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Brian L. Frye*

ABSTRACT

In his controversial essay, "Faith-Based Intellectual Property," Mark Lemley argues that moral theories of intellectual property are wrong because they are based on faith, rather than evidence. This article suggests that Lemley's argument is controversial at least in part because it explicitly acknowledges that consequentialist and deontological theories of intellectual property rely on incompatible normative premises: consequentialist theories hold that intellectual property is justified only if it increases social welfare; deontological theories hold that intellectual property is justified even if it decreases social welfare. According to Berlin, the genius of Machiavelli was to recognize that when two moral theories have incompatible normative premises, societies may be forced to choose between the theories. But Berlin observed that it is possible to adopt different moral theories in different contexts. This article suggests that we can reconcile consequentialist and deontological theories of intellectual property by adopting a consequentialist public theory and deontological private theories.

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INTRODUCTION

“If a lion could speak, we would not understand him.”¹

Intellectual property scholars have advanced both consequentialist and deontological theories of intellectual property. Consequentialist theories are utilitarian, and hold that intellectual property is justified because it increases social welfare. The prevailing consequentialist theory is the economic theory, which holds that intellectual property is justified because it increases economic efficiency. By contrast, there are many different deontological theories of intellectual property, which typically hold that intellectual property is justified because creators have a moral right to own the fruits of their labor or the expressions of their personality.²

I. “FAITH-BASED” INTELLECTUAL PROPERTY

In his provocative essay, “Faith-Based Intellectual Property,” Mark Lemley argues that deontological or “moral” theories of intellectual property are wrong because they are based on faith, rather than evidence.³ Unsurprisingly, he begins by declaring his adherence to the consequentialist theory of intellectual property. According to Lemley, intellectual property is a form of regulation intended to encourage innovation and creation, and regulation requires a “cost-benefit justification.”⁴ In other words, intellectual property is justified if and only if it increases net social welfare.

Next, Lemley reviews the evidence as to whether intellectual property is justified under the utilitarian theory.⁵ He concedes that some intellectual property rights may be justified and observes that historically, a lack of empirical evidence made it impossible to determine whether intellectual property rights were justified.⁶ But he argues that empirical studies have now shown that some intellectual property

¹ LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 223 (1953).

² See generally William W. Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168 (2001); Peter S. Menell, *Intellectual Property: General Theories*, in 2 *ENCYCLOPEDIA OF LAW & ECONOMICS* 129 (2000).

³ Mark Lemley, *Faith-Based Intellectual Property*, 62 *UCLA L. REV.* 1328, 1328 (2015).

⁴ *Id.* at 1331.

⁵ *Id.* at 1331–33.

⁶ *Id.*

rights are justified and others are not, and that increasing the scope of intellectual property rights is probably not justified in most cases:

The relationship between patents and innovation seems to depend greatly on industry; some evidence suggests that the patent system is worth the cost in the biomedical industries but not elsewhere. Copyright industries seem to vary widely in how well they are responding to the challenge of the Internet, and their profitability doesn't seem obviously related to the ease or frequency of piracy.⁷

Then, Lemley observes that some intellectual property scholars have reacted to evidence that intellectual property does not increase social welfare by abandoning the utilitarian theory and adopting a moral theory, which he characterizes as a retreat from science to religion: “I call this retreat from evidence faith-based IP, both because adherents are taking the validity of the IP system on faith and because the rationale for doing so is a form of religious belief.”⁸

Lemley argues that utilitarian theories of intellectual property are scientific because they are based on evidence and can be falsified, and moral theories of intellectual property are religious because they are based on belief and cannot be falsified.⁹ “Faith-based IP is at its base a religion and not a science because it does not admit the prospect of being proven wrong.”¹⁰ And as a consequence, the utilitarian and moral theories of intellectual property are fundamentally incompatible and irreconcilable:

And that leads me to the last—and, to me, most worrisome—problem with faith-based IP. If you are a true believer, we have nothing to say to each other. I don't mean by that that I am giving up on you, deciding that you're not worth my time to persuade. Rather, I mean that we simply cannot speak the same language. There is no principled way to compare one person's claim to lost freedom to another's claim to a right to ownership. Nor is there a way to weigh your claim of moral entitlement against evidence that the exercise of that right actually reduces creativity by others.¹¹

⁷ *Id.* at 1334.

