

The Moral Foundations of Copyright

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ABSTRACT

U.S. copyright law is widely understood to be an amoral body of law that seeks only to optimize creative production through the use of economic incentives. In this Article, we apply recent insights from psychology and cognitive science to show that, in sharp contrast to this conventional wisdom, copyright is in fact a profoundly moral system, that the conduct it regulates is inextricable from moral considerations, and that these insights have major implications for how we talk and legislate about copyright. Part I leverages a functional definition of morality to illustrate that copyright is a moral system insofar as it seeks to constrain our selfish instincts and cause people to behave prosocially. Part II canvasses contemporary research in intuitionist moral psychology, and in particular Moral Foundations Theory (MFT). The latter posits that morality is something we intuit prior to reason, and that those intuitions are based on one of six different innate foundations (care/harm, fairness/cheating, loyalty/betrayal, authority/subversion, sanctity/degradation, and liberty/oppression). Part III applies MFT to copyright law, showing people's reactions to copyright-relevant behavior are not limited to concerns about economic harm. Rather, moral intuitions about copyright array along the six foundations identified by MFT, and so reflect concern for matters as varied as physical suffering, reciprocal fairness, preservation of social hierarchy, patriotic sentiment, religious conviction, and fear of state oppression. Finally, Part IV reflects on the normative implications of this research in terms of its promise for creating more constructive public and private discourse about copyright, and in terms of its importance for better informing copyright legislation in order to achieve copyright's constitutional objective of promoting cultural progress.

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† Professor of Law, Southwestern Law School. The authors thank T.J. Chiang, Jeanne Fromer, Sena Koleva, Jake Linford, Mark McKenna, Christina Mulligan, Jessica Roberts, Zahr Said, Andres Sawicki, and Rebecca Tushnet, as well as participants at the 2014 Works in Progress—IP Conference at Santa Clara Law School for helpful comments. Matt Alsberg, Monique Damore, Leah Eubanks, Lindsey Hay, Brandon Intelligator, Rebecca Magenheimer, and Rebecca Sundin provided invaluable research assistance.

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TABLE OF CONTENTS

INTRODUCTION: COPYRIGHT’S MORALITY PUZZLE.....	1
I. THE MYTH OF COPYRIGHT’S AMORALITY	6
A. <i>The Straight Story</i>	6
B. <i>Moral Psychology and the New Functional Morality</i>	11
C. <i>Copyright as a Moral System</i>	14
II. MORAL INTUITIONS AND FOUNDATIONS.....	19
A. <i>Moral Intuitions and Moral Reasoning</i>	20
B. <i>Expanding the Moral Domain</i>	23
III. COPYRIGHT’S MORAL INTUITIONS AND FOUNDATIONS.....	27
A. <i>Moral Intuitions About Copyright</i>	27
B. <i>The Moral Foundations of Copyright</i>	33
1. The Care/Harm Foundation	35
2. The Fairness/Cheating Foundation	40
3. The Loyalty/Betrayal Foundation	45
4. The Authority/Subversion Foundation.....	49
5. The Sanctity/Degradation Foundation	53
6. The Liberty/Oppression Foundation	57
IV. NORMATIVE IMPLICATIONS.....	61
A. <i>Toward More Civil Copyright Discourse</i>	61
B. <i>MFT and Copyright Policy</i>	66
CONCLUSION: BEYOND COPYRIGHT.....	74

INTRODUCTION: COPYRIGHT'S MORALITY PUZZLE

The standard story of U.S. copyright's morality is simple: there isn't one. In the Anglo-American tradition, federal law grants authors exclusive rights not out of principle or as a reflection of merit, but simply as a necessary means to the desirable end of optimizing creative production. This consequentialist aim has led many courts and commentators to regard copyright—as well as the subject matter it governs and the rights it creates—as lacking any moral valence.¹ On this view, copyright is purely economic legislation seeking to engineer a desirable social outcome.² This lies in contrast with other areas of the law such as crimes, torts, or even physical property, where courts and commentators alike exhibit sharp awareness of the morally charged character of both the law itself and the conduct it regulates. So while copyright infringement may give rise to civil penalties, law tends to treat it as technically illegal but ethically neutral, such as forgetting a tax filing deadline or flouting a vehicle registration requirement.³

This vision of amoral, purely economic copyright is difficult to square, though, with the actual reactions exhibited by authors, owners, and users when facing copyright issues. For example, Dilbert creator Scott Adams conceded that although the unauthorized use of his comic strips probably helped promote his brand and enhance his viewership, he still regarded such use as wrong and as a profoundly personal violation.⁴ Fashion houses typically express outrage at the perceived wrongfulness of having their work ripped off,⁵ despite a growing body of evidence that

¹ To take one of many examples, William Patry observed that “[t]here is no reason to keep pretending that the Copyright Wars involve morality or principle—they don’t and never have.” WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 189 (2009). We discuss this prevailing view in much more detail in Part I, *infra*.

² The notion that legislation is amoral because it is “economic” is false, and part of our aim in this Article is to debunk this notion. See Part I, *infra* (arguing that copyright’s use of economic incentives to achieve consequentialist aims is part of what makes it a moral system).

³ Stacey Lantagne, *The Morality of MP3s: The Failure of the Recording Industry’s Plan of Attack*, 18 HARV. J. L. & TECH. 269, 282 (2004) (“[I]n the United States, copyright infringement is not a question of morals. Rather, copyright infringement is a *malum prohibitum*—and action that is not [considered] wrongful or ‘immoral’ independent of its being illegal...” (citation and internal quotation marks omitted)).

⁴ Scott Adams, “Is Copyright Violation Stealing?” Dilbert Blog, Apr. 7, 2007, http://dilbertblog.typepad.com/the_dilbert_blog/2007/04/is_copyright_vi.html.

⁵ KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* (2013) (recounting stories of fashion designers, such as

knock-off designs actually provide an economic benefit, rather than a detriment, to designers.⁶ The many musicians who complained that their work was used in connection with the interrogation of detainees at Guantanamo articulated their concerns not in terms of lost royalties, but as a deep visceral opposition to having their creations used as a psychological tool to harm fellow humans.⁷ And when the devout Christian sculptor Frederick Hart sued Warner Brothers for using a likeness of his religious sculpture in the orgy scene of the film “The Devil’s Advocate,” he explained his motivation not in terms of the studio’s failure to pay for the rights to use his work, but because he felt deeply offended at the inclusion of his Christian-themed sculpture in a prurient context.⁸ The notion of copyright as a morality-free zone also makes it hard to explain the increasing rancor that has come to characterize the tension between owners and users in recent decades.⁹ These struggles have grown so emotionally charged they have become known in common parlance as the “copyright wars,”¹⁰ and interest groups have been formed and congressional hearings convened to try to calm both sides down.¹¹

Foley + Corinna, whose anger over unauthorized copies of their clothing led them to lobby for federal legislation to stop the practice).

⁶ Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Intellectual Property and Innovation in Fashion Design*, 92 VA. L. REV. 1687, 1732-35 (2006) (arguing that unauthorized copies of fashion designs help the copied designers by burnishing their brands while not harming them because knockoffs are purchased by consumers in different markets).

⁷ Tom Morello, Zack de la Rocha, Tim Commerford & Brad Wilk, *Band Rages Against Using Music as Torture*, THE DENVER POST (Aug. 24, 2008, 12:30 AM), http://www.denverpost.com/opinion/ci_10271001 (quoting Rage Against the Machine’s being “sickened” to learn that their music was used in connection with torture of Guantanamo detainees).

⁸ Gustav Niebuhr, “Warner Brothers sued over use of sculpture in ‘Devil’s Advocate,’” DESERET NEWS, Dec. 7, 1997, <http://www.deseretnews.com/article/599449/Warner-Brothers-sued-over-use-of-sculpture-in-Devils-Advocate.html>.

⁹ *E.g.*, Evan Halper, “Congress in Middle of Hollywood Copyright Clash with Silicon Valley,” L.A. TIMES, Feb. 17, 2014 (describing recent legislative and public battle between content industries and copyright low-protectionists over scope of DMCA takedown notices).

¹⁰ For just one example of this usage, see Cory Doctorow, “Copyright wars are damaging the health of the internet,” THE GUARDIAN (U.K.), Mar. 28, 2013, *available at* <http://www.theguardian.com/technology/blog/2013/mar/28/copyright-wars-internet>.

¹¹ *See generally* “A Case Study for Consensus Building: The Copyright Principles Project,” Hearing Before House Subcomm. on Courts, Intellectual Property, and the Internet, No. 113-31, May 16, 2013 (transcript of congressional hearing convened to

This is copyright's morality puzzle: If copyright truly is nothing more than cold, hard economic regulation, then why do authors, owners, and users have such hot-blooded moral intuitions about infringement? If copyright really is amoral, then how can we explain the intensely felt sense of right and wrong that accompanies many, perhaps even most, instances of copyright-relevant behavior? Our solution to this puzzle, and our claim in this Article, is straightforward: contrary to law's conventional wisdom, copyright—both the law itself and the conduct it governs—is very much part of the moral domain. Advances in intuitionist moral psychology—and especially moral foundations theory (MFT)—can help explain how copyright is a richly moral system insofar as it regulates the normative intuitions that people typically exhibit in response to most copyright-relevant behavior. MFT also provides a map of copyright's moral domain that allows us to make sense of people's ethical reactions to copyright ownership and infringement better than the current morality-indifferent approach to copyright law. This claim not only promises a more descriptively accurate account of copyright, but also suggests how we can better achieve copyright's consequentialist aspirations by accepting the inevitable moral reactions of the individuals and conduct it regulates. We elaborate this thesis with three separate claims.

First, copyright is a moral system. This claim depends on a functional definition of morality favored by social and moral psychologists. The functional approach defines morality as any system of values, norms, psychological mechanisms, and other methods by which groups regulate self-interest and enable cooperation. This definition understands morality in terms of what it does, not what it is.¹² The functionalist account thus renders irrelevant familiar legal distinctions between laws that regulate moral subject matter and those that merely seek to establish social order. Law, regardless of the subject matter it governs, is an external constraint that forces us to reign in our worst selves and to play nicely with others. Certainly this is true of copyright, which admonishes us not to use works of authorship without owners' permission, and does so in order to realize certain social goals. Copyright law thus functions much like any other moral system: It aspires to curtail selfish and socially harmful behavior in

consider the view of the bipartisan Copyright Principles Project on how to have more constructive dialogue about copyright issues).

¹² We elaborate and provide the case for this definition of morality in Part I, *infra*. For an accessible overview of intuitionist moral psychology and MFT in particular, see JONATHAN HAIDT, *THE RIGHTeous MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2013).

favor of promoting the general good. Viewing matters through the functional lens thus turns the dominant story on its head. Copyright is not amoral at all, but is actually a classic example of a moral system.

Second, having shown that copyright is a moral system, we turn to the related project of giving content to this idea. We do so by mapping copyright's moral domain. One might initially think that, in light of the conventional wisdom, copyright's moral domain is simple and consequentialist. But observations of the actual moral instincts expressed by authors, owners, and users in reaction to copyright-relevant conduct shows that this is not at all the case. Copyright's normative monism does not reflect people's intuitions about copyright-relevant behavior because their concerns are not limited to economic harm. We leverage insights from intuitionist moral psychology,¹³ and in particular the emergent field of MFT, to show that the moral domain experienced by those who are affected by copyright is richly plural.¹⁴ MFT posits that people's moral instincts derive from one or some combination of six different foundations—care/harm, fairness/cheating, loyalty/betrayal, authority/subversion, purity/degradation, and liberty/oppression.¹⁵ We examine a wide range of qualitative evidence to show that this vision of plural morality holds true for copyright. The moralized anger that people express in reaction to unauthorized use is rooted in intuitive concerns about issues such as non-economic harm, broken reciprocity, anti-Americanism, threats to social order, disgust and sacrilege, and fear of overbearing state oppression. Our analysis thus reveals that the various moral foundations¹⁶ identified by MFT

¹³ See Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCHOL. SCI.* 814 (2001)

¹⁴ For a summary of the empirical evidence supporting MFT's claims that humans possess plural moral instincts, see Jesse Graham, et al., *Mapping the Moral Domain*, 101 *J. PERSONALITY & SOC. PSYCHOL.* 366 (2011).

¹⁵ For a very recent overview of MFT's claims and its influence on research in related areas of psychology and cognitive science, see Jesse Graham, et al., *Moral Foundations Theory: The Pragmatic Validity of Moral Pluralism*, in *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* (forthcoming), available at <http://ssrn.com/abstract=2184440> (hereinafter *Pragmatic Validity*).

¹⁶ Our use of "moral foundations" refers only to the intuitional building blocks that MFT has shown are constitutive of our moral instincts. Other work has referred to "foundational" ideas in human morality that may relate to copyright, e.g., ROBERT MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011) (identifying moral principles drawn from Kant, Locke, and others as "foundations" of moral reasoning), but we stress that this refers to an entirely different idea. In contrast, Merges's foundations are rationalist theoretical justifications for the existence of IP protection. *Id.* at 9-17.

generally contribute to, and provide a descriptively compelling account of, people's moral intuitions about copyright.

These two descriptive claims yield two significant normative implications. First, understanding the moral instincts at play in copyright controversies may help owners, users, policymakers, and others craft more effective arguments by framing claims about infringement in terms that are appealing to the particular moral foundations of a given audience. Moreover, merely understanding that moral intuitions, rooted in the various moral foundations, are at play in copyright discourse may create a mutual sense of empathy that promises to cool the temperature of these overheated copyright wars and lead to more productive dialogue. Second, understanding how our moral instincts operate with respect to copyright enables us to better achieve the consequentialist goal of optimizing creative production. Copyright relies on assumptions about how and why people create, distribute, and use works of authorship. Since these behaviors are bound up with moral intuitions, the law must account for how those intuitions work in order to predict how people will respond to copyright-relevant conduct. MFT provides a map of the rich geography of moral instincts that can lead policymakers to craft copyright regulations in a way most likely to optimize creative production, including especially intractable issues such as filesharing and the creation of attribution rights.

Recent work in moral psychology has shown that morality is an inescapable part of how we understand the world. By importing these novel insights into copyright law, we seek to enable better understanding of how authors, owners, and users experience regulation of their works, and in turn how best to achieve copyright law's practical objectives. This Article develops these claims in four main parts. Part I debunks the conventional wisdom that U.S. copyright is amoral by deploying a functionalist definition of morality. Part II outlines recent scholarship in psychology and cognitive science, focusing in particular on intuitionism and MFT. Part III applies these advances to provide a rich description of copyright's moral domain. It first shows that moral intuitions suffuse our reactions to copyright-relevant behavior and then shows that MFT supplies the best account of the plural moral instincts that people exhibit in response to that behavior. Part IV explicates two practical implications of our descriptive claims: enriching public dialogue about copyright and better equipping law to optimize creative production. Finally, the Conclusion briefly reflects on directions for future work, both in terms of empirical projects that further support this Article's claims, and in terms of other fields such as patents and physical property, where MFT and related advances may bear fruit.

I. THE MYTH OF COPYRIGHT'S AMORALITY

The received wisdom is that American copyright has nothing—or nothing much—to do with morality. In this Part, we show that the received wisdom has it wrong. We first elaborate and parse the commonplace belief that copyright is amoral. Next, we consider how best to define morality. We ultimately favor a capacious, functional account of what morality means that is particularly well-suited to understanding law. And finally, we apply this functionalist definition of morality to copyright to show that the dominant view has it exactly backward. Copyright is not amoral, but in fact it is a body of laws and practices that epitomizes what it means for a system to possess moral content. Moreover, we argue that a full understanding of copyright's moral system should account not only for formal copyright laws and legal practices but also the vast range of informal social norms that guide and govern creative behavior.

A. *The Straight Story*

Most bodies of law cannot lay claim to a single organizing principle. Ask a scholar of property why law protects ownership, and you will get answers that range across many different ideological and methodological axes.¹⁷ U.S. copyright law, though, is different. Anyone who has lasted half an hour into the first day of a copyright course, let alone taught such a course or practiced in the area, has heard of the familiar “utilitarian bargain” that represents copyright law's core narrative.¹⁸ In contrast to the “moral rights” approaches of European copyright systems, U.S. copyright law is said to be strictly utilitarian and, thus, amoral.

According to the received wisdom about U.S. copyright law, copyright exists to solve an economic problem. It is a basic marketplace proposition that the price of goods tends to fall to the cost of marginal production. This simply means that in a competitive environment, you can usually charge buyers just a bit more than what it cost you to make something. This is bad news for purveyors of creative work, because while the cost to an author of writing a novel or producing a hit single tends to be

¹⁷ See JAMES PENNER & HENRY SMITH, eds., *PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW* (2013) (presenting various approaches to property theory).

¹⁸ E.g., Jeanne Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1778 (2012) (referring to the basic scheme of U.S. copyright law as a “utilitarian bargain”).

high, the cost of producing copies of those works tends to be very low.¹⁹ Indeed, in the internet age, the marginal cost of production is virtually zero. You can “make” a new digital copy of a literary or musical work with just a few mouse clicks. This is where copyright comes in. Law gives copyright owners exclusive rights—basically, a monopoly—to make and distribute copies of the works they own. And just like any other monopolist, copyright owners can then charge users more than the market would otherwise dictate for the goods.²⁰

The story of copyright is framed as a “bargain” because both sides give something up to get something in exchange.²¹ The consuming public has to pay more than they otherwise would for copies of the authors’ work, but they enjoy the increased creative production that authors’ exclusive rights are supposed to encourage. And authors get to enjoy the much higher prices the copyright monopoly allows them to charge, but they get to do so only for a limited time, because their copyright will eventually expire, placing the work in the public domain for all to use freely.²² In this idealized version of the story, anyway, copyright represents a happy symbiosis where “the public good ... fully coincides with the claims of individual [authors].”²³ Whether the copyright system actually does optimize creative production, though, remains hotly disputed.²⁴ But for our purposes, that issue is beside the point since this Article concerns the morality, not the efficacy, of the copyright system.

