal system protects through the grant of private monopolies and strict enforcement of exclusive rights, ceases to be the revered symbol of society's progress. In its place, instead, is a human and cultural ecology that depend on an interconnected network of relationships, which will promote the progress of science if copyright laws have core moral and legal content that seek to protect human dignity in the use and production of creative works as well as support society's intellectual, emotional, spiritual, and cultural development through the availability of such works. The notion of the common good, therefore, grounds copyright law on moral principles that legalizes the law and justifies the grant of legal rights and imposition of legal obligations. But more importantly, the notion of the common good prescribes a certain moral content for law and chastises legal instrumentalism that disjoints legal content from core moral principles. It creates an ecology rather than an economy for the copyright system.

The creation of a human and cultural ecology that surrounds the progress of science changes the debate that exists in the copyright system today. By focusing on the common good, copyright laws will arguably promote progress of science by encouraging authentic and responsible creativity that affirms the dignity of the creator and recipient of a work. It is also conceivable that copyright laws will naturally promote the progress of science when they allow society to flourish and thrive from the use and production of creative works. If these assertions are true, then the role of copyright law changes—the law need no longer be an instrument for state policies that aim at progress as a moral end but instead attains progress by encompassing the common good. A moral norm for the common good, for example,

for the common good, such as when a defendant pleads to a lesser charge and saves the state the time and expense of a trial or when a defendant enters plea-bargain by providing information and testimony, which would lead to the arrest of other more dangerous criminals, for a lighter sentence. See John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law?: Legalism and the International Criminal Court*, 79 NOTRE DAME L. REV. 55, 115-16 (2003).

would prescribe that literary and artistic works be publicly available because education, research, and cultural experiences thrive with the availability of such works to the general public.¹⁷¹ The public controversy surrounding the sale of artistic works from the Rose Art Museum at Brandeis University to bolster institutional finances, for example, indicates that society as a whole has difficulty conceptualizing artwork as a marketable commodity.¹⁷² While universities commercialize the inventions of their scientific communities and protect their market value through patent and trade secret laws, universities treat works of art differently. By making works of art widely accessible to society through public displays, universities affirm a universal norm that creative works are educational and beneficial for socio-cultural growth. It is through careful and meticulous observation of the original artwork and the artist's individual style that one learns how to create new works of art.¹⁷³ Art also represents a society's cultural heritage that should certainly be preserved.¹⁷⁴

171. Excluding society from using creative works through private property would seem to contradict the very purpose of the copyright grant, which primary focus is the promotion of learning. See LYMAN RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* 48-50 (1991). Scholars also argue that society thrives and flourishes with accessibility of creative works. Kathleen C. Butler, *Keeping the World Safe From Naked-Chicks-in-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain Through Copyrights in Photographic and Digital Reproductions*, 21 *HASTINGS COMM/ENT L.J.* 55, 57-60 (1998) (arguing that general public ability to access artistic works is necessary for the production of new generations of artwork); Xuan-Thao Nguyen & Jeffrey A. Maine, *Giving Intellectual Property*, 39 *U.C. DAVIS L. REV.* 1721, 1730 (2006) (arguing that charitable donations of intellectual property that increases the pool of creative resource for general use is "essential, not only to the donors and donees, but also to the development and growth of society"); and Mark Schultz & Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 *KY. L.J.* 79, 135-36, 138 (2008-09) (arguing that developing societies thrive and flourish as more creative works are produced and distributed).

172. Susan N. Gray, *The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*, 85 *CHI.-KENT L. REV.* 977, 993-95 (2010).

173. Butler, *supra* note 171, at 74 ("As stewards of art for the public, museums cannot exercise complete control over their collections. Not only must museums preserve art and educate the public, but they must also make works available to the public for use. Therefore, museums routinely hire photographers to make photographs and transparencies of the works in their collections and will license or rent these images to scholars and others, usually for a one-time use, for a fee, and subject to various limitations.").

174. John Nivala, *Droit Patrimoine: The Barnes Collection, The Public Interest, and Protecting Our Cultural Inheritance*, 55 *RUTGERS L. REV.* 477, 481 (2003) (arguing that society has a right to have its cultural inheritance legally protected; "[w]e have a collective droit patrimoine, a right to see and save our cultural inheritance").