⁸ *Id.* at 1337.

⁹ *Id.* at 1346.

¹⁰ *Id.*

¹¹ *Id.*

II. OBJECTIONS TO “FAITH-BASED INTELLECTUAL PROPERTY”

Lemley’s article created quite a stir among intellectual property scholars, and it attracted substantial criticism. For example, Lawrence Solum observed that consequentialism may not provide a true moral theory, and Irina Manta suggested that the subjectivity of welfare may prevent the utilitarian theory of intellectual property from objectively determining whether intellectual property rights are justified.¹² While both of these objections are well taken, neither is fatal to Lemley’s argument.

Solum is correct that if consequentialism does not provide a true moral theory, Lemley’s argument must fail. But Solum’s objection is not specific to Lemley’s argument and would be true of any consequentialist moral theory. If consequentialism provides a true moral theory of anything, it also provides a true moral theory of intellectual property. Notably, consequentialism is the prevailing moral theory, and deontological moral theories typically try to reconcile themselves with consequentialism.¹³

And Manta is correct that the subjectivity of welfare may preclude an objective determination of whether intellectual property rights are justified under the utilitarian theory. The utilitarian theory holds that intellectual property is justified if and only if it increases social welfare. Intellectual property both increases welfare by encouraging marginal innovators to invest in innovation and decreases welfare by discouraging marginal innovators and consumers from using innovations protected by intellectual property. But how can we objectively quantify and compare the subjective welfare created by innovation or precluded by intellectual property? And if we cannot objectively determine the net effect of intellectual property on social welfare, then the utilitarian theory cannot tell us whether intellectual property is justified.

¹² Lawrence Solum, *Lemley on Non-consequentialist Justifications for Intellectual Property*, LEGAL THEORY BLOG (Apr. 2, 2015, 11:30 AM), <http://lsolum.typepad.com/legaltheory/2015/04/lemley-on-non-consequentialist-justifications-for-intellectual-property.com>; Irina D. Manta, *Theory and Empirics: Where Do Locke and Mossoff Leave Us*, LIBERTY OF LAW AND LIBERTY (May 8, 2015), <http://www.libertylawsite.org/liberty-forum/theory-and-empirics-where-do-locke-and-mossoff-leave-us/>.

¹³ See, e.g., Larry Alexander & Michael Moore, *Deontological Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Salta ed., 2015), available at <http://plato.stanford.edu/archives/spr2015/entries/ethics-deontological/> (discussing “threshold deontology”).

Of course, Manta's objection is also not specific to Lemley's argument, and it applies to any welfarist utilitarian moral theory. However, Lemley exposes—or rather creates—an Achilles heel in his argument by adopting a welfarist utilitarian theory of intellectual property in the first place. Lemley observes that a welfarist utilitarian theory of intellectual property “can and should value more than simply dollars.”¹⁴ And he is absolutely correct. But the obligation of welfarist utilitarian theories to consider non-economic welfare is both a strength and a weakness.

While welfarist utilitarian theories of intellectual property have the advantage of addressing welfare created by subjective, non-economic incentives, like attribution, they have the corresponding disadvantage of indeterminacy. And that indeterminacy is a problem, because it prevents welfarist utilitarian theories from objectively determining whether intellectual property rights are justified. For example, Lemley argues that empirical studies show that some intellectual property rights are not justified because their costs exceed their benefits.¹⁵ But if a welfarist utilitarian theory cannot objectively quantify and compare the costs and benefits associated with intellectual property rights, it cannot tell us whether or not they are justified.