In the United States, then, copyright is understood to be a functional tool designed to achieve a particular result. The state gives authors

¹⁹ WILLIAM A. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 11-70 (2003).

²⁰ For a mainstream account of the economic story of copyright, see LANDES & POSNER, *supra* note 19, at 11-70; for a more skeptical take, see Steven Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

²¹ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003) (“The rights of a patentee or copyright holder are part of a ‘carefully crafted bargain,’ under which, once the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution.”).

²² Though in practice, it now takes a really long time for this to happen. Copyrights typically don’t expire until seventy years after the author’s death. 17 U.S.C. § 302(a).

²³ THE FEDERALIST No. 43 (Madison).

²⁴ Lots of work has questioned whether the copyright system actually does incentivize authorship, at least at a level that warrants the system’s costs. *E.g.*, Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009) (questioning the economic theory of copyright by showing that authors create for numerous reasons, many of which are unrelated to possible future income).

exclusive rights in order to prevent the underproduction of creative work that would presumably occur otherwise.²⁵ It is American copyright's essentially administrative character that leads to the widespread conviction that this body of law is morally inert. This understanding, in turn, is premised on the notion that law does not always regulate in the domain of morality. According to this view, law sometimes regulates in order to prevent conduct that is widely understood to be wrongful (e.g., murder, theft, arson). But at other times, law renders illegal some behavior that is not intrinsically wrongful or harmful in order to achieve some other practical aim, and therefore lies independent of moral considerations.²⁶ Consider jaywalking. There is nothing intrinsically wrong with crossing the street outside of the area delineated by a crosswalk. But law still sanctions this conduct in order to increase pedestrian safety and reduce traffic congestion. Commentators typically understand the subject matter regulated by the former category ("malum in se") to represent the domain of morality. By contrast, the latter subject matter ("malum prohibitum") is thought merely to represent necessary social engineering without the same morally fraught content.²⁷ So, since authors' exclusive rights in their works have been understood since the framing of the Constitution merely as a means to the end of increasing creative production,²⁸ copyright plausibly seems like an administrative tool to achieve a desirable outcome, not a protection of something that is a preexisting, morally charged entitlement. Copyright, in other words, is thought to concern things that are merely malum prohibitum, not malum in se.²⁹

²⁵ *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 543-44 (2d Cir. 1964) ("The financial reward guaranteed to the copyright holder is but an incident of this general objective, rather than an end in itself.").

²⁶ See Stuart P. Green, *Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1557 (1997) (discussing social perceptions of the moral content of laws as the basis for the distinction between malum in se and malum prohibitum).

²⁷ See *id.* The distinction between malum in se and malum prohibitum remains widely used, as the citations in this section indicate, but has been critiqued as incoherent for some time. See, e.g., Rollin M. Perkins, *The Civil Offense*, 100 U. PA. L. REV. 832, 832 & nn.2-5 (1952) (observing that the distinction persists, but has been accompanied by fierce criticism).

²⁸ *Feist Pub., Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'").

²⁹ E.g., Sheldon Halpern, *Copyright Law in the Digital Age: Malum in Se and Malum Prohibitum*, 4 MARQ. INTELL. PROP. L. REV. 1, 10-11 (2000) (premising a lecture on the notion that copyright is malum prohibitum, not malum in se).

This dominant view of U.S. copyright law as morally inert is premised on a specific presumption about what morality means. This approach appears to assume that a legal system deals with morality only to the extent that it is premised on various natural rights or deontological theories. So because U.S. copyright law is not concerned with issues of rights and justice and is instead only interested in economic tradeoffs about incentives and access, it is widely thought to lack moral content. This lies in contrast with European copyright systems that are directly grounded in and governed by authors' rights, which are explicitly labeled "moral rights" regimes, and are typically understood (in contrast to the U.S. copyright system) to be bound up with morality.³⁰

The notion that copyright is as ethically inert as jaywalking laws or speed limits has deep roots in our legal culture. It is the dominant way that both courts and commentators talk about copyright. In the earliest U.S. Supreme Court copyright case, *Wheaton v. Peters*, the Court held that copyright was solely a product of statutory law, not natural right. This holding explicitly rejected the plaintiff's position that copyright was "established in ... abstract morality."³¹ Federal courts have generally concurred in this conclusion, typically citing copyright's economic motivations as a basis for its amorality. As the Second Circuit recently held, "copyright laws are not matters of strong moral principle but rather represent economic legislation based on policy decisions that assign rights based on assessments of what legal rules will produce the greatest economic good for society as a whole."³²

Similarly, it is a familiar, even uncontroversial, notion among copyright scholars that American copyright law is largely devoid of moral content.³³ William Patry observes that "[t]here is no reason to keep

³⁰ Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y U.S.A. 1 (1980) (distinguishing European and U.S. copyright systems on the basis that the former is suffused with morality, while the latter is indifferent to it).

³¹ 33 U.S. 591, 672 (1834) (Thompson, J., dissenting).

³² *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 489 F.3d 474, 480 n.3 (2d Cir. 2007) (internal quotation marks omitted); see also *Gilliam v. Am. Broad. Co.*, 538 F.2d 14, 20–21 (2d Cir.1976) ("American copyright law ... does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal rights of authors.").

³³ E.g., Patti Waldmeir, *There Is No Nobility in Music Theft*, FIN. TIMES (LONDON), Sept. 29, 2003, at 14 ("[C]opyright law is not a commandment of God or nature, like the prohibition against murder, or the theft of an ox or an ass or a wife."); Cassandra Spangler, 39 SETON HALL L. REV. 1299, 1321 (2009) ("[C]opyright is inherently amoral.") (internal quotation marks omitted).

pretending that the Copyright Wars involve morality or principle—they don't and never have."³⁴ Commentators, like courts, typically base this inference of copyright's moral inertness on its overtly economic aspirations. Since copyright seeks to attain an economic goal via an incentivist strategy, scholars typically think of this body of law as economic—and hence non-moral—legislation.³⁵ Even scholars who normatively object to the amoral, economic view of copyright, recognize its existence.³⁶ But regardless of approach, the scholarly consensus is clear: American copyright concerns economic incentives, and that means it operates outside the moral domain.³⁷ It is a body of law that governs subject matter that is *malum prohibitum*, not *malum in se*.³⁸

There are, though, a handful of spaces within U.S. copyright law that are overtly billed as moral. These are, it seems, the moral exceptions that prove the amoral rule. The most conspicuous example is the Visual Artists Rights Act (VARA).³⁹ This law was explicitly incorporated into the Copyright Act in 1990 as part of the United States' gradual accession to the Berne Convention for the Protection of Literary and Artistic Property. Article 6bis of the Berne Convention extends to certain artists two of the entitlements (attribution and integrity) typically protected in countries that, in contrast to the United States, adopt a moral rights approach to copyright. VARA represented Congress's attempt to incorporate the integrity and attribution rights into American copyright law.⁴⁰ The resulting law included an attenuated series of authors' protections that have only rarely been litigated in the quarter-century since its passage. But while its substantive

³⁴ PATRY, *supra* note 1, at 189.

³⁵ See, e.g., Carol G. Ludolph & Gary E. Merenstein, *Authors' Moral Rights in the United States and in the Berne Convention*, 19 STET. L. REV. 201, 227 (1989) ("Present copyright law protects the copyright owner's economic rights, not the author's moral rights or the public's right to benefits from creative labors.").

³⁶ See Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1946 (2006) ("Copyright's provision of economic incentives is consistent with its underlying utilitarian philosophy."); MADHAVI SUNDER, FROM GOODS TO THE GOOD LIFE 11 (2012) ("Intellectual property scholars today focus on a single goal: efficiency."); MERGES, *supra* note 16, at 2 ("Current convention has it that IP law seeks to maximize the net social benefit of the practices it regulates.").

³⁷ Spangler, *supra* note 20, at 1321 ("Americans see copyright as a money issue and not a moral issue").

³⁸ Michael Abramowicz, *A New Uneasy Case for Copyright*, 79 GEO. WASH. L. REV. 1644, 1680 n.202 (2011) ("[C]opyright infringement ... is a *malum prohibitum*, not a *malum in se* offense."); Halpern, *supra* note 29, at 10-11.

³⁹ 17 U.S.C. § 106A.

⁴⁰ See Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 945-47 (1990)

impact has been limited, the presence of some (albeit weak and narrow) federal moral rights protections has further entrenched the notion that the rest of American copyright law is amoral. VARA, with its explicit language of “moral rights,” operates as a point of contrast against which the economic character of U.S. copyright seems even starker.⁴¹ Indeed, this point has been made even before VARA’s passage. As one commentator argued, the overall indifference to the moral rights approach in American law evidences the amorality of our copyright.⁴²

The widely accepted picture of American copyright is one that is dominantly administrative and functional, largely morally inert. American copyright, the story goes, extends exclusive rights to authors solely to reach a practical outcome: the maximization of creative production. This renders the rights it creates economic in character, as opposed to moral rights granted in foreign regimes (and by a few domestic laws) that are concerned instead with protecting authors’ interests. Copyright’s moral domain is, according to the dominant narrative, like an ocean in winter. It appears largely empty, save for a few isolated icebergs (or, for our purposes, moral rights laws) dotting an otherwise vacant seascape. But just as the glassy surface of the ocean belies the vast amount of ice lurking just beneath, so does the dominant narrative fail to comprehend the deeply moral character of copyright itself.

B. *Moral Psychology and the New Functional Morality*

The idea of morality in copyright is generally underdeveloped, at least as a descriptive matter.⁴³ That is, scholarship about morality and

⁴¹ *E.g.*, *Berrios Nogueras v. Home Depot*, 330 F. Supp. 2d 48 (D.P.R. 2008) (“Moral rights are to be distinguished from economic rights, which are held by the holder of a copyright in a work.”)

⁴² DaSilva, *supra* note 30 (arguing that in contrast to European copyright regimes, American copyright law is essentially amoral).

⁴³ There is a growing body of scholarship on copyright’s normative morality, that is, arguments about what copyright’s morality should be. *See e.g.*, MERGES, *supra* note 16, at 3; Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988); ROBERTA KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW OF THE UNITED STATES* (2009); SUNDER, *supra* note 36, at 3.

There is, however, very little discussion of copyright’s descriptive morality beyond the utilitarian. For two examples, see James Grimmelmann, *The Ethical Visions of Copyright Law*, 77 FORD. L. REV. 2005 (2009); Gregory Mandel, *The Public Psychology of Intellectual Property*, 66 FLA. L. REV. (forthcoming 2014). For a discussion of trademark’s descriptive morality using MFT, see Mark Bartholomew, *Trademark Morality*, 55 WM. & MARY L. REV. 85 (2013).

copyright is largely limited to normative questions about what copyright should seek to do, and what ethical framework should guide its aspirations. Our claim about morality is, by contrast, descriptive. We seek to show that, contrary to the conventional wisdom, copyright laws themselves comprise a moral system. This argument, of course, depends on a definition of what morality is. In this Subpart, we propound such an account, drawing on recent insights from the field of moral psychology.

The study of morality has ancient roots, most commonly associated with Aristotelian virtue ethics. Aristotle's ethics concerned not only the normative question of how we should act, but also investigated how ethical teachings could shape emotions and intuitions about moral questions.⁴⁴ Virtue dominated the Western world's understanding of ethics until the Enlightenment, when European philosophers faced the challenge of understanding morality in a world that was increasingly skeptical of both organized religion and traditional authority.⁴⁵ The two leading schools of thought that emerged were deontology and consequentialism. Deontologists advocated rule-based systems, most famously Immanuel Kant's categorical imperative. Kant argued that we may regard actions as right only if they could be justified by a universally applicable rule. Consequentialists such as John Stuart Mill and Jeremy Bentham, by sharp contrast, rated the morality of actions by the consequences they created. Utilitarianism epitomizes consequentialism, and suggests that conduct that is ethical always brings about the greatest good for the greatest number. The deontology/consequentialism pairing has come to dominate Western understandings of morality.⁴⁶

The Enlightenment's turn away from virtue ethics not only narrowed the understanding of morality in Western cultures to deontological and consequentialist approaches. It also reformulated the core question of morality from a multi-faceted one concerned with descriptive as well as normative ethical issues (i.e., what morality is as well as what it means to act morally) to one focused almost exclusively on the latter question—so-called “quandary ethics.”⁴⁷ The move away from virtue also rendered the

⁴⁴ ARISTOTLE, *NICHOMACHEAN ETHICS* (W.D. Ross trans., 1941).

⁴⁵ A. MACINTYRE, *AFTER VIRTUE* (1981).

⁴⁶ Jonathan Haidt & Selin Kesebir, *Morality*, in *HANDBOOK OF SOCIAL PSYCHOLOGY* 798 (Susan Fiske et al. eds., 5th ed. 2010) (characterizing the turn away from virtue ethics as the “Great Narrowing”).

⁴⁷ EDMUND PINCOFFS, *QUANDARIES AND VIRTUES: AGAINST REDUCTIVISM IN ETHICS* (1986) (coining this phrase as a way of lamenting the reduction of ethics to rule-based thinking about how to resolve dilemmas, instead of a broader inquiry about how the good life should be lived).

study of morality more of a conceptual than an empirical discipline. That is, the primary tool used to investigate morality was abstract conceptual analysis rather than the qualitative or quantitative methods of the social sciences.⁴⁸ Over the course of the twentieth century, interest in morality as a descriptive question began to emerge. Social psychologists were the primary scholars who led the way in this area, as they began to engage the question of what people believe about right versus wrong. This discipline has produced some great and often shocking insights, such as Stanley Milgram's famous Yale study showing a willingness among subjects to (apparently) inflict great suffering on another person so long as they were instructed to do so by an authority figure.⁴⁹ Yet this field, too, has largely been dominated by quandary ethics that seek to determine how people resolve dilemmas that pit consequentially and deontologically correct options against one another.⁵⁰ Elliot Turiel's definition—probably the most influential in the field of moral psychology—defines the moral domain as “prescriptive judgments of justice, rights, and welfare pertaining to how people ought to relate to each other.”⁵¹

For most of the past century, moral psychology represented a break from mainstream approaches to ethics in the sense that it empirically studied actual moral reactions, but it nonetheless retained the restrictive notion that the domain of morality was limited to consequentialist or deontological questions. Of late, though, moral psychology has been undergoing a “multidisciplinary renaissance,” and this has led to a reexamination of what morality itself means.⁵² The importation of insights from anthropology and sociology has pushed some scholars in the field to move from the current definition that looks to the content of moral issues to a broader one that looks to the function of moral systems.⁵³ Jonathan Haidt and Selin Kesebir have argued, *contra* Turiel, that:

⁴⁸ See Haidt & Kesebir, *supra* note 46, at 798 (observing that post-Enlightenment moral philosophy featured both an assumption that ethics can be derived from a single rule, and an insistence that moral decisions should be made by logical calculation rather than on feeling or intuition).

⁴⁹ Stanley Milgram, *Behavioral Study of Obedience*, 67 *J. ABNORMAL PSYCHOL.* 371 (1963).

⁵⁰ E.g., J. Greene, et al., *Cognitive Load Selectively Interferes with Utilitarian Moral Judgment*, 107 *COGNITION* 1144 (2008) (showing that responses to the famous “trolley” dilemma are complicated when made under stressors).

⁵¹ ELLIOT TURIEL, *THE DEVELOPMENT OF SOCIAL KNOWLEDGE: MORALITY AND CONVENTION* 3 (1983).

⁵² Haidt & Kesebir, *supra* note 46, at 797.

⁵³ Contemporary moral psychologists did not invent the idea of functionalist morality, of course. Durkheim, for example, favored a very similar definition, observing that “[w]hat

Moral systems are interlocking sets of values, virtues, norms, practices, identities, institutions, technologies, and evolved psychological mechanisms that work together *to suppress or regulate selfishness and make cooperative social life possible*.⁵⁴

This descriptive definition of morality breaks from past accounts used in moral psychology in two ways. First, it is functional rather than conceptual. It does not seek to divide the world of decision intuitions into those that are moral and those that are not. It rather treats any external source of decisionmaking authority that ethically constrains a person's decisions as functioning morally. And second, its functionalism lends this definition a degree of pluralism absent in Turiel's more restrictive account. The functionalist approach shows that "there are multiple defensible moralities because societies have found multiple ways to suppress selfishness."⁵⁵

According to the functionalist account, morality is what morality does. That is to say, a system is a moral system to the extent that it establishes and enforces rules that govern behavior. Moral systems guide people towards outcomes that are viewed by the system as morally favorable, but the favorableness of outcomes is not governed solely by concerns about rights, justice, and welfare. Functionalist moral psychology generally accepts a pluralism of moral values that a system may try to assert or promote.

C. *Copyright as a Moral System*

This Article proceeds on the assumption that the new, functional definition of morality articulated by Haidt and Kesebir is the best way to think about morality in copyright—and indeed, in law more generally. It is beyond the scope of this Article to provide an exhaustive defense of this definition against those of Turiel and others who propound a narrower vision of the moral domain. Still, we believe that there are two reasons that this functionalist definition is especially appropriate for our project. The first derives from the pluralism of functionalist morality. Our aim is to develop a descriptively accurate understanding of U.S. copyright's moral domain. This requires an approach that captures the moral intuitions of all

is moral is everything that is a source of solidarity, everything that forces man to ... regulate his actions by something other than his own egoism." EMILE DURKHEIM, *MORAL EDUCATION* (1925) (Wilson & Schnurer trans. 1973).