Likewise, the practice of putting movies away for an unspecified time to prompt dealers to order huge supplies of the movie and thus create artificial demand—the practice known as a moratorium—ultimately affects society adversely by increasing prices and therefore erecting access barriers to these movies.¹⁷⁵

Moral norms of the sort proposed in this article direct individual action towards the common good and public welfare by insisting that creative works are not tradable commercial commodities but are a community's cultural heritage and identity instead. As such, there should be a moral responsibility to make these works available and accessible to the public for two reasons. First, the dignity of a human creator is affirmed when he is assured that, through his creative effort, a valuable contribution is made toward the cultural heritage of the community or society of which he is a part especially when the work, which is an embodiment of his personality, is treated with integrity and not as a commodity for market exchange. Second, society, as a whole, thrives and flourishes when its members are surrounded by creative works that are authentic expressions of artistic or authorial personalities, who contribute such works to develop their society's cultural identity, tradition, and pride. These moral norms provide a clear point of reference that informs when an activity contravenes the common good, such as the plundering of art and cultural artifacts by Nazi officials or the sale of public artwork into private hands that permanently deprives society from access to such works, and offers a deontological perspective—which is on opposite ends with the present expectation of entitlement—on how creative works should be used and produced. Copyright law, which has the common good at its core, will, thus, have to be deontological (duty-based) rather than teleological, where rights are commonly granted to achieve a given end.

A duty-based conception of copyright will support a human and cultural ecology that has as its forefront the progress of science for the betterment of society. For the copyright system to sustain progress through the use and production of creative works, moral norms, which work to constrain rather than sanction behavior, must be incorporated into the law to guide activities in the legal system toward the common good. Professor

175. See R. Anthony Reese, *The First Sale Doctrine in The Era of Digital Networks*, 44 B.C. L. REV. 577, 602-03 (2003).

David Gauthier, in his book *Morals by Agreement*, has argued that morality works as a “necessary constraint on the interaction of rational persons”¹⁷⁶ and facilitates co-operative behavior when it is necessary and possible for the common good of society.¹⁷⁷ To build an ecology where human dignity is upheld and society thrives and flourishes through the use and production of creative works necessitates commitment and co-operation from individuals and organizations involved with such activities. Building and sustaining an ecology where authentic and responsible creativity support and enhance learning, education, and research occurs through co-operative rather than competitive behavior. But it is also important that there be restraint and constraint on how authors, publishers, and society produce, disseminate, and use creative works if progress of science is to be achieved and ultimately sustained. In many ways, building and sustaining a copyright ecology that affirms human dignity and allows society to thrive through the creation and use of literary and artistic materials is more difficult than building a copyright economy that supports the commercialization of creative works in the market. Conceivably, it would be easier for law to grant rights in the pursuit of an identifiable goal than it is to impose duties to build a conducive environment where individuals, organizations, and society as a whole thrive from proper production, dissemination, and use of creative works. But sustainable progress of science requires constraint and co-operation among those involved with the use and production of creative works. It is only through the law’s commitment to the common good that such legal obligations become justified.

IV. ENVIRONMENTAL LAW AS A MODEL

Uniting divergent interests over creative works and cultivating responsible behavior that will allow for sustained progress of science will be a challenge for copyright law. Deeply entrenched industrial interests that emerged out of the system of proprietary rights and private entitlements that underlie the copyright system today may not accept a duty or obligation based system of law that has, at its core, a commitment to protecting the common good.¹⁷⁸ Constitutional norms also seem to dictate

176. DAVID GAUTHIER, *MORALS BY AGREEMENT* 84 (1986).

177. *Id.* at 113.

178. ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTY: AUTHORSHIP, APPROPRIATION, AND THE LAW* 54 (1998) (describing increasing rights

that intellectual property be protected through a system of exclusive rights.¹⁷⁹ The Copyright Clause in the Constitution, describing Congress's power to promote the progress of science, links progress with the protection of "writings" through "exclusive rights" and although scholars, most notably Phillip Bobbit in his book *Constitutional Fate*,¹⁸⁰ have advanced an ethical interpretation of the Constitution, there has been little use of ethics in resolving copyright questions or interpreting the Intellectual Property Clause of the Constitution. Scholarly literature and case law analyzing the copyright system from the vantage point of obligation and ethics are also scant.¹⁸¹ Given the paucity of models of ethics that may be used to build an ethos that would protect human dignity and allow society to thrive and flourish through the use and production of creative works through the copyright system, this article turns to environmental law for guidance. Three fundamental beliefs in environmental law—the precautionary principle, environmentalism, and ecology—provide immensely helpful direction for copyright law.