The prevailing consequentialist theory of intellectual property is the economic theory, which holds that intellectual property is justified if and only if it increases economic efficiency.¹⁶ While the economic theory has the disadvantage of disregarding subjective, non-economic incentives, it has the advantage of increased determinacy. While measuring the economic efficiency of intellectual property rights is by no means easy, it is a considerably more manageable proposition than measuring subjective welfare. Moreover, at least some subjective, non-economic incentives are presumably captured by the revealed preferences of innovators and consumers.¹⁷

¹⁴ Lemley, *supra* note 3, at 1346.

¹⁵ *Id.* at 1332–34.

¹⁶ See, e.g., *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The 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.’”), *superseded by statute*, 37 C.F.R. § 202.10(c) (1959), *as recognized in* *Fabrica, Inc. v. El Dorado Corp.*, 697 F.2d 890, 892 (9th Cir. 1983).

¹⁷ See, e.g., Lisa Larrimore Ouellette, *Patent Experimentalism*, 101 VA. L. REV. 65 (2015). *But see, e.g.*, Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970 (2012) (criticizing both the welfarist utilitarian and economic theories of intellectual property).

But the prevailing response to Lemley's article was discomfort.¹⁸ For example, Solum objected to Lemley's observation that Locke and Rawls did not explicitly address intellectual property as a form of improper "argument from authority" and to his characterization of deontological theories of intellectual property as "faith-based" as a form of "ad hominem argument."¹⁹ Manta observed that utilitarian theorists rarely, if ever, favor increasing the scope of intellectual property, and she suggested that "the falsifiability that is [utilitarianism's] point of pride" may be largely "theoretical."²⁰ Jeremy Sheff argued that deontological theorists do not actually reject consequentialism and suggested that deontological and consequentialist theorists "are simply disagreeing over the appropriate domain of empirical inquiry—chiefly with respect to the measurement of value."²¹ And Stephanie Plamondon Bair argued that the consequentialist and deontological theories of intellectual property are actually consistent because perceived "fairness" may provide a salient ex ante incentive to marginal authors.²²

So, why did so many intellectual property scholars find Lemley's argument so disturbing and controversial? Some of their objections go to the polemical tone of the essay. For example, Lemley argues that some intellectual property scholars have adopted moral theories of intellectual property precisely in order to ignore empirical evidence relating to the economic efficiency of intellectual property:

Participants on both sides of the IP debates are increasingly staking out positions that simply do not depend on evidence at all. That is, their response to evidence that doesn't accord with their beliefs is not to question their beliefs, or even to

¹⁸ See, e.g., Lisa Larrimore Ouellette, *Lemley on Faith-Based IP*, WRITTEN DESCRIPTION (Apr. 2, 2015, 9:59 PM), <http://writtendescription.blogspot.com/2015/04/lemley-on-faith-based-ip.html> (observing that Lemley's essay "has already ignited quite a discussion in the blogosphere" and collecting responses).

¹⁹ Solum, *supra* note 12.

²⁰ Manta, *supra* note 12. *But see, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (holding that extending the copyright term of existing works is consistent with the economic theory).

²¹ Jeremy Sheff, *Faith-Based vs. Value-Based IP: On the Lemley-Merges Debate* (Apr. 2, 2015), <http://jeremysheff.com/2015/04/02/faith-based-vs-value-based-ip-on-the-lemley-merges-debate/>.

²² Stephanie Plamondon Bair, *Rational Faith: The Utility of Fairness in Copyright*, B.U. L. REV. (forthcoming 2016).

question the evidence, but to retreat to a belief system that doesn't require evidence at all.²³

In other words, proponents of intellectual property have adopted moral theories in order to ignore evidence that intellectual property may decrease social welfare, and detractors of intellectual property have adopted moral theories in order to ignore evidence that intellectual property may increase social welfare. That is a powerful charge of academic dishonesty, which may have provoked some of the objections to Lemley's essay.