⁵⁴ Haidt & Kesebir, *supra* note 46, at 800 (emphasis added).

⁵⁵ *Id.*

Americans.⁵⁶ The traditional understanding of morality as limited to consequentialist and deontological considerations does match with some people's moral intuitions, but these folks are mostly WEIRD. Seriously: most social science studies focus exclusively on populations that are White, Educated, Industrialized, Rich and Democratic, yet these populations may not be representative (and indeed, may be uniquely unrepresentative) of the rest of the world, or even the national, population.⁵⁷ Moral psychology is no exception. Most people think of ethical issues largely in terms of Bentham's net average utility and Kant's abstract rules.⁵⁸ Functionalist morality ameliorates this problem, allowing us to move from a moral parochialism in which there is one proper moral domain that happens to include the values of the people who defined it, to moral pluralism in which we accept multiple inconsistent but defensible ways of structuring society.⁵⁹ For our purposes, since not all Americans are WEIRD, especially outside the blue states and higher socioeconomic strata, and so to understand how everyone reacts morally about copyright, we will need to apply a conception of ethics that uses the broadest possible lens.

Second, a functional definition of morality bears the most promise for fulfilling copyright law's practical aspirations (and, indeed, for law's practical aspirations generally). As the previous Subpart described, American copyright does not give rights just for rights' sake. It seeks to encourage authors to make the world a more beautiful and interesting place. In other words, copyright law—like most law—wants to make people do things. In particular, though, copyright is especially concerned with issues at the heart of the functionalist approach to morality, especially the suppression and regulation of selfishness and the promotion of cooperative social life.⁶⁰

The entire utilitarian bargain is premised on a vision of how people will react positively to incentives and negatively to the threat of infringement liability. For this reason, it is crucial to know what people's actual moral intuitions are when faced with problems related to the creation

⁵⁶ To the extent that U.S. law implicates international concerns, we may also want an approach to morality that captures the intuitions of the various people affected by U.S. law.

⁵⁷ See Joe Henrich et al., *The Weirdest People in the World?* RatSWD Working Paper Series No. 139 (2010), *available at* (pointing out that most social science studies examine populations that are white, educated, industrialized, rich and democratic, and suggesting that this raises serious concerns because such people are unrepresentative of the rest of the world population).

⁵⁸ Graham, *supra* note 14, at 367.

⁵⁹ Haidt & Kesebir, *supra* note 46, at 800.

⁶⁰ *Id.*

and violation of exclusive rights in works of authorship. A purely conceptualist argument that people should not regard some class of issues as moral does little to help the project of copyright if people actually do regard that class of issues as moral. By understanding morality functionally rather than conceptually, then, we can develop an understanding of copyright's morality that is more pragmatically useful to crafting rules that achieve its ultimate goals.

With this functional understanding of morality, as well as a sense of its appeal, in mind, it quickly becomes clear how copyright is not only not amoral, but is in fact a profoundly moral system. Per the Haidt/Kesebir formulation, moral systems are those that impose an external "set of norms" or "institutions" that "suppress selfishness and makes cooperative social life possible." Copyright law readily meets these criteria. The substantive rules of copyright amount to a norm not in the sense of a weakly organized general behavioral practice, but in the stronger sense of a formally articulated body of rules backed up by the coercive authority of the state. Copyright law itself may also be regarded as an institution in the sense that it is a longstanding state-sanctioned body of law that possesses widespread legitimacy. And regardless, the formal element of Haidt and Kesebir's definition was not meant to be exclusive, but simply to refer to any externally imposed source of moral authority, of which all law—including copyright—is certainly one. And copyright's main aims are entirely consonant with Haidt and Kesebir's functionalist definition of morality.⁶¹ Copyright attempts to promote cooperative social behavior in the form of creating and distributing new works of authorship and it regulates selfishness by preventing people from making and distributing cheap reproductions of owners' works by imposing stiff penalties for infringement.

Once viewed through this lens, the widely accepted notion that American copyright is not moral because it protects only "economic" rights or because it is driven by a utilitarian bargain rather than based on authorial interests seems incoherent. What judges and scholars refer to as the difference between economic versus moral conceptions of copyright actually tracks the two ways of thinking about ethics that have been prevalent in Western society since the Enlightenment's turn away from virtue ethics. The American approach to copyright is correctly understood as a utilitarian system, in the sense that it totes up the costs of copyright (for the public, having to pay monopoly rents; for authors, having only a limited copyright term) but then compares these costs to the system's considerable

⁶¹ Haidt & Kesebir, *supra* note 46, at 800.

benefits (greater creative production), and concludes that since the latter overbear the former, copyright is a good proposition.⁶² But simply because this is a consequentialist calculus that looks to costs and benefits does not make it amoral. On the contrary, it is just *differently moral* than alternative systems. It uses consequences, not abstract rules, as its justificatory benchmark. The functionalist account of morality is thus not even necessary to explain why this does not remove American copyright from the moral domain. Copyright's utilitarian framework is what makes it (one kind of) a moral system, one that operates to provide an external check on otherwise self-interested behavior. Even Turiel's definition of morality included "judgments about ... welfare," just as Benthamite utilitarianism and the Millian harm principle have been understood as foundational ways to approach moral problems for centuries.⁶³

That courts and commentators have wrongly understood most of American copyright as amoral does not mean that they were also wrong to understand its handful of provisions oriented around authors' rights as moral. VARA, too, clearly fits the Haidt/Kesebir functional definition of morality. Like the utilitarian majority of copyright law, this vanishingly small island of "moral rights" also represents a "norm" that "suppresses selfishness" by preventing people from engaging in self-interested behavior (i.e., from misattributing or defacing works of visual art). The difference is that VARA is animated by a rule- and rights-based framework, rather than the consequentialist/utilitarian approach that undergirds the vast majority of American copyright law. In this respect, VARA (as well as foreign and state moral rights regimes) more closely approaches the deontological than the consequentialist side of Western moral reasoning's traditional dyad. The distinction between American copyright's treatment of authors' rights as a means to an economic end and other regimes' treatment of those rights as ends in themselves does not mean that the latter is moral and the former is not. It means only that the two systems are differently moral, and also that the distinction between utilitarian and moral-rights approaches to copyright tracks the consequentialist/deontology divide that dominates Western moral philosophy. But as the following Part illustrates, this does not fully reflect the varieties of moral experience relevant to copyright.

⁶² MERGES, *supra* note 16, at 2 ("IP policy, according to this [utilitarian] model, is a matter of weighing [costs and benefits], of striking the right balance. ... It is easy to picture the toting up of costs and benefits, and to think of a good policy as one that equilibrates the scale at just the right point...").

⁶³ See Pincoffs, *supra* note 47 (regretting the reduction of Western moral reasoning to normative questions guided by consequentialist or deontological frameworks).

Copyright's moral domain does not end, however, at the boundaries of the formal legal system. A complete view of the copyright system as a moral domain must acknowledge the innumerable ways in which informal norms, social behaviors, and non-legal actors influence how people produce, distribute, and use creative works. Just as only knowing about a religion's beliefs without knowing anything about its actual practices would provide a shallow understanding of its moral domain, only reading the U.S. copyright statute without appreciating how people act and speak about and around copyright-relevant issues would give a dim view of how creative works come into existence and how their circulation and use is encouraged and policed.

Accordingly, copyright's moral domain includes a variety of other behaviors beyond the formal boundaries of the law. For example, copyright's moral domain should include the way that children are taught about copyright law.⁶⁴ It also includes the ways in which creators and users talk about copyright issues in public fora such as the protests against the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA). And it includes the vast range of informal norms that govern the creation and use of works either in the shadow of formal laws or in their absence.

A considerable body of recent research has studied this last issue. Research on a wide variety of creative practices, including fashion design,⁶⁵ open-source coding,⁶⁶ cooking,⁶⁷ tattooing,⁶⁸ and stand-up comedy,⁶⁹ has illustrated the extent to which informal norms and social practices regulate creative behavior. In some fields, such as open-source computer coding, although copyright protection is available and is occasionally used by some participants, behavior is largely governed by norms about acceptable use.⁷⁰

⁶⁴ See www.copyrightkids.org

⁶⁵ RAUSTIALA & SPRIGMAN, *supra* note 5.

⁶⁶ Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002).

⁶⁷ Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121 (2007); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008).

⁶⁸ Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511 (2013).

⁶⁹ Dotan Oliar & Christopher J. Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008).

⁷⁰ Benkler, *supra* note 66. See also David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093 (2011); Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 676-77 (2006).

In other fields such as elite restaurant cooking, formal IP protection is unavailable, so social norms do the work of determining which behaviors are acceptable (such as altering another chef's recipe with a new creative twist) and which are unacceptable (such as identically copying another chef's recipe without attribution).⁷¹ Within these communities, the same functionalist moral concerns exist that also arise in more typical areas of creative production, such as music, literature, and film. Members still need to promote cooperation and creativity and reign in selfishness, but instead of relying on the existence (or at least the threat) of legal sanctions, they must negotiate informal strategies of encouragement and policing.⁷²

Importantly, the morality that emerges from these extra- and non-legal domains often differs significantly from formal copyright law.⁷³ Public discussions of copyright-relevant issues, for example, often focus on concerns about fairness and desert rather than incentives to create.⁷⁴ And in many creative fields, providing attribution to authors is considered morally necessary even though U.S. copyright law (apart from VARA) does not recognize a right to attribution.⁷⁵ When these behaviors are incorporated into our understanding of copyright's moral domain, the picture that emerges is richer and more complex than statutes and judicial decisions let on. Accordingly, in the following Parts, our survey of copyright's moral foundations includes a broad range of sources and actors.

II. MORAL INTUITIONS AND FOUNDATIONS

The previous Part discussed and debunked the prevalent myth that U.S. copyright is amoral. This analysis rested on recent insights in moral psychology that have deployed a broad, functional definition of morality

⁷¹ Fauchart & von Hippel, *supra* note 67, at 193; Buccafusco, *supra* note 67, at 1147.

⁷² See Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657, 659 (2010). (discussing "the governance of what we refer to as constructed commons in the cultural environment, in which the resources to be produced, conserved, and consumed are not crustaceans but pieces of information: copyrighted works of authorship, patented inventions, and other forms of information and knowledge that may, but need not, be aligned with formal systems of intellectual property (IP) law.").

⁷³ See Elizabeth L. Rosenblatt, *Intellectual Property's Negative Space: Beyond the Utilitarian*, 40 FLA. ST. UNIV. L. REV. 441 (2013) (applying labor-desert, personality, and distributive justice theories to low-IP regimes).

⁷⁴ *Id.* at 464.

⁷⁵ The value that creators place on attribution is mentioned in most of the studies cited above. See also, Catherine Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49 (2006).

that looks at what it means for a system to perform a moral function, rather than using conceptual categories to regard only some decision-making heuristics as the true moral domain. This Part discusses a pair of insights—intuitionism and moral foundations theory—that we will later use to analyze copyright’s moral domain.

A. *Moral Intuitions and Moral Reasoning*

Contemporary moral psychology has deep roots in a longstanding debate about the nature of morality in human thought. The view that morality is fundamentally an operation of human reason gained support from psychological research in the second half of the twentieth century. Building on Jean Piaget’s work with children,⁷⁶ Lawrence Kohlberg studied the ways in which people solve moral dilemmas, such as whether a man should steal a drug to save the life of his dying wife.⁷⁷ As children develop into adults, they may reach a stage of post-conventional moral reasoning where they apply abstract and categorical ethical principles involving justice, fairness, and respect for persons.⁷⁸ According to the rationalist model of moral psychology developed by Kohlberg and his followers, moral decision making is, when properly done, a reason-based analysis of whether actions will lead to injustice, harm, or the violation of rights.⁷⁹ When confronted with a moral dilemma, people rationally and deliberately sift through evidence that would suggest whether the behavior is morally acceptable or unacceptable. Only once the moral pros and cons of the behavior have been weighed do people offer moral judgments. This account is probably the leading theory in moral psychology today.

Despite its prominence, the rationalist approach to moral judgment has had its share of detractors. It found its first major challenge in the work of Scottish skeptic philosopher David Hume. The familiar dictum that “reason is, and only ought to be the slave of passions” epitomizes Hume’s very distinct conception of human nature.⁸⁰ This essential notion reemerged when scholars from a variety of disciplines in the later twentieth century

⁷⁶ See JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (1932).

⁷⁷ See LAWRENCE KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT, VOL. 1: THE PHILOSOPHY OF MORAL DEVELOPMENT* (1981); LAWRENCE KOHLBERG, CHARLES LEVINE & ALEXANDRA HEWER, *MORAL STAGES: A CURRENT FORMULATION AND A RESPONSE TO CRITICS* (1983).

⁷⁸ Lawrence Kohlberg & Richard H. Hersch, *Moral Development: A Review of the Theory*, 16 *THEORY INTO PRACTICE* 53, 55 (1977).

⁷⁹ Haidt, *Emotional Dog*, *supra* note 13 at 817.

⁸⁰ DAVID HUME, *A TREATISE OF HUMAN NATURE* (1739).

showed a renewed interest in the role of intuition in human thought, including but not limited to moral decisionmaking.⁸¹

The alternative to the rationalist approach, and the one we adopt here, places intuition rather than reason at the core of moral judgment.⁸² Much of the early work in this vein investigated the moral intuitions of children. Children provided an especially promising way to test the rationalist/intuitionist debate, because in a purely rationalist view, children would lack any moral sensibility, since they did not yet have the capacity to reason that rationalists believed to be a prerequisite to morality. Numerous studies, however, showed the opposite to be true.⁸³ Far from lacking any notion of ethical conduct, even very young children and infants demonstrated some notion of—admittedly rudimentary—moral sensibility.⁸⁴ In fact, even babies appear to demonstrate negative reactions to videos of cartoon characters undermining other characters, in contrast to more positive reactions to videos of cartoon characters helping each other.⁸⁵

There is a constantly increasing body of empirical research supporting the primacy of intuition in moral judgment. For example, contrary to the rationalist model, many studies indicate the fundamental role of emotion in moral judgment.⁸⁶ People with damage to emotion-processing regions of their brain make moral judgments that seem psychopathic,⁸⁷ and healthy people's judgments about moral dilemmas are influenced by affective processing and emotional states.⁸⁸ In addition, although they lack

⁸¹ See e.g., Walter Sinnott-Armstrong, *Moral Intuitionism Meets Empirical Psychology*, in *MORAL PSYCHOLOGY: HISTORICAL AND CONTEMPORARY READINGS* 340 (Thomas Nadelhoffer et al., eds. 2010).

⁸² For a philosophical defense of moral intuitionism that goes beyond our claims and goals here, see Sinnott-Armstrong, *supra* note 81, at 340 (“Moral intuitionism is the claim that some people are adequately epistemically justified in holding some moral beliefs independently of whether those people are able to infer those moral beliefs from any other beliefs”).

⁸³ See J. Kiley Hamlin, Karen Wynn & Paul Bloom, *Social Evaluation by Preverbal Infants*, 450 *NATURE* 557 (2007) (showing that infants prefer individuals who help others over those that hinder others).

⁸⁴ See Kristina R. Olson & Elizabeth S. Spelke, *Foundations of Cooperation in Young Children*, 108 *COGNITION* 222 (2008) (reporting evidence that young children engage in direct and indirect reciprocity with others).

⁸⁵ Hamlin, Wynn & Bloom, *supra* note 83.

⁸⁶ For a review, see June Price Tangney et al., *Moral Emotions and Moral Behavior*, 58 *ANN. REV. PSYCHOL.* 345 (2007).

⁸⁷ ANTONIO DAMASIO, *DECARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (1994).

⁸⁸ See Joshua D. Greene et al., *An fMRI Study of Emotional Engagement in Moral Judgment*, 293 *SCI.* 2105 (2004).

human reasoning powers, higher order primates exhibit certain essential “building blocks” of human morality.⁸⁹

Also important in this area are the studies of “moral dumbfounding” conducted by Haidt and others. In one study, people are presented with a vignette about a brother and sister who agree to have sex together one time only, who take multiple steps to avoid conception, and who believe that the experience was enjoyable.⁹⁰ Respondents insisted that the conduct was wrong even when they could not articulate a reason why. According to the authors, this kind of moral response—an immediate intuitive judgment followed by a search for reasons that support it—characterizes the vast majority of our moral behavior.⁹¹ Morality does not work like a judge rationally sifting through evidence; it works like a lawyer trying to build a case for a judgment that has already been reached.⁹²

The notion that morality begins with intuition rather than reason now provides a cornerstone of much contemporary moral psychology. Intuitionism rejects the distinction between emotion and cognition entirely, instead understanding both of these as forms of information processing.⁹³ Yet contemporary intuitionist moral psychology also rejects Hume’s assertion that reason is a mere “slave” to passion. These scholars instead have shown that intuition and intellection are simply two different, intrinsically related forms of cognition,⁹⁴ and that intuition tends to serve as a greater driver of our ethical decision-making than reason.⁹⁵ “We do moral reasoning,” explained Jonathan Haidt, “not to reconstruct the actual reasons why we ourselves came to a judgment; we reason to find the best possible

⁸⁹ FRANS DE WAAL, *GOOD NATURED: THE ORIGINS OF RIGHT AND WRONG IN HUMANS AND OTHER ANIMALS* (1996).