A. The Precautionary Principle

The primary objective in environmental law can be described as promoting preservation or conservation of our natural environment and health.¹⁸² To fulfill this objective, environmental law constantly balances communitarian values, which allow for the flourishing of the common good as a whole, including human health and well-being, animals and plants, and natural resources, against values of personal liberty and individual autonomy such as the freedom to use property or pursue economic development.¹⁸³ Consistent with environmental law's concern for

and entitlements in intellectual property "without due regard for the public interest [and] ignoring out interests in freedom of speech, promoting expressive activity, or protecting the public domain").

179. Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 275-77 (2004).

180. PHILLIP BOBBIT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 93 (Oxford University Press 1982).

181. Ng, *supra* note 61, at 15.

182. A. Dan Tarlock, *The Future of Environmental 'Rule of Law' Litigation*, 19 PACE ENVTL. L. REV. 575, 576 (2002).

183. CELIA CAMPBELL-MOHN, BARRY BREEN & J. WILLIAM FUTRELL, *SUSTAINABLE ENVIRONMENTAL LAW: INTEGRATING NATURAL RESOURCE AND POLLUTION ABATEMENT LAW FROM RESOURCES TO RECOVERY* 146 (West Publishing 1993) (stating that "[e]nvironmental law constantly balances communitarian values and individual liberty).

the well-being of the community and ecology is the common-law rule that “one must so use his own as not to do injury to another (*sic utere tuo ut alienum non laedas*),” which imposes liability upon the use of private property that causes harm to the environment and human health.¹⁸⁴ The application of this rule was *ex post facto*¹⁸⁵ and harm to the environment had to be established before liability ensued.¹⁸⁶ The precautionary principle operates in conjunction with this common-law rule but is applied *ex ante* to constrain individual and state actors in taking action and requiring them to proceed with caution when making individual choices and policy decisions that could have potentially far reaching and permanently damaging effects on the environment and on human beings, animals, plants, and other life forms.¹⁸⁷ The precautionary principle works as a preventive measure against harm instead of taking corrective measures to repair or recompense for damage already done. With the precautionary principle, personal liberty and individual autonomy must yield to responsible conduct that reflect communitarian values and the common good to avoid doing harm to the environment.

184. James E. Hickey, Jr. & Vern R. Walker, *Refining the Precautionary Principle in International Environmental Law*, 14 VA. ENVTL. L.J. 423, 427 (1995).

185. *Id.* (“Early domestic law imposed no duty, and therefore no compensation was due, until an injury occurred.”).

186. *Id.* at 429 (Professors Hickey and Walker cite the United Nations Conference on the Human Environment held in Stockholm, Sweden (Stockholm Conference) in 1972 for this proposition. They state that the Conference “reflected an effort by the international community to address pollution [but] did little to disturb traditional notions of state sovereignty, which tended to preserve the post-injury approach to state responsibility for polluting acts. For example, the Stockholm Conference Report required that substances introduced into the sea must ‘result’ in ‘deleterious effects’ before they could be defined as marine ‘pollution.’ That is, unless it could be established that actual harm occurred no liability could be imposed on states.”).

187. *Id.* at 430 (Professors Hickey and Walker describe how the international community realized that imposing damages in tort for damage to the environment was going to cause long-term damage to the environment and soon shifted to a precautionary approach to regulating environmental threats. They explain that “[i]n the 1980s, environmental concern began to encompass both threats of regional and global injuries, such as marine pollution, global warming, ozone layer depletion, sea level rise, deforestation, acid rain, and desertification, and collective human and corporate activity that could cause cumulative injury to a weakened global environment. As a result of that concern the focus of international environmental attention expanded from local, transboundary harms to regional and global harms, from isolated polluting activities to broad patterns of activity, and from case-by-case determinations to general proscriptions of behavior. With the change in focus, the shield of state sovereignty began to yield, and states began to acknowledge some responsibility for preventing pollution.”).