James Grimmelmann specifically objected to the polemical tone of Lemley's essay because he was concerned that it could make it more difficult for consequentialists and deontologists to reach consensus on the causal effects of intellectual property.²⁴ He described Lemley's essay as "an attempt to turn a scholarly debate into a culture war" by "tak[ing] questions about which reasonable minds can and do disagree and recast[ing] them such that reasonable minds cannot disagree because one of the alternatives is by definition unreasoned," and argued, "[r]ecasting an empirical issue in cultural terms, as Lemley has done, makes it harder, not easier to reach empirical consensus."²⁵

But I think that something else is also at stake. Many intellectual property scholars assume that consequentialist and deontological theories are compatible because they produce similar results.²⁶ Indeed, many of the objections to Lemley's essay explicitly assume that consequentialist and deontological theorists can find common ground.²⁷

I suspect that Lemley's essay makes intellectual property scholars uncomfortable in large part because he observes that the consequentialist and deontological theories of intellectual property are fundamentally incompatible. And

²³ Lemley, *supra* note 3, at 1336.

²⁴ James Grimmelmann, *Faith-Based Intellectual Property: A Response*, LABORATORIUM (2d Ser., Apr. 21, 2015), <http://2d.laboratorium.net/post/117023858730/faith-based-intellectual-property-a-response>.

²⁵ *Id.*

²⁶ See, e.g., Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L.J. 803 (2001).

²⁷ See, e.g., Sheff, *supra* note 21; Grimmelmann, *supra* note 24.

I would like to suggest that Isaiah Berlin's study of Machiavelli can help explain why that proposition is so controversial.

III. MACHIAVELLI & CONFLICTING VALUES

In his seminal essay, "The Question of Machiavelli," Isaiah Berlin argued that Machiavelli's great philosophical contribution was to show that normative theories may be incompatible, forcing people to choose one or the other.²⁸ Berlin observed that scholars have advanced a congeries of theories of Machiavelli's works, and he suggested that this surprising lack of consensus reflected "something peculiarly disturbing about what Machiavelli said or implied, something that has caused profound and lasting uneasiness."²⁹ According to Berlin, Machiavelli's works were uniquely disturbing because they observed that Classical and Christian values are incompatible, and societies must choose between them.³⁰

The great originality, the tragic implications of Machiavelli's theses seem to me to reside in their relation to a Christian civilization. It was all very well to live by the light of pagan ideals in pagan times; but to preach paganism more than a thousand years after the triumph of Christianity was to do so after the loss of innocence—and to be forcing men to make a conscious choice. The choice is painful because it is a choice between two entire worlds. Men have lived in both, and fought and died to preserve them against each other. Machiavelli has opted for one of them, and he is prepared to commit crimes for its sake.³¹

Machiavelli is typically seen as a cynic who simply argued that morality inhibits political success. Berlin disagreed, arguing that Machiavelli was not a cynic at all, but rather a sincere believer in Classical values.³² "Machiavelli's values may be erroneous, dangerous, [and] odious; but he is in earnest. He is not cynical. The

²⁸ Isaiah Berlin, *The Question of Machiavelli*, N.Y. REV. BOOKS (Nov. 4, 1971), available at <http://www.nybooks.com/articles/1971/11/04/a-special-supplement-the-question-of-machiavelli/>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

end is always the same: a state conceived after the analogy of Periclean Athens, or Sparta, but above all the Roman Republic.”³³

Conventional wisdom assumes that a universal theory of normative ethics must govern human behavior. “If to ask what are the ends of life is to ask a real question, it must be capable of being correctly answered. To claim rationality in matters of conduct was to claim that correct and final solutions to such questions can in principle be found.”³⁴ In other words, conventional wisdom assumes that Classical and Christian values are generally compatible, although they may conflict in certain extreme circumstances. In that case, Christian values can and should prevail, unless abnormal circumstances create an emergency that requires a wicked act. “[D]esperate cases require desperate remedies” and “necessity knows no law.”³⁵