⁹⁰ Jonathan Haidt, Fredrik Bjorklund & Scott Murphy, *Moral Dumbfounding: When Intuition Finds No Reason*, working paper, available at <http://www.commonseatheism.com/wp-content/uploads/2011/08/Haidt-Moral-Dumbfounding-When-Intuition-Finds-No-Reason.pdf>. This paper is also discussed in Haidt, *Emotional Dog*, *supra* note 13, at 814.

⁹¹ *Id.* at 818.

⁹² *Id.* at 814.

⁹³ Haidt, *supra* note 12, at 44-45 (“Moral judgment is a cognitive process, as are all forms of judgment. The crucial distinction is between two kinds of cognition: intuition and reasoning.”).

⁹⁴ *Id.* at 44 (“Emotions are a kind of information processing.”).

⁹⁵ Haidt & Kesebir, *supra* note 46, at 801-08 (citing numerous studies evidencing the proposition that intuition is primary, but not solely dominant, in human decision-making); Haidt, *Emotional Dog*, *supra* note 13, at 814.

reasons why somebody else ought to join us in our judgment.”⁹⁶ Haidt offers the example of an elephant and its rider to illustrate his model of the relationship between reason and intuition in moral thinking.⁹⁷ The elephant represents our moral intuitions: dominant and certainly more powerful than the tiny human sitting on top of it. The rider represents the role of reason: small in relative terms, but occasionally able to nudge an especially well-trained elephant in one direction or another. But as the metaphor illustrates, the rider (reason) is not a useless mouthpiece that does nothing other than provide post-hoc justifications for first-order moral intuitions.⁹⁸ Rather, the rider can stop the elephant from going off half-cocked, by looking into the future and encouraging better decision-making. And the rider being a spokesman also allows the elephant to be taken more seriously, rather than seeming just like a wild intuition-driven beast.⁹⁹ Finally, and perhaps most importantly, the use of reason as opposed to the simple articulation of an intuition can cause other people to shape and cabin their own intuitions in a way to cause them to be more in accord with ours, helping to create social consensus.¹⁰⁰

B. *Expanding the Moral Domain*

Moral psychology depends on the premise that intuitions play a central, even dominant, role in our ethical decision-making, in turn leading to a richer understanding of the kinds of thinking that count as “moral.” As

⁹⁶ Haidt, *supra* note 12, at 44. Relatedly, Howard Margolis posited a distinction between “seeing-that” and “reasoning why,” whereby we start by making conclusions about how the world should be, and only thereafter engage in post-hoc reasoning that justifies and explains those prior conclusions. HOWARD MARGOLIS, PATTERNS, THINKING, COGNITION: A THEORY OF JUDGMENT (1990). See also GREENE, *infra* note 302, at 335-36 (discussing why there is a more elaborate role for moral reasoning in his theory than in Haidt’s). These paragraphs form only a very brief and incomplete summary of the recent interdisciplinary sea change in how we understand human reasoning.

⁹⁷ Haidt, *supra* note 12, at xxi (“[T]he mind is divided, like a rider on an elephant, and reason is the rider.”). A similar analogy is that emotion is to reason like a dog to its tail, hence the phrase “the emotional dog and its rational tail.” See Haidt, *Emotional Dog*, *supra* note 13.

⁹⁸ Haidt, *supra* note 12, at 45 (portraying our sense of morality in Margolis’ terms, as starting with an instinctive “seeing-that” (the elephant) and only then following with a rational “reasoning-why” (the rider)).

⁹⁹ *Id.* at 45.

¹⁰⁰ *Id.* at 47 (emphasizing that reason can lead us to express our moral senses in ways that cause others to be more in accord with them); cf. JOHN RAWLS, A THEORY OF JUSTICE (3d ed. 1999) (articulating a theory of public reason whereby the act of reasoning publicly can make social consensus about contentious issues more likely).

we explained in Part I, Western moral philosophy has, since the Enlightenment, featured two primary ways of thinking about moral dilemmas: consequentialism and deontology. It is thus no surprise that in the WEIRD world, two main moral arguments tend to convince people: that we should not cause harm and that we should not violate others' rights.¹⁰¹ These themes do not exhaust the reasons that people may find their behavior constrained in the WEIRD world, but they are the only reasons that people tend to label as "moral."¹⁰² Other rules, such as having respect for elders, tend to be relegated to the level of mere "social conventions" that we are free to follow, but that people can privately agree to ignore, and that the state should certainly not impose.¹⁰³

One particular strain of moral psychology—moral foundations theory (MFT)—has shown that "there's more to morality than harm and fairness."¹⁰⁴ MFT, like much of moral psychology, rests on the assumption that our thinking about ethical dilemmas begins with, and is largely controlled by, instinctive psychological reactions.¹⁰⁵ But work in this vein has expanded and refined our understanding of how these innate reactions work, showing that there are at least six different moral foundations that arise when people perceive certain patterns in the social world, which in turn guide our judgments of right and wrong.¹⁰⁶ These studies recognize

¹⁰¹ See Haidt, *supra* note 12, at 112 (observing that Western moral thinking is like a town with two places to eat: "There's the Utilitarian Grill serving only sweeteners (welfare) and the Deontological Diner, serving only salts (rights). Those are your two options.").

¹⁰² Graham, et al., *Moral Domain*, *supra* note 14, at 367 (observing that definitions of morality as limited to harm and fairness work well only for educated Westerners). By contrast, study subjects in India regarded as intrinsically morally wrong behavior that WEIRD people might regard as a social convention of politeness (e.g., a son calling his father by his first name). Richard Shweder, et al., *Culture and Moral Development*, in *THE EMERGENCE OF MORALITY IN YOUNG CHILDREN* (J. Kagan & S. Lamb, eds., 1987).

¹⁰³ Haidt, *supra* note 12, at 15; *id.* at 21 (people of lower socioeconomic classes, in America and Brazil, tended to regard "harmless taboo" violations as morally wrong rather than as mere social conventions).

¹⁰⁴ Haidt, *supra* note 12, at 91; *see generally* Graham et al., *Pragmatic Validity*, *supra* note 15. The insight that the moral domain encompasses more than harm and fairness predates MFT. Earlier work by Richard Shweder, for example, found that the moral domain experienced by people in Eastern cultures such as India tended be richer. Actions that would be dismissed as mere social conventions in the U.S., he found, were taken as seriously as other moral convictions in India.

¹⁰⁵ Jonathan Haidt & Craig Joseph, *Intuitive Ethics: How innately prepared intuitions generate culturally variable virtues*, *DAEDALUS* 55 (Fall 2004).

¹⁰⁶ Initial work suggested only five moral foundations, hence the reference to five such foundations in this article. Spassena Koleva et al., *Tracing the Threads: How five moral*

that the traditional Western metrics of utility (in the form of concern about causing harm) and deontology (in the form of concern about justice) animate our moral reactions, but show that this is only part of the overall moral language we speak. The six moral foundations MFT scholars have identified are:

- care/harm (concern that people and objects of value are cared for, and not harmed);
- fairness/cheating (concern that people behave in concert with reciprocity norms such as tit-for-tat and the Golden Rule);
- authority/subversion (concern that people defer to legitimate authority figures and socially recognized hierarchies);
- loyalty/disloyalty (concern that people remain loyal to relevant in-groups like nations or families);
- sanctity/degradation (concern that people seek to remain pure and avoid sullyng sacred things); and
- liberty/oppression (concern that people remain free from being forced to do things by overbearing authorities).¹⁰⁷

These six moral foundations operate like ethical taste buds.¹⁰⁸ When we first taste something, we immediately sense whether it tastes good or bad. But pressed for an explanation, we might say that the food tastes good because it is sweet or bad because it is salty. Different people may have different preferences, so that the bitterness of some food makes it appealing to some, but abhorrent to others. Studies have revealed much the same dynamic at play with respect to morality. Just as we react instantly to good

concerns (especially Purity) help explain culture war attitudes, __ J. RESEARCH IN PERSONALITY __ (in press). Later work has reconfigured the moral foundations slightly to reveal a total of six. See Haidt, *supra* note 12, at 181-84 (making the case for a sixth moral foundation looking to liberty and oppression). MFT's leading scholars have emphasized that their claim is that there are at least six moral foundations, and that there may be more. See Graham, et al., *Pragmatic Validity*, *supra* note 15, at 34 ("MFT has never claimed to offer an exclusive list of moral foundations."). Other possibilities—called "candidate foundations"—remain under consideration. *Id.* at 34-36 (discussing candidate foundations such as efficiency/waste and ownership/theft). MFT is not, of course, without its critics, some of whom argue that all moral instincts derive from concerns about harm. *E.g.*, Kurt Gray, et al., *Mind perception is the essence of morality*, 23 PSYCHOL. INQUIRY 101 (2012).

¹⁰⁷ Graham et al., *Moral Domain*, *supra* note 14, at 368-379 (testing the validity of the foundations and concluding that "the MFQ is clearing a high bar in providing unique predictive validity for outcomes relevant for moral and political psychology").

¹⁰⁸ See Haidt, *supra* note 12, at 115 (referring to moral foundations as "ethical taste receptors").

or bad tasting food, when people observe some morally charged conduct, they immediately categorize it as right or wrong. When pressed for an explanation, their answers tend to follow along the lines of instincts that invoke at least one of the six moral foundations, in much the same way that people articulate the appeal (or distaste) of a food in terms of how it affects different taste receptors.

Different people will feature different degrees of sensitivity to different moral foundations,¹⁰⁹ so that what seems right to one person may seem glaringly wrong to another.¹¹⁰ For instance, one recent study found that the sanctity/degradation moral foundation predicted disapproval for gay marriage more than any other foundation,¹¹¹ suggesting that opposition to gay marriage is most prominent among people who consider homosexuality impure and/or gay unions a degradation of the institution of marriage. Of course, multiple moral foundations may undergird this and other intuitions that a behavior is wrong. In situations of intuitively overdetermined judgments, it may be difficult to specify which particular foundations are doing the moral work, especially since we may not be aware of what moral intuitions are driving our attitudes.¹¹²

According to MFT, people's moral intuitions and their sensitivities to different foundations are organized in advance of experiences about the moral world. Some of these intuitions are likely based on humans' evolutionary heritage (for example, our concerns about fair distributions of resources). Other moral intuitions may be more thoroughly shaped by the cultures and environments in which we are raised.¹¹³ Thus, people who grow up in strongly religious communities are likely to be more sensitive to

¹⁰⁹ Importantly, people tend to feature arrays of any or all of the six moral foundations, not just one to the exclusion of all five. Some people's moral sensibility may be largely driven by care/harm, while others' may feature authority/subversion, loyalty/disloyalty and purity/degradation, for example. This different sensitivity to different moral foundations among groups helps to explain the wide (and increasing) gulf between liberals and conservatives in American politics. See Haidt & Graham, *supra* note 107.

¹¹⁰ Peter Ditto & Spassena Koleva, *Moral Empathy Gaps and the American Culture War*, 3 EMOTION REVIEW 331, 332 (2011) ("When people exasperated from a heated political argument exclaim that their opponents 'just don't get it,' moral intuitions are almost always the ineffable 'it' the opponents don't 'get.'").

¹¹¹ See Koleva, *supra* note 106, at 5 ("[T]he debate about same-sex relationships and marriage evokes concerns about [various foundations] yet both are by far best predicted by Purity.").

¹¹² See *id.* (pointing out that MFT research indicates that "attitudes on moral and political issues may have intuitive bases of which we are not aware").

¹¹³ Intuitions are like a "first draft" of our morality, which will inevitably be revised by our life experience. GARY MARCUS, *THE BIRTH OF THE MIND* 34, 40 (2004).

violations of authority and purity than are people who grew up in secular communities. The extent to which evolution or culture shapes our moral intuitions is not essential to this Article. But it is important to recognize the degree to which those intuitions pre-exist and prepare our moral judgments.

The moral domain is far richer and more complex than copyright scholars have heretofore acknowledged. Copyright is a moral system because it rests explicitly on consequentialist foundations, as Part I explains, but the story of copyright's morality does not stop there. As the foregoing Subpart explains, recent advances in moral psychology have shown that ethical thinking is inevitably bound up with and depends on intuition, with reason taking a back seat. MFT has expanded on these insights by showing that the range of human moral intuition is far broader than the utility/moral rights duality that is typically thought to cover the field of copyright morality. Rather, there are six different types of moral instincts that people may express when faced with morally charged conduct, including but not limited to the traditional Western moralities of consequentialism (care/harm) and deontology (fairness/cheating). The following Subpart leverages these new insights about the nature of human moral intuition to shed light on the breadth and shape of copyright's moral domain.

III. THE MORAL FOUNDATIONS OF COPYRIGHT

Part I showed that, counter to the conventional wisdom, copyright is a deeply moral system. Part II explored recent advances in psychology and cognitive science that have deepened our understanding of what morality means. In Part III, we bring those insights to bear on copyright law, elaborating on the claim that copyright is a moral system by exploring its moral domain. This exploration is warranted by copyright's normative monism. As Part I indicated, the goal of U.S. copyright is almost exclusively consequentialist: to optimize creative production for the public's benefit. This aspiration to achieve a single policy concern has led to a widespread blindness toward, or dismissal of, the richness of people's moral instincts about copyright-relevant behavior. Copyright's normative monism, in other words, has suppressed systematic examination of the plural nature of copyright's moral domain. In this Part, we engage in such an examination in two steps. In Part III.A, we examine recent research showing that people possess a variety of instinctive intuitions about copyright law. And in Part III.B, we deploy MFT to understand and explain

these ethical intuitions. By analyzing the language that people use when explaining their moral intuitions about copyright-relevant conduct, we show that all six of the innate moral foundations identified by MFT research are at play in people's moral instincts about copyright.¹¹⁴ At times, people seem to express moral outrage about copyright issues that derives from intuitions about fairness, authority, purity, loyalty, and autonomy. Taken together, these two Subparts show that moral intuitions are bound up with the subjective experience we all have with respect to copyright-relevant behavior, and that those intuitions are not narrowly limited to concerns about economic harm, but are in fact richly plural.

A. *Copyright Intuitions*

Over the past decade or so, social sciences have increasingly turned their attention to the existence and development of moral intuitions. The research on moral foundations discussed above offers an account of the fundamental grounding of people's moral intuitions and judgments. But people are capable of more than six moral intuitions. The foundations described by MFT are just that—foundations upon which many other intuitions and judgments develop.¹¹⁵ In many contexts, people develop more nuanced and complex moral judgments about specific issues and behaviors. While they rest on the same underlying moral foundations, certain intuitions may become sufficiently developed through repeated exposure, specific instruction and teaching, or evolutionary pressure that they can be identified and studied separately from the moral foundations.

Recently, scientists have begun to study the existence and development of moral intuitions that are more specifically relevant to copyright systems. For example, numerous studies have explored intuitions of both children and adults about real and personal property.¹¹⁶ These studies have examined when children begin to understand and apply rules about ownership, acquisition, and sharing of property.¹¹⁷ Children who are too young to engage in reasoning about property rights nonetheless have well-formed intuitions about, for example, whether the first pursuer or the

¹¹⁴ It bears emphasis that we mean “innate” in the nativist sense as “organized in advance of experience.” *Id.*

¹¹⁵ See Graham et al., *Moral Domain*, *supra* note 14 at 368.

¹¹⁶ For a review, see Jeremy A. Blumenthal, “*To Be Human*”: A Psychological Perspective on Property Law, 83 TUL. L. REV. 609 (2009).

¹¹⁷ See Hildy Ross & Ori Friedman, eds., ORIGINS OF OWNERSHIP OF PROPERTY, in 132 NEW DIRECTIONS FOR CHILD AND ADOLESCENT DEVELOPMENT (2011).

first possessor of an object is its owner.¹¹⁸ One scholar has gone so far to claim that such studies are evidence of a “property instinct” in humans.¹¹⁹

Whether or not humans have such an instinct, these studies of real and personal property are suggestive of the kinds of intuitions that people may have about intellectual property and copyrightable works. And new research indicates that many similar intuitions are, in fact, at play for intellectual property. For example, children apply the same principles of ownership to ideas that they apply to physical property.¹²⁰ A study by Shaw, Li, and Olson showed that six-year-old children believe that ideas such as songs, jokes, and solutions to math problems can be owned. These children also seem to apply ownership principles about first possession, denial of permission, and non-transfer of ownership through theft to creative ideas.¹²¹ It seems likely that children map their intuitions about physical property (which develop earlier) onto intellectual property as they begin to learn that ideas can be valuable.¹²² Thus, by the time we enter grade school (at least in the U.S.¹²³), we already understand that ideas can be subject to individual ownership and propertization.

By a very early age, children seem to understand relationships between creating ideas, ownership, and value. Studies show that very young children will assign ownership of objects to people who invested creative effort in them rather than the initial possessor of the underlying materials, and that they will do this for themselves and for third parties.¹²⁴

¹¹⁸ Ori Friedman & Karen R. Neary, *Determining Who Owns What: Do Children Infer Ownership from First Possession?*, 107 COGNITION 829 (2008) (finding that, like adults and the U.S. legal system, three-year-old children assign ownership to the first possessor of an object); see also Jay Hook, *Judgments about the Right to Property from Preschool to Adulthood*, 17 L. & HUMAN BEHAV. 135 (1993).

¹¹⁹ Jeffrey Evans Stake, *The Property “Instinct,”* 359 PHIL. TRANS. ROYAL SOC. LONDON 1763 (2004).

¹²⁰ Alex Shaw, Vivian Li & Kristina R. Olson, *Children Apply Principles of Physical Ownership to Ideas*, 36 COGNITIVE SCI. 1383 (1403).