Much has been written about the precautionary principle and it is not the purpose of this article to discuss scholarship and commentary about the principle.¹⁸⁸ The precautionary principle when applied to the copyright system, however, provides a useful model for which individuals and states can be made responsible for the ethos of culture built on a system of private proprietary rights over social uses of creative works. The most widely accepted version of the precautionary principle states that “[w]hen an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. In this context the proponent of the activity, rather than the public, should bear the burden of proof.”¹⁸⁹ In essence, this statement on the precautionary principle proposes that when the health of humans and the environment is at stake, it may not be necessary to wait for scientific certainty to take protective action, thereby requiring two things of individuals and state actors: (1) an ethic of prudence and constraint to avoid risk and (2) an affirmative obligation to act to prevent harm.¹⁹⁰ The search for a common good for the copyright system to protect human dignity and allow society to thrive and flourish through the use and production of creative works will ultimately be worthwhile only if the ethos that emerges from the recognition and acknowledgement of the common good is preserved and sustained through a similar principle of constrain, obligation, and social

188. Some really good work on the precautionary principle in general environmental law include CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005) (arguing that the precautionary principle predisposes society to fear, panic, and inaction); DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* (2010) (arguing for use of the precautionary principle instead of risk-assessment and cost-benefit analysis in environmental law to allow all forms of life to flourish); David A. Dana, *A Behavioral Economic Defense of The Precautionary Principle*, 97 NW. U. L. REV. 1315, 1316-17 (2003) (arguing that the precautionary principle functions as a counter-balance to cognitive biases); and Noah M. Sachs, *Rescuing The Strong Precautionary Principle From its Critics*, 2011 U. ILL. L. REV. 1285 (arguing that the precautionary principle, through burden shifting, requires risk creators to research and justify the risks they impose on society).

189. ROBERT COX, *ENVIRONMENTAL COMMUNICATION AND THE PUBLIC SPHERE* 341 (2006) (this definition was adopted in 1998 at the Wingspread Conference at Racine, Wisconsin convened by the Science and Environmental Health Network and a few foundations that funded scientific research. Thirty-two participants ranging from scientists, researchers, philosophers, environmentalists, treaty negotiators, and labor workers from the U.S., E.U. and Canada attended the conference.

190. *Id.*

responsibility that is at the heart of the precautionary principle.

When a similar principle is applied to the copyright system, attitudes toward the use and production of creative works will most likely change and the promotion of the progress of science will become an equal concern of individuals and corporations who produce and use such works. Collective and social responsibility for the ethos created will probably replace any expectation to commercial profits and personal freedom as creative works are produced and used if the law embraces a posture of caution where the dignity of individuals and well-being of the community or society could be at stake. Thus, where proposed regulation could potentially affect society's ability to use creative works that are freely available through the Internet, caution is warranted, placing the burden on the party proposing regulation to disprove harm to the common good, or to approach the issue as an involved individual committed to preserving and protecting the common good.¹⁹¹ If the choice to be moral is almost always a rational choice, as David Gauthier asserts,¹⁹² decisions to act with prudence and restraint in the face of uncertainty about the consequences of action would also be rational choices. Codifying a "right to be forgotten" to protect individual privacy would also be viewed with caution¹⁹³ for as long as it is uncertain how the protection of such a right would impact society's ability to have access to vital historical records and information that make up a community's identity and personality—the moral rational choice

191. Two recent proposed laws, the Stop Online Piracy Bill and the Protect Intellectual Property Bill, were rejected by the public and by the White House because, in providing the Justice Department and copyright owners with far-reaching powers to block access to copyright infringing websites, they were a risk to legitimate sites providing non-infringing content. The White House's statement that "[a]ny provision covering internet intermediaries such as online advertising networks, payment processors, or search engines must be transparent and designed to prevent overly broad private rights of action that could encourage unjustified litigation that could discourage start up businesses and innovative firms from growing" shows a more cautious attitude toward the uncertainty of regulation on the Internet. See Craig Blackwell, *Regulatory and Legislative Update*, ST024 ALI-ABA 227, 234 (2012).