Machiavelli disagreed. He believed that Classical and Christian values are fundamentally incompatible and that people must choose to live according to one or the other.³⁶ This was a profoundly disturbing observation because it rejected the possibility of a universal moral theory:

One is obliged to choose: and in choosing one form of life, give up the other. That is the central point. If Machiavelli is right, if it is in principle (or in fact: the frontier seems dim) impossible to be morally good and do one’s duty as this was conceived by common European, and especially Christian, ethics, and at the same time build Sparta or Periclean Athens or the Rome of the Republic or even of the Antonines, then a conclusion of the first importance follows: that the belief that the correct, objectively valid solution to the question of how men should live can in principle be discovered is itself, in principle, not true.³⁷

Ironically, Machiavelli himself was untroubled by the incompatibility of Classical and Christian values:

The notion of *raison d’état* entails a conflict of values which may be agonizing to morally good and sensitive men. For Machiavelli there is no conflict. Public life

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

has its own morality, to which Christian principles (or any absolute personal values) tend to be a gratuitous obstacle. This life has its own standards: it does not require perpetual terror, but it approves, or at least permits, the use of force where it is needed to promote the ends of political society.³⁸

Machiavelli chose to adopt Classical values because he believed that only Classical values could promote the flourishing of the state.³⁹ Accordingly, he willingly rejected Christian values, not because he saw them as wrong, but because he saw them as incompatible with Classical values and therefore detrimental to the flourishing of the state.⁴⁰

Essentially, Berlin argues that Machiavelli's works were disturbing because they rejected the premise of a universal ethical theory and argued that different ethical theories must govern different circumstances.⁴¹ According to Machiavelli, Classical values and Christian values are not merely different, but incompatible.⁴² Christian values may be appropriate to private life, but only Classical values are appropriate to public life. This observation was fatal to the universal humanist project.

But Berlin recognized an alternative solution: rather than a single, universal moral theory, we may reconcile ourselves to the fact that different moral theories may govern different circumstances.⁴³ Rather than choose one theory, like Machiavelli, we may embrace the path of tolerance and the possibility of error:

If there is only one solution to the puzzle, then the only problems are first how to find it, then how to realize it, and finally how to convert others to the solution by persuasion or by force. But if this is not so (Machiavelli contrasts two ways of life, but there could be, and, save for fanatical monists, there obviously are, more than two), then the path is open to empiricism, pluralism, toleration, compromise. Toleration is historically the product of the realization of the irreconcilability of equally dogmatic faiths, and the practical improbability of complete victory of one

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

over the other. Those who wished to survive realized that they had to tolerate error. They gradually came to see merits in diversity, and so became skeptical about definitive solutions in human affairs.⁴⁴

IV. MACHIAVELLIAN INTELLECTUAL PROPERTY

The parallels between Machiavelli and Lemley should be obvious. Both are controversial because, *inter alia*, they explicitly recognize that two competing moral theories depend on fundamentally incompatible normative premises. Of course, neither Machiavelli nor Lemley found that observation troubling. Machiavelli observed that Classical values and Christian values are incompatible, and he chose Classical values. Lemley observed that the consequentialist and deontological theories of intellectual property are incompatible, and he chose consequentialism. But what makes their respective works controversial is not their choice of moral theory, but their frank acknowledgement that one must choose at all.

Machiavelli was untroubled by the incompatibility of Classical and Christian values because he believed that only Classical values are consistent with the flourishing of the state.⁴⁵ He rejected Christian values not because he believed they were wrong, but because he believed they were incompatible with the flourishing of the state.⁴⁶ Berlin argued that Machiavelli was and remains controversial precisely because he explicitly recognized the incompatibility of Classical and Christian values.⁴⁷ His contemporaries wished to believe that they could reconcile those values, but Machiavelli forced them to recognize that they could not.⁴⁸

Likewise, Lemley is untroubled by the incompatibility of the consequentialist and deontological theories of intellectual property because he believes that only consequentialism is compatible with public welfare.⁴⁹ He rejects moral theories of intellectual property not because he believes they are wrong, but because he believes they are incompatible with increasing public welfare.⁵⁰

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Lemley, *supra* note 3, at 1344–46.