¹²¹ *Id.* at 1398 (“The fact that children here apply rules of ownership to ideas provides a more direct demonstration that children think of ideas as owned.”).

¹²² *Id.* at 1399.

¹²³ The authors speculate that children’s intuitions about the ownership of ideas may be less strong in non-Western cultures that are more collectivist or where ideas are understood as being part of the common public good. *Id.* at 1400.

¹²⁴ Patricia Kanngiesser, Nathalia Gjersoe & Bruce M. Hood, *The Effect of Creative Labor on Property-Ownership Transfer by Preschool Children and Adults*, 21 PSYCHOL. SCI. 1236 (2010) (showing that both children and adults were likely to transfer ownership in modeling clay when someone else invested creative labor in shaping it); Patricia Kanngiesser & Bruce M. Hood, *Young Children’s Understanding of Ownership Rights for*

Importantly, young children also distinguish between creativity and labor, and they place more value on the former. In a series of studies, researchers found that four- and six-year-old children prefer pictures that depict their ideas over ones on which they have labored.¹²⁵ And six-year-olds generally assigned ownership of a picture to the person who contributed the ideas about the picture rather than to the person who contributed the labor.¹²⁶ Even very young children understand that ideas can be created, that creativity is especially valuable, and that creativity can lead to ownership relationships with the objects that embody the creativity.

Moreover, young children also understand that taking others' ideas or objects embodying those ideas is wrong. Two- and three-year old children will object when someone attempts to take objects which they have created (although they do not yet object on behalf of third parties).¹²⁷ In a different study, three-year-old children protested when someone threatened to destroy an object that a third party had created.¹²⁸ In addition, by the time they are six or so, children also object to others who take ideas.¹²⁹ In one study, children were shown videos of people who drew unique pictures and people who copied others' pictures. The children were then asked to rate how good or bad each person was. They rated the copier significantly worse than they did the creative drawer.¹³⁰ These children typically mentioned copying or something similar as the reason why they rated the plagiarist poorly.¹³¹ Interestingly, however, the copier was rated as less bad than someone who stole a piece of physical property.¹³²

Newly Made Objects, 29 COGNITIVE DEVELOPMENT 30 (2014) (showing that 2- and 3-year olds appreciate ownership for newly made objects).

¹²⁵ Vivian Li, Alex Shaw & Kristina R. Olson, *Ideas versus Labor: What do Children Value in Artistic Creation*, 127 COGNITION 38 (2013) (showing that by six years old, children distinguish between contributing ideas and contributing labor and that they value the former more than the latter). This is true even though the children spent significantly more time on the pictures with the labor.

¹²⁶ *Id.* at 42. Four-year-olds showed no preference for ideas or labor in assigning ownership.

¹²⁷ *Id.* at 38.

¹²⁸ Amrisha Vaish, Manuela Missana & Michael Tomasello, *Three-year-old Children Intervene in Third-party Moral Transgressions*, 29 BRIT. J. DEVELOP. PSYCHOL. 124, 128 (2011).

¹²⁹ Kristina R. Olson & Alex Shaw, *'No Fair, Copycat!': What Children's Response to Plagiarism Tells Us about Their Understanding of Ideas*, 14 DEVELOPMENTAL SCI. 431 (2011).

¹³⁰ *Id.* at 435.

¹³¹ *Id.* at 437.

¹³² *Id.*

Even though children cannot yet reason about copyright-relevant behaviors they have strong moral intuitions about them. By an early age, children understand that ideas can be created, and children can accurately attribute ideas to their creators. Children understand that creativity is valuable and that it can confer ownership over the ideas that have been created. And children make negative moral judgments about those who destroy created property or those who copy others' ideas. Research has not yet determined the source for children's moral intuitions about creativity and copying; they may reflect socialization and teaching, but they may also be related to innate tendencies to care about valuable objects.¹³³ Nonetheless, the easy and early development of these intuitions indicates their strength and their importance. Although positive moral intuitions about creativity and negative moral intuitions about destroying or copying creativity may be selectively displaced as we age, it is likely that they will exert some degree of intuitive force in many situations throughout our lives.

Beyond these early and fundamental intuitions about creativity and copying, people likely have a number of other moral intuitions that are specifically relevant to copyright. As people become increasingly familiar with the copyright system, they tend to develop specific and nuanced intuitions about good and bad behavior.¹³⁴ These specific intuitions rest upon one or more of the moral foundations discussed above, but, through repeated use, they may become directly accessible without reference to the underlying moral foundation.

The last few years have seen a significant increase in psychological studies of various aspects of copyright law. In a new study, Gregory Mandel has surveyed people's attitudes towards a wide variety of copyright issues, including standards for infringement, creativity thresholds, joint and independent creation, and justifications for IP rights.¹³⁵ For example, when asked to choose among different reasons for granting IP rights, most subjects supported a rationale that is more consistent with a natural rights theory of IP rather than a utilitarian theory of IP.¹³⁶ In this and other situations, Mandel finds that people's judgments about copyright law do not always match up with legal rules.

¹³³ See Li, Shaw & Olson, *supra* note 125 at 1399 (suggesting that these intuitions may be a matter of learning and socialization and/or innate mental systems for thinking about property).

¹³⁴ We suspect that most students who enter a copyright class have no moral intuitions about termination rights, for example, but that after they have studied the concept they do.

¹³⁵ Mandel, *supra* note 43.

¹³⁶ *Id.* at 28.

A host of studies, going back to the early 1990s, has attempted to account for the seemingly paradoxical phenomenon that most people consider theft of physical copies of records to be morally wrong but are unconcerned about illegal online filesharing.¹³⁷ Perhaps most interesting from our perspective is a study hypothesizing that judgments about whether illegal filesharing is morally wrong would be correlated with subjects' moral development as measured along the lines suggested by Kohlberg and others.¹³⁸ Not surprisingly, at least to us, the authors found very little evidence to support their hypothesis.¹³⁹ The rationalist account of moral judgment did a poor job of predicting people's actual moral beliefs and behaviors.

Other psychological studies have begun to provide insight into how people think morally about copyright issues. Both quantitative experimental evidence¹⁴⁰ and qualitative survey research¹⁴¹ indicates that creators attach significant value to receiving attribution for their work even though U.S. copyright law does not establish formal attribution rights. In addition, creators of new works place very high economic value on IP-like rights in their own creations, in part due to their beliefs about their works' quality.¹⁴² Large valuation gaps between creators and others over the value of copyrighted works could lead to moral judgments of unfairness on either side if creators feel they are being undercompensated for their work or users feel they are being asked to pay too much for it. More research is needed in

¹³⁷ See Mohsen Manesh, *The Immorality of Theft, the Amorality of Infringement*, 2006 STAN. TECH. L. REV. 5; Joseph C. Nunes et al., *Why Are People So Prone to Steal Software? The Effect of Cost Structure on Consumer Purchase and Payment Intentions*, 23 J. PUB. POL. & MARKETING 43 (2004); Jeanne M. Logsdon, Judith Kenner Thompson & Richard A. Reid, *Software Piracy: Is It Related to Level of Moral Judgment?*, 13 J. BUS. ETHICS 849 (1994). See also Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219 (1996).

¹³⁸ Logsdon et al., *supra* note 137.

¹³⁹ There was no correlation with one measure of moral development and a weak correlation with another measure. *Id.* at 853.

¹⁴⁰ See Chris Sprigman, Christopher Buccafusco & Zachary Burns, *What's a Name Worth? Experimental Tests of the Value of Attribution in Intellectual Property*, 93 B.U. L. REV. 1389 (2013).

¹⁴¹ See Fromer, *supra* note 18; Fisk, *supra* note 75.

¹⁴² See Christopher Buccafusco & Christopher J. Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31 (2011) (demonstrating that painters attach significantly greater value to IP-like rights in their paintings than do either owners or would-be purchasers of those rights); Christopher Buccafusco & Christopher J. Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1 (2010) (showing that authors of haikus attach significantly greater value to IP-like rights in their works than do would-be purchasers).

these and other areas to further to understand people's moral judgments about copyright.

B. *The Moral Foundations of Copyright*

Having shown that moral intuitions suffuse the way we think about copyright-relevant conduct, we now move on to deploy MFT to identify and understand those intuitions. A number of clarifications are in order before we proceed to that analysis. First, we are not claiming that each of the moral foundations is equally responsible for people's moral intuitions about copyright. The care/harm and fairness/cheating dyads unquestionably do a lot of the moral heavy lifting, at least in the U.S. Nonetheless, the other moral foundations arise regularly and often seem to determine why people have moral objections to copyright-relevant behavior. Related, although we organize this section according to the separate moral foundations, we do not claim that, in any given example, only one foundation is responsible for people's moral intuition about that copyright-related conduct.¹⁴³ Rarely do moral dilemmas only elicit a response because they trigger a single moral foundation. In fact, situations that are characterized as moral dilemmas are usually those that pit different moral values against one another.¹⁴⁴ Thus, in our analysis, issues about the wrongfulness of infringement or the status of "orphan" works likely call on a variety of different moral foundations. Ultimately, in order to determine with precision which moral foundations are active, controlled experimental testing is necessary. While we wait for that research, however, we can still make judgments about which foundations are at work based on the language that people use when they discuss copyright issues. Indeed, much of the MFT research looks to, and takes at face value, research subjects' accounts of why they think a particular act is immoral.

¹⁴³ Our main goal in this Article is to demonstrate the descriptive claim that each of the moral foundations can affect how people think about copyright issues. Other readers may disagree about our characterization of a given response as evidence of Loyalty rather than Authority, but, for our present purposes, little rides on these precise characterizations. In fact, we doubt that such precision is either warranted or valuable considering that the modal copyright issue likely triggers intuitions from multiple foundations rather than a single one.

¹⁴⁴ See Brittany Liu & Peter Ditto, What Dilemma? Moral Evaluation Shapes Factual Belief, *SOCIAL PSYCHOL. & PERSONALITY SCI.* 1 (2012) ("Moral dilemmas arise from dissonant intuitions about morally appropriate responses, often pitting consequentialist intuitions against deontological ones.").

The role of language in our analysis raises another issue that we must discuss before continuing. Our approach to understanding how different moral foundations affect people's judgments about copyright issues centers on what those people write and say. Because we believe that copyright's morality includes more than just the formal legal regime,¹⁴⁵ our study extends beyond the writings of judges and legislators. We are also interested in what lobbyists say when they are trying to convince people to support changes to the law. We are interested in what creators say about how people use their works. And we are interested in what users and the public say about their rights. Accordingly, we draw from a wide variety of sources, including legal opinions, congressional testimony, news reports, blog posts, and instruction guides for teaching children about copyright law. Judges, attorneys, and scholars understand copyright's utilitarian story, and they conform their arguments to it. The full picture of copyright's morality will only become clear once we look outside the boundaries of formal legal analysis.

In order to study the role of moral foundations in shaping people's judgments, we often focus on the metaphors that people use to talk about copyright. Metaphors are incredibly popular in copyright discourse.¹⁴⁶ People talk about copyright infringement as "theft" or "piracy," they refer to authors as "parents" of works, and works whose authors cannot be located are "orphans."¹⁴⁷ Yet these metaphors are not simply clever speech. Research on linguistics and cognition has demonstrated the important role that metaphors play not just in embellishing speech but also in shaping thought and judgment.¹⁴⁸ Metaphors can also reveal subconscious or intuitive relationships between abstract concepts and moral judgments.¹⁴⁹ Indeed, some neuropsychological research suggests that we cannot organize

¹⁴⁵ See *supra* Part I.B.

¹⁴⁶ Peggy Radin observed that "analogies to physical property, and to invasions of physical property, ... are showstoppers of persuasion." Margaret Jane Radin, *Information Tangibility*, in *ECONOMICS, LAW AND INTELLECTUAL PROPERTY* 395, 400 (Ove Granstrand ed., 2003).

¹⁴⁷ A number of scholars have analyzed the role of metaphor in copyright discourse. See e.g., PATRY, *supra* note 1; Mark Rose, *Copyright and Its Metaphors*, 50 *UCLA L. REV.* 1 (2002); Patricia Loughlan, *Pirates, Parasites, Reapers, Sowers, Fruits, Foxes...The Metaphors of Intellectual Property*, 28 *SYDNEY L. REV.* 211 (2006); Simon Stern, *The Metaphorics of Physical Space in the Eighteenth-Century Copyright Debate*, 24 *L. & LIT.* 113 (2012).

¹⁴⁸ GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (2nd ed. 2003).

¹⁴⁹ Haidt, *Emotional Dog*, *supra* note 13, at 835 ("Metaphors have entailments, and much of moral argument and persuasion involves trying to get the other person to apply the right metaphor.").

our thinking about complex issues, such as morality, without resort to the kind of categories and patterns that metaphors facilitate.¹⁵⁰

We must be careful about claims that metaphors specifically and language generally are evidence of the operation of moral foundations. Many of the parties that we quote below are actively trying to convince their audience of the moral correctness of their position. If that is the case, does their language authentically represent their moral intuitions or is it mere rhetoric intended to excite the audience? We probably cannot know for sure. As we noted above, empirical tests may be needed to prove how different moral foundations affect copyright judgments. Yet, the repetition and successful reception of morally charged language suggests that it has some effect of triggering moral intuitions. The ease with which “theft” and “piracy” metaphors are taken up and persist indicates that they must resonate with some people’s moral intuitions about copyright infringement. Presumably not every metaphor about unlawfulness would have been equally successful.¹⁵¹

With these caveats in mind, we now take up our analysis of copyright law’s moral foundations.

1. The Care/Harm Foundation

A major driver of many people’s moral intuitions is concern that people be cared for, and conversely that they not be harmed. This moral intuition finds evolutionary roots in the need for mammals to care for and nurture relatively fewer offspring for a relatively longer time than other animals.¹⁵² The need to care for young has inculcated strong positive responses to the perceived need to care for those in need (like children), and correlatively strong negative responses to perceived acts of harm.¹⁵³ The notion that someone, especially someone vulnerable, has been harmed or threatened with harm may contribute to a sense that the person doing the harming is acting wrongfully.¹⁵⁴ This foundation is not limited to care for and harm to humans. The threat of harm to animals generates much of the concern for animal rights supporters’ sense of moralistic anger, just as the

¹⁵⁰ MARGOLIS, *supra* note 102.

¹⁵¹ We suspect that if online filesharers had been dubbed “Vikings” the moniker would not have stuck. Indeed, Jack Valenti’s attempt to connect VCRs with the Boston Strangler seems to have fallen on dead ears.

¹⁵² HAIDT, *supra* note 12, at 153-54.

¹⁵³ *Id.*

¹⁵⁴ Graham, et al., *Mapping the Moral Domain*, *supra* note 14, at 378, tbl. 8.

threat of harm to trees or oceans animates environmentalists' moral objections to pollution.

The care/harm foundation features centrally in moral intuitions about copyright. Indeed, the straight "utilitarian bargain" story is often interpreted as a narrative about harm, and in particular about preventing economic harm to authors who will be undercompensated in the absence of exclusive rights. This kind of moral appeal shows up most consistently in the testimony and public statements of content industry reps who are seeking support for stronger laws against unauthorized use of creative works. As one industry representative put it, "Online piracy harms the artists, both famous and struggling, who create content."¹⁵⁵ The RIAA has described infringement as "devastating" creators.¹⁵⁶ The standard argument that artists suffer from unauthorized use finds a particularly pathos-inducing corollary in content industry representatives' invocation of harm to the "little guy" who serves a humble role in the entertainment world (sound engineer assistant, boom mike operator), and who may lose his job if infringement drives recording companies or film studios out of business.¹⁵⁷ These appeals also stress the harm to the consuming public that will accrue if infringement proliferates. "Piracy," one industry source warns, "ultimately also hurts law-abiding consumers who must ... compensate for the cost of piracy."¹⁵⁸ This strategy represents an especially effective invocation of the care/harm narrative because it makes listeners not just concerned that others will be hurt, but that they themselves will suffer.

And the relative sobriety of these appeals pales in comparison to the more dramatic attempts to inflame public sentiment about infringement using threats of dire harm. The most infamous is Jack Valenti's 1982

¹⁵⁵ Daniel Castro, *Better Enforcement of Online Copyright Would Help, not Hurt, Consumers*, ITIF (Oct. 2010). It bears noting that even the title of Castro's article frames infringement in terms of harm and care. The Software & Information Industry Alliance similarly framed infringement in terms of deprivation to artists. "When someone infringes a copyright, the copyright holder is effectively deprived of income." SIAA.net.

¹⁵⁶ RIAA.com (section on "online piracy").

¹⁵⁷ Chris Dodd, "Copyright—A Leading Force for Jobs, Innovation, and Growth," available at http://www.huffingtonpost.com/chris-dodd/copyright--a-leading-forc_b_4302882.html ("And these are not just the famous people whose names and faces so many of us know, but the men and women sweating behind the scenes every day developing the latest software, building sets for films and TV shows, operating the lights and cameras, recording and producing the music we listen to, or publishing the latest books we love to read. These people provide the foundation of a healthy creative industry and they all depend on copyright for their livelihoods.").

¹⁵⁸ Castro, *supra* note 155. Another industry organization warned that infringement is "hurting the economic growth of this country." SIAA.net, *supra* note 155.