192. Gauthier, *supra* note 176, at 345-49 (even an autonomous being who need not be prudent will still choose to be given the decision to participate in social life because it is in itself a rational choice).

193. Jeffrey Rosen, *The Deciders: The Future of Privacy and Free Speech in the Age of Facebook and Google*, 80 *FORDHAM L. REV.* 1525, 1533-34 (2012) (discussing a proposal by the European Union to codify a right to be forgotten, which would allow individuals to request removal and deletion of personal information from online storage systems).

in this situation would be to assess the harms that would ensue from the protection of such a right before a decision is taken to codify it. The extension and restoration of copyright should also be approached from this position of caution to ensure that the preservation of the common good is not compromised by additional proprietary control of or retroactive application of copyright to creative works.

B. Environmentalism

Environmentalism can be broadly defined as the commitment individuals and state actors make to the conservation and preservation of their natural environment. Environmentalism as a social movement involves various goals, including these identified by Professor Christopher Stone in his well-known book, *Should Trees Have Standing*, as “educating the public (environmental literacy), changing tastes and preferences, changing individual behavior, fostering favorable legislation, increasing public donations, increasing public funding, successful litigation, miscellaneous environmental front activities, and (the bottom line) improving the physical environment.”¹⁹⁴ Environmentalism may also involve private sector commitment to preserving and conserving public land.¹⁹⁵ The commitment to public education, changing public attitudes and beliefs, increasing public participation and involvement with active conservation, and empowering private individuals and organizations with the tools to make a lasting impact on society is at the heart of the environmental movement and may prove constructive in shaping an ecology for the copyright system that is centered on the promotion of the common good. This is particularly so when the commitment to the conservation and preservation of the natural environment is replicated to conserve and preserve a vibrant culture that affirms individual dignity and supports the growth and development of society through the production and use of creative works.

The type of activism in the environmental movement that has led to widespread public and political awareness about the

194. CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?: LAW, MORALITY, AND THE ENVIRONMENT* 145 (2010).

195. Christopher Serkin, *Entrenching Environmentalism: Private Conservation Easements Over Public Land*, 77 U. CHI. L. REV. 341 (2010) (showing how private donations of conservation easements over publicly owned land to a non-profit conservation organization may ensure the perpetual conservation of land).

accumulative effect of individual conduct on the health of the biosphere has already begun in the copyright system.¹⁹⁶ The public domain today is most famously likened by Professor James Boyle to the opposite space of a system of intellectual property rights for materials in the public domain are “never capable of being owned” or are no longer capable of being owned “because rights [over them] have expired.”¹⁹⁷ The public domain is, in Boyle’s view, the proper and most healthy environment for cultural production that will allow individuals and society to flourish through the use of freely available materials. To protect the public domain, some form of “cultural environmentalism” that has the preservation and conservation of the public domain as its central concern would be necessary to solve the practical and theoretical problems in intellectual property.¹⁹⁸ Early writings that influenced Boyle’s view about the public domain as an affirmative space that is equivalent to an environment for cultural expression would be the notion of public domain as conceptualized by Professor David Lange in an article written in 1981.¹⁹⁹ In that article, Lange described the expansion of intellectual property rights at that time, which were, in his views, “unwise” because they tended to blur and then displace “important individual and collective rights in the public domain.”²⁰⁰ Later in 2003, Lange expounded on his earlier notion of the public domain by describing it as “a place of sanctuary for individual creative expression, a sanctuary conferring affirmative protection against the forces of private appropriation that

196. PAUL K. WAPNER, ENVIRONMENTAL ACTIVISM AND WORLD CIVIC POLITICS 61-66 (1996) (describing broad shifts in predispositions, behavior and attitudes, such as the change in political and social discourses, acceptance of unconventional ideas, and express commitments to environmental preservation by public figures (actors, politicians, and religious leaders), which all charted the way for the eventual success of the environmental movement).

197. JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 38 (2008).

198. *Id.* at 241 (“Cultural environmentalism is an idea, an intellectual and practical movement, that is intended to be a solution to a set of political and theoretical problems - an imbalance in the way we make intellectual property policy, a legal regime that has adapted poorly to the transformation that technology has produced in the scope of the law, and, perhaps most importantly, a set of mental models, economic nostrums, and property theories that each have a public domain-shaped hole at their center.”).