⁵⁰ See *id.* at 1346 (“And that leads me to the last—and, to me, most worrisome—problem with faith-based IP. If you are a true believer, we have nothing to say to each other. I don’t mean by that that I am giving

Many intellectual property scholars wish to believe that they can reconcile the consequentialist and deontological theories of intellectual property. For many scholars, both theories of intellectual property are compelling.⁵¹ They believe that the purpose of intellectual property is to increase public welfare by solving market failures in public goods, but they also believe that inventors and authors are entitled to certain exclusive rights in their inventions and works of authorship.⁵² Accordingly, they are comforted by the assumption that the consequentialist and deontological theories of intellectual property are broadly consistent, even if they occasionally conflict on the margins. Lemley's article is troubling and controversial because he explicitly acknowledges that those competing theories are not consistent but are, in fact, fundamentally incompatible.⁵³ In other words, he forces people to choose. And while he finds it an easy choice, others do not.

V. BERLIN'S CHOICE

So, how should we respond to such a Hobson's choice? As Berlin observed, the incompatibility of Classical and Christian values can be resolved, or at least avoided, if one is willing to embrace tolerance and accept contradictions and contingency.⁵⁴ Fortunately, the incompatibility of the utilitarian and moral theories of intellectual property can also be resolved or avoided in a similar way.

Essentially, the consequentialist and deontological theories of intellectual property can be reconciled if one sees them as appropriate for different spheres of

up on you, deciding that you're not worth my time to persuade. Rather, I mean that we simply cannot speak the same language.”).

⁵¹ See, e.g., RONALD A. CASS & KEITH N. HYLTON, LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS (2013).

⁵² *Id.*

⁵³ While both Jeremy Sheff and Stephanie Bair argue that the consequentialist and deontological theories of intellectual property are compatible, neither makes a compelling case. Sheff argues that deontological theorists are also consequentialists because they care whether the consequences of the intellectual property are consistent with their deontological values. Sheff, *supra* note 21. While that is true, Sheff ultimately acknowledges that the tension between the consequentialist and deontological theories is the result of their incompatible normative premises. *Id.* By contrast, Bair argues that the consequentialist and deontological theories of copyright are compatible because perceived “fairness” may provide a salient ex ante incentive to some marginal authors. Bair, *supra* note 22. But even if that is true, it only shows that the consequentialist and deontological theories of intellectual property may contingently coincide under certain circumstances, not that they are compatible.

⁵⁴ Berlin, *supra* note 28.

activity. The consequentialist theories are appropriate for public actors, and the deontological theories are appropriate for private actors.

The consequentialist theories of intellectual property are appropriate for public actors because they describe when it is justified for the state to intervene in the market of ideas by creating property rights in public goods. Specifically, they hold that the state may create intellectual property rights in expressions and ideas only if doing so will increase net public welfare. As Lemley observes, the deontological theories of intellectual property are necessarily incompatible with the consequentialist theories because they hold that the state must create and enforce certain intellectual property rights, even if they decrease net public welfare.⁵⁵

There is no contradiction between a consequentialist public theory and a deontological private theory of intellectual property. For example, Machiavelli argued that Christian values are no threat to Classical values, so long as they are confined to private action.⁵⁶ Likewise, deontological theories of intellectual property are no threat to consequentialist theories of intellectual property, so long as they are confined to private action. In other words, there is no conflict between public actors adopting a consequentialist theory of intellectual property and individuals adopting deontological theories of intellectual property. The state should create and enforce intellectual property rights only when it legitimately believes that doing so will increase net public welfare, but individuals may choose to reward inventors and authors at their discretion, according to whatever moral values they wish to adopt. There is no tension between the two.