Congressional testimony in which he asserted that the VCR was to the “American film producer and the American public as the Boston Strangler is to a woman at home alone.”¹⁵⁹ Valenti’s analogy accessed the care/harm moral foundation in the most visceral possible way, associating the VCR with the specter of a violent criminal threatening to sexually assault and murder a vulnerable victim. Content industry representatives continue to use language designed to trigger moral intuitions against harm. The most frequently invoked metaphor is that infringement will not only harm, but will “kill” the entertainment industry as we know it.¹⁶⁰ The group Lobbyists for Morality in Media even intimated that widespread infringement “facilitates crimes against children.”¹⁶¹ Industry appeals to children in this regard are particularly telling, because they are direct moral appeals unmediated by any sense of obligation to defer to the straight “utilitarian bargain” story. A suggested lesson plan for elementary school children designed to inculcate copyright values, for example, explained that copyright infringement is wrong because “real people like J.K. Rowling [...] are hurt when copies are made without the permission of the copyright owner.”¹⁶²

That copyright infringement touches on the care/harm moral foundation is not that surprising. Copyright’s elemental “utilitarian bargain” story rests on the assumption that infringement inflicts economic harm on authors, as content industry reps ceaselessly remind us. But this one angle does not exhaust the variety of ways unauthorized copying implicates this moral foundation.¹⁶³ Rather, artists whose work is copied without permission most often speak not in pecuniary terms, but rather of a

¹⁵⁹ House Judiciary Committee Hearing on Home Recording of Copyrighted Works, 97th Congress, 2d session, Apr. 12, 1982 (Testimony of Jack Valenti, President of Motion Picture Academy of America).

¹⁶⁰ Examples abound. One computer developer stated that “piracy ... killed a lot of great independent developers.” Tim Ingham, *Piracy Has Killed Enthusiasm for PC, Computer and Video Games* (May 2010). And the RIAA warned even before the advent of digital media that “home taping is killing music.” Nate Anderson, *100 Years of Big Content Fearing Technology: In Its Own Words, Law & Disorder* (Oct. 2009).

¹⁶¹ John Borland, “File Swapping vs. Hollywood,” CNET News, Jan. 2005.

¹⁶² Copyright Society of the USA, Copyright Awareness Week Lesson Plan for Upper Elementary Students at 3, *available at* media.csusa.org/caw/Elem_JK_Rawling_Story_and_Quiz.doc.

¹⁶³ Though artists do, frequently, articulate their moral indignation about infringement in terms of concerns that they will be financially harmed by it. Wil Wheaton stated that “As an actor and writer, I have a personal stake in making sure that [c]opyright law is enforced. If I can’t own the works I create, then I can’t feed my family.” <http://www.wilwheaton.net/mt/archives/001096.php>.

dignitary harm inflicted by the experience of having their work wrested from them and used—especially when modified—without their permission. Artist Chris Cooper, for example, explained that having his work copied made him feel like “somebody broke into your house and stole your stereo.”¹⁶⁴ This reaction locates the harm of infringement as a demoralizing act of violation, not as a mere economic cost. Indeed, many artists reject the argument that unauthorized use can help them by creating free PR,¹⁶⁵ suggesting that the suffering felt by artists when their work is copied is more dignitary than economic. And while harm narratives appear most commonly in connection with owners’ and authors’ concerns about unauthorized use, copyright skeptics make appeals designed to trigger this moral foundation as well. The “cultural environmentalism” movement that arose in the early 1990s sought to articulate a specific object of concern that was harmed—the public domain—by ever-expanding copyright.¹⁶⁶ And just as environmentalists appeal to the care/harm foundation by invoking the specter of vanished species and denuded landscapes, public domain advocates succeeded in generating a sense of moral indignation by imagining overreaching owners gaining so much control over shared culture that it would be inaccessible, leaving behind a cultural environment as sadly denuded as a strip of ravaged Amazon rain forest.¹⁶⁷ And sometimes, copyright skeptics simply express their concerns in the kind of violent language that owners have often used to play on moral instincts about unauthorized use. The bitter PR cannonade against the proposed SOPA and PIPA legislation in early 2013 warned that the anti-copying bills would

¹⁶⁴ Brian Doherty, *An Artist on Getting Ripped Off*, Reason (July 2013) (interviewing artist Chris “Coop” Cooper), available at <http://reason.com/archives/2013/05/28/an-artist-on-getting-ripped-off>.

¹⁶⁵ Upon settling with Jeremy Scott for his unauthorized use of Jimbo Phillips’ designs, Santa Cruz Skateboards issued a statement indicating that they “do not believe in the idea that any publicity is good publicity. There was a lot of interest in the issue, but we do not need this type of PR to help grow our brands. It was actually quite damaging to us.” See Hypebeast, “Jeremy Scott and Santa Cruz Skateboards Reach Settlement over Plagiarism Claims,” Sept. 4, 2013, available at <http://hypebeast.com/2013/9/jeremy-scott-and-santa-cruz-skateboards-reach-settlement-over-plagiarism-claims>.

¹⁶⁶ See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990) (introducing the notion of the public domain as an object of social and cultural concern).

¹⁶⁷ See, e.g., James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33 (2003) (analogizing the public domain to open plains subjected to owners’ overreaching claims of copyright, threatening to choke off public access).

“destroy” or “kill the internet.”¹⁶⁸ And it worked, thanks in large part to the visceral effectiveness of the opposition’s moralized rhetoric.¹⁶⁹

Copyright’s critics have also expressed concern along the care/harm foundation by creating care narratives. Their choice of the term “orphan works” to refer to works under copyright but without an identifiable owner¹⁷⁰ expertly appealed to the widely shared instinct to care for defenseless subjects, especially children.¹⁷¹ Presumably, most Americans cared very little about the difficulties of tracking down authors of unpopular and out-of-print works. But once these works were described as “orphans,” they triggered people’s moral intuitions that they needed care and support. And while Congress has not yet passed proposed legislation to protect orphan works, social concern about them almost certainly was greater than if they had been given a morally inert name such as “late-term copyrighted works with unidentifiable authors.”¹⁷² The care/harm foundation also emerges when unauthorized users defend their conduct. One major defense invoked by users is that their conduct inflicts no harm on copyright owners. As one writer of fan fiction insisted, “once the characters are or have been out there, they belong to us, and we’re not hurting them . . . by playing with them ourselves. Death of the author and all that.”¹⁷³ It is beside the point whether this assertion about harming authors is true or not as an empirical matter. What matters is that when called on to justify unauthorized use of a

¹⁶⁸ E.g., John Paul Kassil, “How PIPA and SOPA will destroy the internet,” WASH. TIMES, Jan. 19, 2012 ; see also Jennifer Martinez & Michelle Quinn, “Will the SOPA Bill Kill the Internet?” POLITICO.COM, Dec. 16, 2011, available at <http://www.politico.com/news/stories/1211/70554.html> (discussing the “kill the internet” meme).

¹⁶⁹ Ian Paul, “Were SOPA/PIPA Protests a Success? The Results Are In,” PCWorld, Jan. 19, 2012 (attributing the success of SOPA/PIPA opposition to the fiery harm rhetoric used by its opponents), available at http://www.pcworld.com/article/248401/were_sopa_pipa_protests_a_success_the_results_a_re_in.html.

¹⁷⁰ See generally Report of the Register of Copyrights on Orphan Works, Jan. 2006 (describing the scope and impact of the orphan works problem).

¹⁷¹ HAITT, *supra* note 12, at 153-56 (observing that the care/harm foundation is related to and accessed especially by concern that young children be cared for, and not harmed).

¹⁷² The term “orphan works” first appears in the secondary literature in a pair of articles from the year 2000. E.g., Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777 (2000). By 2006 the Register of Copyrights had prepared and issued a report on orphan works. The term has been used 454 times in law review articles alone since then.

¹⁷³ Darthfox, quoted in Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 L. & CONTEMP. PROBS. 135 (2007).

copyrighted work, the fan fiction author articulated his moral opinion (that the use was not wrongful) in terms of the harmlessness of his act.

2. The Fairness/Cheating Foundation

The second moral foundation identified by MFT studies is rooted in the very basic human desire not to get flim-flammed. A second major basis for our instincts that something is morally wrong is that it flouts basic principles of reciprocity, hence Haidt's equation of this foundation with "the law of karma."¹⁷⁴ The evolutionary roots of this foundation lie in the adaptiveness of mutually beneficial cooperation. Hunters who worked together to bring down prey could do better than those who acted alone. But this kind of group behavior depended on reciprocity as well; a hunter who benefited from his compatriots' efforts without doing his part was a detriment to the group's survival. This ancient source remains in modern sensibilities, where it manifests as a sense of moralized anger when we feel that people are cheating or taking advantage of ourselves or of others. The deeply rooted tit-for-tat instinct manifests, for example, in right-wing expressions of moral anger at redistributive economic policies, which some feel reward the lazy at the expense of the hardworking.¹⁷⁵ And it also provides the architecture of left-leaning moral opprobrium for tax policy that is perceived not to make the rich "pay their fair share."¹⁷⁶

One illustration of the depth with which the fairness/cheating foundation animates moral instincts about copyright infringement is the extent to which it appears in U.S. court opinions about the issue—even in the face of clear blackletter law to the contrary. The straight utilitarian story of copyright has been the exclusive public justification for the American copyright system since the founding of the republic.¹⁷⁷ As we have seen,

¹⁷⁴ Haidt, *supra* note 12, at 206. Other familiar moral bromides capture the essence of this moral foundation: "Do unto others as you would have them do unto you," "Do not reap where others have sown."

¹⁷⁵ *Id.* at 206 (arguing that Rick Santelli's famous rant on the floor of the Chicago Mercantile Exchange, which led to the formation of the Tea Party movement, resonated with the public due to the fairness/cheating foundation, since Santelli claimed that mortgage bailouts were wrong because they rewarded "losers" instead of "reward[ing] the people that could carry the water instead of drink the water").

¹⁷⁶ *Id.* at 160-61 (observing that "[o]n the left, fairness often implies equality," and finding evidence of this at work in Occupy protest signs demanding to "tax the wealthy fair and square").

¹⁷⁷ In the first Supreme Court copyright case, *Wheaton v. Peters*, the Court rejected the plaintiff's argument that his painstaking efforts in collecting and publishing reports of Supreme Court cases gave rise to a common law copyright. The Court stressed that

this justification treats authors' exclusive rights only as a means to an end and not as a way to compensate them for their hard work. As a result, domestic copyright law does not protect every product of intellectual labor, but only those products that possess the kind of originality that furthers the aims of the Progress Clause.¹⁷⁸ Yet this position grates on the fairness/cheating foundation, because it means that much hard work—such as collecting and publishing factual material, phone directories, and databases—will remain unprotected, allowing others to use these works without paying for the privilege. Defendants who use these materials without compensating their creators may be safe from copyright liability, but their conduct will still trigger outrage from those whose moral sensibilities emphasize the cheating/fairness foundation. But since federal courts' responsibility is to follow the blackletter law, rather than to give voice to their moral instincts, the outcome in cases where defendants copy a plaintiff's uncopyrightable work should always favor the former.

But until quite recently, this was not—or at least not entirely—the case. While judges usually resolved copyright cases consistently with the pecuniary utilitarian story, and required originality for works to merit protection, they also often favored a very different theory that premised copyright on the amount of effort an author had made to create his work. This “sweat of the brow” theory resonated along the fairness/cheating foundation because it reflected a simple notion of karmic justice: If a creator worked hard on something, she should be compensated. And despite this theory being radically inconsistent with the straight story of copyright, it had adherents on the federal bench throughout almost all of the twentieth century. In *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, for example, the Second Circuit rejected the originality standard in favor of a theory that copyright protection should be commensurate with an author's productive labor, regardless of originality.¹⁷⁹ Numerous federal courts followed the Second Circuit's lead, extending copyright even to works that lacked originality on a tit-for-tat theory: the author had worked hard, and that merited protection against unauthorized use.¹⁸⁰ It was not until 1991

American copyright law was exclusively statutory, and that the statute did not reward all effort with copyright. 33 U.S. 591 (1834).

¹⁷⁸ The Trade-Mark Cases, 100 U.S. 82, 94 (1879).

¹⁷⁹ 281 F. 83 (2d Cir. 1922) (“He produces by his labor a meritorious composition, in which he may obtain copyright, and thus obtain the exclusive right of multiplying copies of his work.”).

¹⁸⁰ E.g., *Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937); *Rural Tel. Serv. Co., Inc. v. Feist Publ'ns, Inc.* 663 F. Supp. 214 (D. Kan. 1987), *aff'd*, 916 F.2d 718 (table decision) (10th Cir. 1990), *rev'd*, 499 U.S. 340 (1991); *Shroeder v.*

that the Supreme Court finally stepped in to stamp out the sweat of the brow theory once and for all, stressing that “originality”—not reciprocity or desert—“is the sine qua non of copyright.”¹⁸¹ Yet even after the Supreme Court decided *Feist*, federal courts have often indicated that they are morally (even if not legally) swayed by the karma-like concerns associated with the fairness/cheating foundation.¹⁸²

Another window into the persistence of the fairness/cheating foundation in moral controversies about copyright is the frequency with which copyright is equated with theft. As a legal matter, copyright is not the same as theft (or stealing). The Copyright Act refers to violations of an owner’s exclusive rights as infringement,¹⁸³ while theft refers to the act of taking someone’s physical chattel property intentionally and without permission.¹⁸⁴ Nevertheless, owners express their moral outrage about unauthorized use by equating it with theft (or stealing, or sometimes also trespass) so frequently that the infringement/stealing elision has become a standard moral appeal in content industry rhetoric.¹⁸⁵ And on the other side of the coin, copyright skeptics often take pains to distinguish infringement from theft in order to avoid the moral opprobrium that the former may entail.¹⁸⁶ Indeed, one district court ordered the plaintiffs in a copyright infringement suit to avoid using the term “thieves” (or “pirates”) at trial

Morrow, 566 F.2d 3 (7th Cir. 1977); *Hutchison Telephone Company v. Frontier Directory Company of Minnesota, Inc.*, 770 F.2d 128, 132 (8th Cir. 1985).

¹⁸¹ *Feist*, 499 U.S. at 345.

¹⁸² *E.g.*, *Value Group, Inc. v. Mendham Lake Estates, L.P.*, 800 F. Supp. 1228 (D.N.J. 1992) (“Value Group has spent significant time, effort, and money in developing these plans. It would be a grave injustice to permit a competitor to profit from another competitor’s hard work and injure that competitor simultaneously.”).

¹⁸³ 17 U.S.C. § 106. And the Supreme Court has held that copyrighted works were not covered by a federal statute that criminalized the interstate transportation of property. *Dowling v. United States*, 473 U.S. 207 (1985).

¹⁸⁴ *E.g.*, Cal. Penal Code § 486 (enumerating the elements of theft under California state law).

¹⁸⁵ *E.g.*, Dodd, *supra* note 157 (quoting the MPAA president as highlighting the moral wrongfulness of copyright infringement by saying “[s]tealing is wrong”). *See also* RIAA Amicus Brief on Behalf of Appellant in *Lenz v. Universal Music Corp.* (lamenting “widespread theft of intellectual property”), *available at* <https://www.eff.org/files/2013/10/17/riaaamicusbrief.pdf>.

¹⁸⁶ Mike Masnick, “Why It’s Important Not to Call Copyright Infringement Theft,” *Techdirt*, Sept. 14, 2010, *available at* <https://www.techdirt.com/articles/20100913/22513210998.shtml>.

because “such derogatory terms would add nothing to the Plaintiffs’ case, but would serve to improperly inflame the jury.”¹⁸⁷

As we have explained above, the metaphors speakers use to express their moral indignation help to illuminate the moral foundations that animate their intuitive reaction that something is wrong. The moral meaning of the theft metaphor is multivalent, but it can certainly serve as an expression of (or an appeal to) the fairness/cheating foundation. A major reason that theft metaphors have such power is that they articulate a basic violation of the principle of reciprocity: thieves take from people without compensating them. Sean Combs, for example, connected the idea of infringement-as-theft to the imbalance that is generated when one reaps where another has sown¹⁸⁸: “When you make an illegal copy, you’re stealing from the artist. It’s that simple. Every single day we’re out here pouring our hearts and souls into making music for everyone to enjoy. What if you didn’t get paid for your job? Put yourself in our shoes!”¹⁸⁹ Singer-songwriters also invoked the theft metaphor in a way designed to appeal to the notion of tit-for-tat that is central to the cheating/fairness foundation, saying that if you are going to infringe copyright, “[y]ou might as well walk into a record store, put the CDs in your pocket, and walk out without paying for them.”¹⁹⁰

The presence of the fairness/cheating foundation in copyright’s morality extends even beyond invocations of the theft metaphor. Artists’ frequent expressions of moral opposition to unauthorized use of their works sound frequently, perhaps even primarily, in terms of the simple formal injustice of people taking from them without providing any recompense. Author Lloyd Shepherd articulated his sense of infringement’s immorality in terms of his concern that others were profiting from his creation (“someone is making money from my own labour”), thereby invoking the core fairness/cheating idea that it is wrong to reap where others have sown.¹⁹¹ And novelist J.K. Rowling’s expression of moral approval of the

¹⁸⁷ *Disney Enters, Inc. v. Hotfile Corp.*, Omnibus Order, Case No. 11-204277-CIV (S.D. Fla. Nov. 27, 2013).

¹⁸⁸ According to the eighteenth-century British decision of *Millar v. Taylor*, it is “not agreeable to natural justice, that a person should reap the beneficial pecuniary produce of another man’s work.” Quoted in Loughlan, *supra* note 147, at 220.

¹⁸⁹ http://www.musicunited.org/3_artists.aspx

¹⁹⁰ “Artists give Newsbeat their views on music piracy,” BBC Newsbeat, Oct. 15, 2013, <http://www.bbc.co.uk/newsbeat/24524871>.