199. Boyle, *supra* note 149, at 59 (attributing central importance to the writings of friend and colleague David Lange for initiating contemporary study on the subject).

200. David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 171 (Autumn 1981).

threatened such expression.”²⁰¹ The idea of the public domain as a sanctuary, shelter, or refuge for creative individuals bears much similarity to the natural environment for wildlife and fauna, which unless protected could potentially be destroyed through the exercise and follow-through of imprudent and unwise choices by individuals, corporations, and governments. Both natural and allegorical environments need to be preserved and protected to enable their habitants to flourish.

Private sector involvement with the preservation and conservation of the public domain for creative works shows that the kind of activism that Lange and Boyle called for has already occurred and will most likely continue to grow in the copyright system.²⁰² Professor Robert Merges has pointed out that private sector initiatives to protect the public domain operate as resistance to the trend of proprietary rights expansionism and increasing control of intellectual property. Economic and social conditions, which have led to the explosion of property rights over creative works in the past, such as the fear of the tragedy of the commons for intellectual property, may have evolved over time and created reasons for private-sector activism in protecting the public domain from expansionism in an equally committed fashion.²⁰³ Public disclaimers of copyright and exclusive use of creative works have resulted in a much richer and vibrant public domain. The provision of Creative Commons licenses to creators of literary and artistic content, for example, allows the owner of a copyright to make their works freely available to society by pre-granting permission to use the work for so long as the use is within limits defined by the license.²⁰⁴ Use of these licenses by copyright owners effectively grants the public rights to use creative works through the assurance that the copyright owner

201. David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 466 (Winter/Spring 2003).

202. Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 183-184 (2004) (“From large-scale investments by pharmaceutical firms in public domain gene sequences, to massive investments by IBM in ‘open source’ software, to the advent of the ‘Creative Commons’ concept that permits any creator of digital content to specify open-access terms of use, we have been witnessing massive growth in private initiatives to expand the public domain.”).

203. *Id.* at 184 (“Just possibly, the same private initiative that has led to the expansion of IP rights may be capable of partially counteracting this expansion. Simply put, conditions may have changed enough to increase private incentives to reduce property-related hassles.”).

204. *Id.* at 197-99; for more information, visit the Creative Commons webpage at: www.creativecommons.org (last visited April 6, 2012).

will not enforce his or her copyright over the work.²⁰⁵

To some extent, Creative Commons licenses are the functional equivalent of a restrictive covenant on private land use or a conservation easement that is granted by a property owner to the public to preserve and conserve the natural environment for the common good. As copyright owners become increasingly aware of the important role they play in conserving and preserving a healthy environment that supports creative production through their work and begin to allow public uses of their work within well defined limits, a more vibrant culture that supports individual creativity will emerge for the common good (as it has already) in the same way that much of our natural environment is protected and sustained today through private grants of conservation easements to land trusts and conservation organizations.²⁰⁶ Copyright law may effectively limit the exercise of exclusive rights that may harm the environment for creativity and encourage responsible behavior that protects the public interest by making owners of literary and artistic works stewards of creative resources for society. By encouraging private individuals and corporations to act in the interest of the public and for the common good, copyright law may develop an ethics or morality for creative production wherein copyright owners voluntarily offer to protect the environment for creativity through the general grant of public rights to use the work.²⁰⁷

C. The Ecology of Culture

The environmental movement, as Professor Boyle points out in his book, emerged out of a concern for two interdependent realities.²⁰⁸ The first was that the ecology was made up of “fragile, complex, and unpredictable interconnections between living systems” and second that markets often fail to make producers

205. Merges, *supra* note 202, at 199 (“Creators granted certain rights under copyright law publicly disclaim some or all of those rights. They in effect leave some of the rights that they might have claimed ‘on the table,’ thereby giving a gift to other users.”).

206. Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J. 373 (2001) (describing how private grants of conservation easements have been used to protect the environment for the common good).

207. For discussion on how private conservation of land for the public good leads to a new environmental ethic, *see id.* at 424-25.