As I have previously explained, intellectual property and charity law are complementary.⁵⁷ The state is justified when it uses intellectual property to increase social welfare by solving market failures, but it is not justified when it uses intellectual property laws to bestow a windfall on those fortunate enough to have created inventions or works of authorship of special value. Intellectual property is justified when it provides an incentive to marginal inventors and authors, but not when it merely enables inventors and authors to collect additional rents.

But there is no reason that individuals cannot act on their own to reward those who have contributed valuable inventions or works of authorship, and there is no reason that the government cannot encourage those acts of altruism. Indeed, as technology reduces the fixed, opportunity, and transaction costs associated with the creation and distribution of intellectual property, and as social technology reduces

⁵⁵ See Lemley, *supra* note 3, at 1338–44.

⁵⁶ Berlin, *supra* note 28.

⁵⁷ Brian L. Frye, *Copyright as Charity*, 39 NOVA L. REV. 343, 343 (2015).

transaction costs associated with altruism, it becomes increasingly apparent that different ethical theories can govern intellectual property in different contexts.

We have developed two different bodies of law specifically in order to address this issue: intellectual property and charity law. Intellectual property should reflect the strengths of the government. The government is good at solving market failures in public goods by providing an incentive for marginal inventors and authors to invest in the creation of inventions and works of authorship. But it is not good at determining how much people value those inventions and works of authorship once they are created, how much of the increase in net social welfare or “spillovers” to give to the creators of those inventions or works of authorship, or how to divide those spillovers among all creators of inventions and works of authorship.⁵⁸ As a consequence, attempting to distribute those spillovers among inventors and authors through the intellectual property system creates a spoils system, which is inefficient because it distributes spillovers in a way that can have little or no incentive effect.

By contrast, charity law is good at solving government failures or circumstances in which transaction costs associated with information and politics tend to cause the government to distribute resources inefficiently. By using charity law to encourage people to subsidize the production of charitable goods they value, including inventions and works of authorship, the government can achieve a more efficient and equitable distribution of spillovers to inventors and authors. The moral theories of intellectual property can facilitate this distribution by encouraging individuals to make such charitable contributions.

Of course, charity failures, or inefficiencies in charity law, can reduce its ability to achieve those efficiencies. But as I have observed elsewhere, developments in social technology have substantially reduced those charity failures.⁵⁹ Specifically, crowdfunding and related technologies have enabled individuals to directly support the inventors and authors who create inventions and works of authorship that they value.⁶⁰

Notably, this distinction between the relative role of intellectual property and charity law is consistent with Lemley’s characterization of deontological theories of intellectual property as “faith-based.” Consequentialist theories of government typically hold that government action intended to increase public welfare is justified, but the First Amendment prohibits direct government intervention in matters of faith.

⁵⁸ See Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 100 COLUM. L. REV. 101 (2006).

⁵⁹ Brian L. Frye, *Solving Charity Failures*, 93 OR. L. REV. 155, 159 (2014).

⁶⁰ *Id.*

Of course, many people believe that religion also increases public welfare or is good in its own right, and charity law encourages them to take private action consistent with that belief by providing tax exempt status to religious organizations and enabling donors to deduct certain charitable contributions to religious organizations from their taxable income.

Likewise, consequentialist theories of intellectual property hold that the government is justified in creating and enforcing intellectual property rights if and only if it believes that they will increase public welfare. But that is perfectly consistent with individuals taking private action to reward innovation, which is typically considered a form of charity. Perhaps we can facilitate a reconciliation of the consequentialist and deontological theories of intellectual property by recognizing that the state and individuals properly play different roles in promoting innovation. The state should properly focus on public welfare, and individuals should properly focus on moral desert.

To analogize to Machiavelli, government must be ruthless, but individuals may be generous. Government must pursue the public interest, but individuals may reward private interests. In Machiavellian terms, Classical values are analogous to the consequentialist theories of intellectual property, and Christian values are analogous to the deontological theories of intellectual property. Set against each other, they inevitably conflict, but kept in their own separate spheres, they can harmoniously co-exist.