¹⁹¹ Lloyd Shepherd, “My parley with ebook pirates,” *THE GUARDIAN* (U.K.), Mar. 16, 2012, <http://www.theguardian.com/books/2012/mar/16/lloyd-shepherd-ebook-pirates-mobilism>.

copyright infringement judgment she won against the author of “The Harry Potter Lexicon” in 2008 similarly relied on the law of karma. “The proposed book took an enormous amount of my work and added virtually no original commentary of its own.”¹⁹² What was really wrong was not the unauthorized taking itself, Rowling suggested, but rather the notion that the author of “Lexicon” sought to profit from her work without providing any commensurate effort of his own.¹⁹³

Although all of the examples we have used so far illustrate the role of moral intuitions in negative judgments about behavior, moral intuitions are also active in laudatory judgments of others.¹⁹⁴ Most of the studies involving creativity in IP’s “negative spaces,” where formal prohibitions on copying do not exist, indicate that sharing and reciprocity help establish bonds between people that encourage social benefits.¹⁹⁵ Chefs cannot protect their recipes with copyright law, but they tend not to worry about inappropriate copying because they inhabit a norms-based community that encourages sharing and rewards reciprocity.¹⁹⁶ Similarly, open-source computer coders rely on group norms about reciprocal use of others’ code to distribute software broadly and for free.¹⁹⁷ Because the community all endorses the same moral intuitions about fairness and sharing, individual

¹⁹² Shawn Adler, “‘Harry Potter’ Author J.K. Rowling Wins Copyright Infringement Lawsuit,” MTV News, Sept. 8, 2008, <http://www.mtv.com/news/articles/1594367/jk-rowling-wins-copyright-infringement-lawsuit.jhtml>.

¹⁹³ It bears noting that not all authors express similar concern for reciprocity when faced with music infringement. *See* BBC Newsbeat, *supra* note 190 (“Before there was the internet, there was people selling mix tapes and CDs with your music on it—they sell it, they benefit from it. I get promotion out of it, which is a good thing for me, because people like my song and put on a stage show.”)

This is perfectly consistent with—and even illustrative of—the basic principles of MFT. The theory indicates that different people tend to favor different moral foundations, just as different people think different flavors make food taste good or bad. *See* Ditto & Koleva, *supra* note 110, at 332 (observing that people feature different innate moral responses to similar phenomena). So the artists who appear unconcerned by unauthorized use may simply not have the same concern for fairness and cheating as those artists who object to the practice more strongly.

¹⁹⁴ According to Haidt and Kesebir, this “negativity bias” in our greater sensitivities to negative behavior than positive behavior is likely due to the original role our moral systems played in cheating detection. Haidt & Kesebir, *supra* note 46, at 813.

¹⁹⁵ *See supra* notes 66-72.

¹⁹⁶ *See* Buccafusco, *supra* note 67. A standard practice in elite kitchens is “staging,” where outside chefs are invited to work in the kitchen to learn techniques and recipes on condition that they keep their kitchens open to others who might like to do the same.

¹⁹⁷ *See* Benkler, *supra* note 66.

members need not be hypervigilant about free-riding and anti-social behavior.

3. The Loyalty/Betrayal Foundation

Another driver of moral intuition is a sense of whether conduct represents loyalty to or betrayal of some relevant in-group. This moral foundation has its evolutionary roots in the needs of early hunter-gatherer homo sapiens to band together against outside threats and to form coalitions to defend against attacks from rival groups.¹⁹⁸ Vestiges of this tribalism persist in the moral intuitions of modern humans, so that perceptions that someone has betrayed a relevant in-group—whether nation, faith, military unit, or even any close-knit informal social collective—can serve as the deep architecture of an instinct that their behavior is wrong. This foundation was certainly at play in the sense of moral indignation that led to boycotts when Dixie Chick Natalie Maines said at a 2003 concert that she was “ashamed the President of the United States is from Texas.” “People are shocked,” said one country radio program director whose moral disapprobation was framed explicitly in terms of betrayal of an in-group, “They cannot believe that Texas’ own have attacked the state and the President.”¹⁹⁹

Some public issues that are strongly associated with in-group symbols, such as flag-burning or the propriety of visual images of Allah, appear clearly to engage the loyalty/betrayal foundation. Initially copyright does not seem to raise any such concerns, at least insofar as it is usually cast merely as economic legislation seeking only to optimize creative production. Upon closer examination, though, copyright’s nexus with this moral foundation emerges in unexpected ways. Consider, for instance, the reluctance of the United States to accede to the 1886 Berne Convention—the world’s premier international copyright treaty. By the late 1980s, only three major nations had refused to become member nations: the U.S.S.R., China, and the United States. This refusal was rooted in an instinctive sense that it would betray our nation and its values to do otherwise,²⁰⁰ despite the

¹⁹⁸ HAIDT, *supra* note 12, at 163 (“The Loyalty/betrayal foundation is just a part of our innate preparation for meeting the adaptive challenge of forming cohesive coalitions.”).

¹⁹⁹ “Dixie Chicks Pulled from Air After Bashing Bush,” CNN.com, Mar. 14, 2003, <http://www.cnn.com/2003/SHOWBIZ/Music/03/14/dixie.chicks.reut/>.

²⁰⁰ Barbara Ringer, *The Role of the United States in International Copyright -- Past, Present, and Future*, 56 GEO. L.J. 1050, 1051 (1968) (describing the U.S. refusal to comply with international copyright norms as a product of, *inter alia*, “political isolationism”).

obvious practical advantages to becoming a member nation.²⁰¹ And even when the U.S. finally passed the Berne Convention Implementation Act (BCIA) in 1988, Congress stressed its “minimalist” approach to adopting international copyright norms in order to maintain the integrity of our copyright law against adulteration from abroad.²⁰² Congress also justified the passage of the BCIA as an act of patriotism, since it would require other nations to “consider the deeply felt legal, economic, and social values reflected in American copyright law.”²⁰³ Content industry lobbyists have also invoked appeals designed to trigger the loyalty/betrayal foundation in seeking more expansive copyright laws. Jack Valenti’s 1982 Congressional testimony about the VCR is most (in)famous for his “Boston Strangler” comment, but featured even more prominently was the fact that the Sony-made VCR was a Japanese product. This enabled a classic in-group narrative of the private home recording issue, allowing Valenti to portray the VCR as a “flank assault” on the uniquely American domestic film industry:

The U.S. film ... industry ... is the single one American-made product that the Japanese, skilled beyond comparison in their conquest of world trade, are unable to duplicate or to displace or to compete with or to clone. ... [I]t is a piece of sardonic irony that while the Japanese are unable to duplicate the American films by a flank assault, they can destroy it by this video cassette recorder.²⁰⁴

Valenti’s attempt to inflame in-group passions, and thereby access the loyalty/betrayal foundation, could not have been clearer. The VCR was a tool of the tricky and aggressive Japanese who were seeking to undermine the U.S. film industry and the American economy. Advocating home recording, as Valenti framed it, was an act of unpatriotic betrayal. And this

²⁰¹ ROBERT GORMAN & JANE GINSBURG, COPYRIGHT: CASES AND MATERIALS 843-51 (1999) (explaining that by failing to protect the rights of foreign authors, fewer such authors published in the U.S., and foreign countries reciprocally failed to protect the copyrights of U.S. authors abroad).

²⁰² House Report on the Berne Convention Implementation Act of 1988 at 8-9 (stressing the “minimalist” character of the U.S. approach to implementing Berne).

²⁰³ *Id.* at 9.

²⁰⁴ House Judiciary Committee Hearing on Home Recording of Copyrighted Works, 97th Congress, 2d session, Apr. 12, 1982 (Testimony of Jack Valenti, President of Motion Picture Academy of America). This is only part of Valenti’s rhetoric about the “Japanese threat” posed by the VCR. He stressed that “100 percent of these machines are made in Japan and 85 percent of the blank tapes are made in Japan,” warned of the “\$5.3 billion trade deficit with Japan on electronic equipment,” and even referred to Sony’s American-born representative, Mr. Ferris, as “[o]ne of the Japanese lobbyists.” *Id.*

is far from the only time that pro-copyright lobbyists have appealed to in-group loyalty against outsider threats. Supporters of the SOPA/PIPA bills defended them by invoking the danger posed to domestic creative industries from “dangerous” “rogue foreign sites.”²⁰⁵ And the U.S. Trade Representative’s “Notorious Market Reports” highlights infringement by listing foreign websites and physical markets that purportedly threaten U.S. copyright interests.²⁰⁶ These concerns may be valid, but the focus on dangerous foreign sites to the exclusion of domestic ones makes the Report resonate with the loyalty/disloyalty moral foundation by casting them as outsider threats to our shared national in-group.²⁰⁷

Perhaps even more than the “theft” metaphor, the metaphor of copyright infringement as “piracy” is often used by copyright owners to portray acts as morally wrongful.²⁰⁸ Although “piracy” shares some of the same connotations as “theft,” it also imports a sense of “foreignness” to those engaged in it. Whether the metaphor calls to mind swarthy, (homo)sexualized Barbary Coast villains or modern gun-toting Somalis, it triggers an intuition that “we” are being attacked by a band of lawless, violent outsiders.²⁰⁹ Piracy metaphors arose early in copyright debates and in ways that signaled foreignness and disloyalty.²¹⁰ In the nineteenth century, publishers and authors compared America’s unwillingness to protect the copyrights of international authors to Barbary Coast pirates’ refusal to abide by the law.²¹¹ And similar echoes continued throughout the

²⁰⁵ Alex Ben Block, “MPAA Chief Chris Dodd ‘Hurt,’” *The Hollywood Reporter*, Esq., Jan. 19 2012, <http://www.hollywoodreporter.com/thr-esq/chris-dodd-mpaa-piracy-obama-google-283289> (quoting MPAA President and former U.S. Senator Chris Dodd).

²⁰⁶ United States Trade Representative, “Out of Cycle Review of Notorious Markets,” Feb. 28, 2011, *available at* http://www.ustr.gov/webfm_send/2595.

²⁰⁷ Many of the purportedly “notorious” sites are actually quite pedestrian. The Report lists the Russian site VKontakte as permitting “users to provide access to allegedly infringing materials,” but the same could easily be said of many mainstream domestic sites such as YouTube.

²⁰⁸ See ADRIAN JOHNS, *PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES* (2009) (tracing the elaborate history of the concept of piracy of intellectual property).

²⁰⁹ See Loughlan, *supra* note 147, at 219-20.

²¹⁰ JOHNS, *supra* note 208, at Ch. 1.

²¹¹ The publisher Henry Hold argued to the U.S. Senate, “It is time that the United States should cease to be the Barbary Coast of literature, and that the people of the United States should cease to be the buccaneers of books.” Senate Report No. 622, 50th Congress, 1st Session, p. 2 (1888), quoted in Catherine Seville, *Nineteenth-Century Anglo-US Copyright Relations: The Language of Piracy versus the Moral High Ground*, in *COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE* 41 (Lionel Bently et al., eds. 2010).

twentieth century. In a 1995 address to a House committee, Valenti declared, “Each year pirates and thieves the world over try to plunder the greenhouse of intellectual property. And each year those of us in the creative community spend millions of dollars to stand guard against this thievery, to punish violators, to move swiftly against those who are responsible, to make it risky and expensive for pirates to ply their trade.”²¹² Increasingly, at the turn of the twentieth century, fears about piracy often explicitly mention the threat from China, Russia, and the rest of the developing world to American prosperity.²¹³ Marybeth Peters, the former Register of Copyrights, explicitly distinguished the relatively banal piracy in the U.S. to the especially pernicious international piracy coming from China and Russia:

To be sure, piracy anywhere is serious and cause for concern. ... But all too often, what we see abroad bears no resemblance to college students downloading their favorite songs and movies. Much of the foreign piracy about which we are speaking today is done by for-profit, criminal syndicates. Factories throughout China, southeast Asia, Russia, and elsewhere are churning out millions of copies of copyrighted works, sometimes before they are even released by the right holders. These operations are almost certainly involved in other criminal activities. Several industry reports in recent years suggest that dueling pirate operations have carried out mob-style “hits” against their criminal competitors. And, although the information is sketchy at best, there have been a series of rumored ties between pirating operations and terrorist organizations.²¹⁴

Piracy abroad is figured as more dangerous than domestic piracy, in part due to its unwillingness to respect American values regarding individual rights.²¹⁵

²¹² NII Copyright Protection Act of 1995: Joint Hearing Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary and the Senate Committee on the Judiciary, 104th Congress One Hundred Fourth Congress, first session, on H.R. 2441 and S. 1284 (1996), *available at* <https://archive.org/details/niicopyrightprot02unit>.

²¹³ According to Tom Doctoroff, “China is the total flip-side of the U.S. Piracy goes back to the China world view that individual rights don’t matter.” Quoted in Kenneth Rapoza, “In China, Why Piracy is Here to Stay,” *Forbes*, July 22, 2012, available at <http://www.forbes.com/sites/kenrapoza/2012/07/22/in-china-why-piracy-is-here-to-stay/>.

²¹⁴ Statement of Marybeth Peters, The Register of Copyrights before the Subcommittee on Intellectual Property, Committee on the Judiciary, United States Senate, 109th Congress, 1st Session, May 25, 2005.

²¹⁵ See Rapoza, *supra* note 213.

Patriotism may be the most common way that the loyalty/betrayal moral foundation arises in the copyright setting, but it is far from the only one. Authors may interpret unauthorized copying as an in-group violation insofar as it represents a betrayal of another artist. Installation artist Colette Maison Lumiere, for instance, claimed that Lady Gaga had copied her installation designs without permission to make Gaga's 2011 holiday window displays at Barney's. Maison Lumiere cast Gaga's unauthorized use as a betrayal of art-world norms, and also suggested that the art world itself had betrayed her by not supporting her infringement allegations.²¹⁶ Beyond the context of formal copyright law, members of groups that deploy informal IP norms couch their moral opposition to violation of those norms in terms of loyalty and betrayal. Roller derby skaters, for example, tend to follow strict, centralized rules to assure the uniqueness of the pseudonyms under which they compete. Complying with these rules when first choosing a name represents an act of loyalty, insofar as it represents deference to an established group norm.²¹⁷ And skaters regard the breaching of these norms as wrong for many reasons, but among them is the notion that not following those rules is a betrayal of the close-knit in-group that is the roller derby world itself.²¹⁸

4. The Authority/Subversion Foundation

The fourth moral foundation reflects the extent to which our sense of right and wrong is animated by concern for social order and deference to legitimate authority. The urge to respect hierarchal relationships has its roots in the need for groups of advanced mammals—chimps, hunter-gatherers, and contemporary humans—to have some central authority to create order and a sense of justice in the face of what can be a chaotic and disordered world.²¹⁹ This engrained need to defer to constructive hierarchies

²¹⁶ See Jenni Avins, "Artist Feels Ripped Off by Lady Gaga's Windows at Barney's," *NEW YORK MAGAZINE*, Jan. 4, 2012, available at <http://nymag.com/thecut/2012/01/artist-feels-ripped-off-by-lady-gaga.html> (including video of Maison Lumiere in which she complains of betrayal both by Gaga as a fellow artist, and by the art world for not coming to the aid of one of its own).

²¹⁷ See Fagundes, *supra* note 70, at 1128 (showing that beginner skaters comply with roller derby's name-uniqueness rules partly to indicate that they are good cooperators).

²¹⁸ See *id.* at 1111 & n.86 (noting that name copying is wrong because it violates the derby world's "don't be a douchebag" rule by putting an individual's selfish desires above the good of the community as a whole).

²¹⁹ See DE WAAL, *supra* note 89 ("Without agreement on rank and a certain respect for authority there can be no great sensitivity to social rules, as anyone who has tried to teach simple house rules to a cat will agree.").

manifests itself in strongly felt moral intuitions about anyone—ourselves or others—negating or subverting social order.²²⁰ Two different phenomena may trigger this foundation. The first group consists of “anything that is construed as an act of obedience, disobedience, respect, disrespect, submission, or rebellion, with respect to authorities perceived to be legitimate.”²²¹ The second kind of behavior that may trigger this foundation is conduct that seems to subvert the traditions, institutions, or values that create stable social order.²²²

The extent to which authority/subversion drives the moral instincts of players in copyright controversies emerges most clearly in the metaphors they use to critique unauthorized use. The leading metaphor exposing concern for subversion of stabilizing social order is theft. One valence of the moral attraction of invoking these metaphors for unauthorized copying is that they trigger the fairness/cheating moral foundation, as we discussed above. But the efficacy of the theft metaphor as a moral appeal also lies in its resonance with concern for respecting authority. The notion that theft is wrong is ancient, and certainly much more widely shared and deeply felt than the relatively recent and substantively complex notion that copyright infringement is illegal. To equate unauthorized copying with theft, then, raises concern that more than just a formal legal violation has occurred. Rather, it suggests that the infringing conduct threatens the stability of the social order itself by eroding respect for long-accepted boundaries of private physical space.

In a speech by Jack Valenti on the subject, aptly titled “Don’t Be a Scene Stealer,” he capped a long moral equation of infringement and theft by warning that the impact of tolerating theft was decay of the social order. “Everything we do must be rooted in some kind of a code,” warned Valenti, “Otherwise we are anarchists.”²²³ But the clearest invocation of the authority/subversion foundation in the context of the theft metaphor is courts’ (and other sources’) reference to the Biblical proscription “Thou shalt not steal” to admonish infringers.²²⁴ This reference to the Old

²²⁰ See HAIDT, *supra* note 12, at 165-69 (discussing the authority/subversion foundation generally).