208. Boyle, *supra* note 197, at 239.

internalize the full social costs of their activities.²⁰⁹ As producers are routinely absolved from bearing the cost of environmental harm (or prevented from recovering payment for activities that in the long-run benefit the environment) because the market had failed to capture that cost or benefit, environmentally harmful effects are many times produced without concern for the environment and society, which sometimes create permanently damaging consequences. General interest in the protection of the environment was a product of a realization that the combination of these two realities could stimulate selfish behavior that ignored the common good and, in the long-run, harm the environment. This realization provided the impetus for the environmental movement. As Boyle explains, both welfare economics and the notion of the ecology furnished the environmental movement with “its agenda, its rhetoric, and the perception of common interest underneath its coalition politics.”²¹⁰

The idea that an ecology is made up of unpredictable interconnections between individuals or living systems will also provide a rhetoric for copyright jurisprudence as the relationship and interdependency between authors, publishers, and users of creative works become evident. It is important for the copyright system to ensure that the rights of the present generation of authors, publishers, and users are not met by compromising the ability of future generations to use creative resources for artistic and literary expression through the passing of property-based laws that facilitate the internalization of social benefits by the copyright owner but which do not impose ethical or moral obligations that facilitate the internalization of social costs produced from the creation of works. While laws developed by the copyright system must ensure the preservation of cultural resources and creative materials for use by new generations of authors and artists as they pursue their goals of social and cultural progress, the copyright system should also develop laws that obligate individuals and corporations, which produce and use creative works, to create works that benefit instead of harm the identity and culture of a community and society. The production and distribution of violent games, for example, may or may not have an effect on individuals who play them. Although the law

209. *Id.*

210. *Id.* at 240.

protects violent games under the umbrella of free speech guarantee in the interest of the individual,²¹¹ as it does with most form of expressions, the law may also seek protect the ecology of the copyright system, the dignity of other individuals in that community, and the common good of society as a whole more effectively by increasing the costs of producing works that may be socially harmful.

V. CONCLUSION

This article has argued that laws should not be used as an instrument for social policy because there is a core morality that should form the content of every law passed. The core morality of laws for the copyright system is not easily discoverable. Yet, as this article urges, the fact that morality is a difficult value to pin down should not be taken to mean that an objective idea of what is moral does not exist or that the notion of the common good is a misnomer in a pluralistic legal system. In the same light, the difficulty of finding the core moral content for copyright should not be a deterrent in the search for it. Authors and artists, as talented individuals, make the most contribution to society through their creativity and should be motivated to engage in the creation of authentic forms of expressions. But it is also important for the law to acknowledge that authors and artists have a moral responsibility to create works that in the long-run will contribute to, and not harm, the ecology of their culture, such as when works are not produced as authentic expressions of authorship or art but for the sole purpose of market commercialization and profit. The law may also guide individual creators and publishers toward protecting and conserving the common good as well as the public domain by encouraging grants of public rights to use their work in the same way that the public may have rights to enjoy conserved land through a private property owner's grant of a conservation easement to the public. Copyright law may also conserve and protect a culture that is rich with creative works for public use through a public trust. Greater involvement by private parties with the support of copyright laws in conserving and preserving a rich and vibrant public domain will probably build a society's cultural heritage and identity. Finally, individuals in society may be encouraged to engage in more authentic creations through responsible use of works of previous generations of creators in ways that affirm rather than

211. *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, 2742 (2011).

undermine human dignity and to disseminate new expression to society as part of a learning and educational process, assured that their work will be used in ways which affirm their own dignity as creators of the work.

Looking at the copyright system as a legal order that should have at its core evident moral and ethical norms may be a novel way of evaluating pressing issues about private control of creative works and public interests in the use of these works and where the line between private and public interest lies. The shape and direction of the debate between private property and public interest will change as intellectual and legal discourses broaden their consideration of the issues involved in how creative works are produced, disseminated, and used in the name of progress. The Supreme Court in *Golan v. Holder* and *Eldred v. Ashcroft* may or may not arrive at the same conclusion - that congressional policy on copyright take precedence over public interest in use of the work. However, its decisions may be more acceptable to the general public if the Court was convinced (and convinced the rest of us) that the laws upheld were, at their core, for the common good.