²²¹ *Id.* at 168.

²²² *Id.*

²²³ Jack Valenti, *Speech: “Don’t Be A Scene Stealer,”* 11 COMMLAW CONSPECTUS 307 (2003).

²²⁴ *Grand Upright Music v. Warner Bros. Records*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (“‘Thou shalt not steal’ has been an admonition followed since the dawn of civilization. Unfortunately, in the modern world of business this admonition is not always followed. Indeed, the defendants in this action for copyright infringement would have this

Testament frames a technical violation of the U.S. Code into both an affront to God Himself and a threat to social order reflected in a longstanding consensus that we should respect one another's property.

Similarly, the infringement as "piracy" metaphor likely triggers the authority/subversion foundation in addition to the loyalty foundation discussed above. The moral power of the piracy metaphor derives from its suggestion of social disruption, lawlessness, and moral subversion. Pirates symbolize the ultimate threat to the social order—they follow no nation's law, respect no central authority, and create a constant threat to both commerce and tourism at sea.²²⁵ Equating unauthorized copying with piracy, then, resonates strongly along the authority/subversion foundation. The piracy metaphor can either express a speaker's concern that infringers represent threats to established social order, and/or trigger moral outrage in listeners who have strong concern that sources of such order be respected. Content industries in particular deploy the piracy metaphor to describe the destabilization of the regnant hierarchy that gives them a leading role in the delivery of creative content, warning that such a breakdown of order will in turn redound to the detriment of consumers located lower down this hierarchy.²²⁶

A less common, but still telling, metaphor that exposes the frequency with which unauthorized copying resonates along the authority/subversion foundation is the parent/child metaphor. The salience of parenthood as a source of stability and legitimate authority is obvious, and for that reason it shows up as a central theme in the MFT literature's

court believe that stealing is rampant in the music business and, for that reason, their conduct here should be excused. The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country.”)

²²⁵ This was certainly true as a historical matter. See MARCUS REDIKER, *VILLAINS OF ALL NATIONS: ATLANTIC PIRATES IN THE GOLDEN AGE* (2005) (“[P]irates were bold subversives who challenged the prevailing social order and empire building of the five main trading nations[.]”). It remains true today, especially as a resurgence of Somali piracy threatens trade and tourism off the Gulf of Aden. See Adam Nagourney & Jeffrey Gettleman, “Piracy Ends Yachting Dream,” *N.Y. TIMES*, Feb. 22, 2011 (describing a “modern-day piracy epidemic” in the waters off the northeastern corner of Africa), available at <http://www.nytimes.com/2011/02/23/world/africa/23pirates.html>.

²²⁶ John S. Orlando, Senior V.P., National Association of Broadcasters, (“The information age has ... vastly expanded the dangers of digital piracy. The Internet allows pirate content to be made instantly available to millions of people. ... In light of these perils, content creators have made clear they will withhold compelling digital content from over-the-air transmission.”), available at <http://www.gpo.gov/fdsys/pkg/CHRG-108hhr85490/pdf/CHRG-108hhr85490.pdf>.

discussion of the authority/subversion foundation.²²⁷ This helps make sense of the frequency and longevity with which authors have invoked the metaphor that their works are like their children.²²⁸ Cartoonist Gary Larson observed, “These cartoons are my ‘children’ of sorts, and like a parent, I’m concerned where they go at night without telling me. And, seeing them on someone’s website is like getting a call at 2:00a.m. that goes, ‘Uh, Dad, you’re not going to like this much but guess where I am.’”²²⁹ Framing the author/work relationship in terms of the parent/child expresses the immorality of unauthorized use by triggering the authority/subversion foundation. It portrays infringement as a deeply destabilizing act that threatens a core locus of social stability—the nuclear family.

Use of the parent/child metaphor is especially telling in the context of discussions of whether U.S. authors should be granted rights of attribution. In droit moral countries that explicitly recognize attribution rights, those rights are often termed “rights of paternity.”²³⁰ Paternity rights give authors the ability to insist on being named on copies of their work, as well as the right to no longer be named as the author if they choose. The moral force of the metaphor is facially apparent: If the work is the author’s “child,” then, like a real child, it should carry its father’s name.²³¹ The work, on this view, is the author’s legacy, and, thus, when he fears that legacy is in jeopardy, he may refuse to have his name associated with it.²³² In addition, it is the claim of parental authority that establishes the author’s unique right to determine how his children are “raised”—that is, developed, distributed, and matured.²³³ Frankie Sullivan, the guitarist and songwriter for the band Survivor, objected to Newt Gingrich’s use of the song “Eye of

²²⁷ See Haidt, *supra* note 12, at 165-69.

²²⁸ The metaphor of parent/child to represent the author/work relationship goes back at least until the Renaissance in the West. See Rose, *supra* note 147, at 3 (2002) (quoting Daniel Defoe saying that “A Book is ... the Child of his Inventions, the Brat of his Brain[.]”).

²²⁹ Larson, *quoted in* Patry, *supra* note 1, at 69-71.

²³⁰ Rose, *supra* note 147, at 9.

²³¹ See Rosemary J. Coombe, *Challenging Paternity: Histories of Copyright*, 6 *YALE J. L. HUMAN.* 397, 404 (1994).

²³² See Dave Itzkoff, “The Vendetta Behind ‘V for Vendetta,’” *N.Y. TIMES* (Mar. 12, 2006). The article discusses comic book artist Alan Moore’s continuous battles over film adaptations of his works. Regarding the film version of his graphic novel “From Hell,” Moore is quoted as saying, “I did not wish to be connected with it, and regarded it as something separate to my work.”

²³³ The title of a recent article by Jane Ginsburg, a proponent of moral rights, is telling: Jane C. Ginsburg, *Moral Rights in the U.S.: Still in Need of a Guardian Ad Litem*, 30 *CARDOZO ARTS & ENT. L.J.* 73 (2012).

the Tiger” on precisely these grounds: “My motives have nothing to do with politics,” he said. “It’s one of my babies, and I’m just exercising the laws of this great country.”²³⁴ He continued, “My legacy, my life, has been ‘Eye of the Tiger.’”²³⁵

5. The Sanctity/Degradation Foundation

The fifth moral foundation identified by MFT research is sanctity/degradation. Some people’s moral matrix features concern that people, things, or ideas they regard as sacred not be treated in a manner they regard as disrespectful or defiling.²³⁶ This foundation derives from the need of our primitive ancestors to identify and avoid things that would cause them disease—whether rotten food, human waste, or diseased animals.²³⁷ Indeed, the earliest sources of human morality center on maintaining community purity (e.g., the Biblical admonition to cast out lepers or not to sleep around) or avoid disease-risking food (e.g., the Jewish and Muslim prohibitions against eating pork and shellfish).²³⁸ These longstanding concerns about physical purity have translated into modern concerns about moral sanctity. While this foundation may be more salient in foreign cultures,²³⁹ they drive our normative reactions in the West as well. Consider the extent to which traditional and evangelical Christian language about matrimony emphasizes the sanctity of marriage and the purity of virginity. And even those without pronounced religious beliefs can feel the moral pull of sanctity. Haidt’s early work on morality found that when asked to assess scenarios carefully framed to trigger no other possible moral objection than disgust—such as sibling incest or eating a dead cockroach—people still

²³⁴ James C. McKinley Jr., “G.O.P. Candidates Are Told, Don’t Use the Verses, It’s Not Your Song Romney and Gingrich Pull Songs After Complaints,” N.Y. TIMES.COM (Feb. 3, 2012), <http://www.nytimes.com/2012/02/04/arts/music/romney-and-gingrich-pull-songs-after-complaints.html?pagewanted=all>.

²³⁵ Allison Horton, “Former Survivor member sues Newt Gingrich for using ‘Eye of the Tiger,’” SUNTIMES.COM (Jan. 30, 2012, 6:00 PM), <http://www.suntimes.com/news/nation/10332797-418/former-survivor-member-sues-newt-gingrich-for-using-eye-of-tiger.html>.

²³⁶ See Haidt, *supra* note 12, at 170-77 (discussing the sanctity/degradation foundation generally).

²³⁷ Haidt, *supra* note 12, at 172-73.

²³⁸ The Hebrew Bible even proscribes Jews from eating or coming into contact with “the swarming things that swarm upon the earth.” LEVITICUS 11. Consider also the Judeo-Christian admonition that “Cleanliness is next to godliness.”

²³⁹ Haidt, *supra* note 12, at 15-27 (discussing close relationship between sanctity considerations and morality in countries including Papua New Guinea and India).

considered the conduct wrong, though they struggled to articulate just why.²⁴⁰

At first glance, the sanctity/degradation foundation, rooted in notions of physical disgust, may seem worlds apart from American copyright, with its antiseptic economic rationale. But concern for sacredness and defilement are commonplace in copyright disputes. Consider, for example, the extent to which judges' moral disapprobation of copyright cases involving obscene uses appears to dictate those cases' outcomes. In *MCA, Inc. v. Wilson*, for example, the Second Circuit considered whether the defendant's obscene parody ("The Cunnilingus Champion of Company C") infringed the copyright in a classic American ballad ("Boogie Woogie Bugle Boy").²⁴¹ The court denied the defendant's fair use defense in an opinion that seemed driven primarily by moral revulsion at the parody's debasement of a beloved musical standard.²⁴² Numerous other federal courts have denied fair use defenses, and found copyright infringement, where the defendant's unauthorized use is obscene and the plaintiff's work is a wholesome and mainstream one, such as a Disney character²⁴³ or the Dallas Cowboys logo.²⁴⁴

Respect for sanctity and concern about degradation also animate authors' and owners' objections to unauthorized use. Content industry representatives, for example, often attempt to connect copyright infringement with sexual impurity—and in particular, pedophilia—in order to generate moral indignation.²⁴⁵ Authors, as well, express their moral opposition to infringement in terms of sexual violation, with one plaintiff referring to her work being copied as the equivalent of "literary rape."²⁴⁶

²⁴⁰ *Id.* at 41-48.

²⁴¹ 677 F.2d 180 (2d Cir. 1981).

²⁴² *Id.* at 185 ("[A] commercial composer can[not] plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society.").

²⁴³ *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Walt Disney Productions v. Mature Pictures Corp.*, 389 F. Supp. 1397, 1398 (S.D.N.Y. 1975).

²⁴⁴ *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205-06 (2d Cir. 1979).

²⁴⁵ *E.g.*, Kurt Nimmo, Edgar Bronfman's Declaration of War Against the Internet, <http://nimmo.freeservers.com/bronfman.html> (quoting Bronfman as saying that he will "track down those who ignore right from wrong ... hackers and spies, pirates and pedophiles").

²⁴⁶ Author Christina Starobin, quoted in http://www.leagle.com/decision/2001230137FSupp2d93_1220. Author Lewis Perdue, who accused Dan Brown of infringing his work, said of Brown's conduct that "I felt violated,

The sanctity/degradation foundation likely also accounts for the moral outrage of devoutly religious sculptor Frederick Hart, who sued Warner Brothers for using a version of his work “Ex Nihilo” in an orgy scene of the movie “Devil’s Advocate.”²⁴⁷ Hart framed the motivation for his lawsuit not in terms of lost royalties or even loss of authorial control, but rather because he was “deeply disturbed that 13 years of work to create a sculpture of the profound mystery and beauty of God’s creation would be so debased and perversely distorted.”²⁴⁸

And even those who are not religious may have their sanctity/degradation foundation activated by infringement. Describing his legal battles to prevent use of James Joyce’s work by scholars, Stephen Joyce, the author’s grandson, proclaims, “I am not only protecting and preserving the purity of my grandfather’s work but also what remains of the much abused privacy of the Joyce family.”²⁴⁹ Many musicians have objected to legal uses²⁵⁰ of their songs by politicians with whom they disagreed on the grounds that such a use “perverted” or “tarnished” the song or the artist.²⁵¹ In addition, numerous rock, gothic, and heavy metal bands like Rage Against the Machine and Skinny Puppy (whom one might not initially assume to be hypersensitive to sanctity/degradation concerns) have sued the U.S. government for playing their musical works without permission as part of the interrogation of detainees at Guantanamo Bay.²⁵² The bands’ actual objections sound less in terms of concern for unpaid royalties, and more in terms of their sense that their music has been soiled

like somebody had broken into my head."
<http://news.bbc.co.uk/2/hi/entertainment/4126710.stm>.

²⁴⁷ See Niebuhr, *supra* note 8.

²⁴⁸ *Id.*

²⁴⁹ D.T. Max, *Life and Letters The Injustice Collector Is James Joyce’s grandson suppressing scholarship?*, NEWYORKER.COM (June 19, 2006), http://www.newyorker.com/archive/2006/06/19/060619fa_fact?currentPage=all.

²⁵⁰ Many of these uses are legal even though the songwriters have not given permission because the venue playing the song has licensed the copyrights from the music publisher and owner of the sound recording.

²⁵¹ The Foo Fighters objected to John McCain’s use of their song “My Hero,” claiming, “To have it appropriated without our knowledge and used in a manner that perverts the original sentiment of the lyric just tarnishes the song.” Nick Neyland, “Foo Fighters slam John McCain for Unauthorized Use of ‘My Hero,’” PREFIXMAG.COM (Oct. 8, 2008, 11:42 AM), <http://www.prefixmag.com/news/foo-fighters-slam-john-mccain-for-unauthorized-use/22200/>.

²⁵² See John Tehranian, *Guantanamo’s Greatest Hits: The Semiotics of Sound and the Protection of Performer Rights under the Lanham Act*, 16 VAND. J. ENT. & TECH. L. 41 (2013).

by connection with “torture.”²⁵³ Indeed, Skinny Puppy sought \$666,000 in damages to symbolize “the evilness of the [U.S. government’s] deed.”²⁵⁴ Sanctity concerns also drive moral considerations about creativity outside the context of formal copyright law. Tattoo artists have explained their deference to their community’s informal norm that original designs not be copied without permission in terms of the “sacredness” of such designs that would be violated by unauthorized copying.²⁵⁵

A final illustration of the role the sanctity/degradation foundation plays in copyright’s morality play is the revulsion that many people feel when any art—not just their own work—is defaced or defiled. The idea that artists have a right against the “degradation” or “mutilation” of their works, even after the rights in the work are transferred, is a commonplace in moral rights systems.²⁵⁶ But it is telling that this notion—under the guise of a “right of integrity”—underlies one of the few substantive provisions that made it into U.S. law in the watered-down version of moral rights law passed as the Visual Artists Rights Act in 1990.²⁵⁷ This suggests that even though American copyright law is supposed to be entirely about incentives and utility, we too have a moral aversion to the notion that art would be defiled. And indeed, survey data appears to support this conclusion. A 2009 study by Fred Schauer and Barbara Spellman of American university subjects found that most respondents considered it wrong to deface a painting, even one that the defacer had legally purchased.²⁵⁸

²⁵³ Rage Against the Machine explain, “As artists and as human beings, it sickens us to know that the U.S. government has been using our music to torment detainees. We are especially appalled by the discovery that there is very little that we, as artists, can do to stop the military and the CIA from turning our music into a weapon.” Morello, *supra* note 7.

²⁵⁴ “Canadian techno band Skinny Puppy sue US for using their music in torture of Guantanamo prisoners,” Daily Mail (U.K.) Online, Feb. 8, 2014, <http://www.dailymail.co.uk/news/article-2554625/They-using-music-inflict-damage-Canadian-techno-band-Skinny-Puppy-sue-US-using-music-torture-Guantanamo-prisoners.html>.

²⁵⁵ Aaron Perzanowski, *Tattoos and IP Norms*, 98 MINN. L. REV. 511 (2013).

²⁵⁶ See Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 269 (2009)

²⁵⁷ 17 U.S.C. sec. 106A.

²⁵⁸ Barbara Spellman & Fred Schauer, *Artists’ Moral Rights and the Psychology of Ownership*, 83 TUL. L. REV. 661, 667-69 (2009). By contrast, respondents did not think it was wrong for an owner to deface his car by placing stickers all over it. *Id.* at 667.

6. The Liberty/Oppression Foundation

The final moral foundation represents a relatively recent addition to the list. The first MFT work posited a five-foundation model that accounted quite well for the range of moral intuitions subjects expressed in studies.²⁵⁹ But this model left certain other observed phenomena, of which the most conspicuous was its failure to account for libertarian morality.²⁶⁰ Haidt has proposed to enhance the pragmatic validity of the MFT model by further refining what was originally understood as the justice/fairness foundation into two components. The first is the fairness/cheating foundation, which, as described above, reflects the moral intuition that rules be followed and in particular that people not reap where they have not sown. The other, and the sixth proposed moral foundation, is liberty/oppression.²⁶¹ This foundation refers to the intuition that people not be subjected to oppressive exercises of power by some person or institution.²⁶² The evolutionary roots of this foundation lie in the need for early human groups to have strong, but not overweening, leadership. Groups were more likely to survive if their members resisted and rebelled against leaders who exercised their authority to advance their own thirst for power at the group's expense.²⁶³

The result of this evolutionary trend has been a tendency toward “reactance”—the name for our desire to resist a course of conduct more strongly when someone bossily tells us to do it. In turn, this animates the liberty/oppression foundation, which leads many people to consider morally wrong insistence that they must act a certain way or do a certain thing.²⁶⁴

²⁵⁹ Graham, *supra* note 154, at 366 (defining MFT as “a measure of the degree to which individual endorse each of five intuitive systems...: Care/Harm, Fairness/Reciprocity, Ingroup/Loyalty, Authority/Respect, and Purity/Sanctity”).

²⁶⁰ The first paper that sought to examine libertarian morality in the context of MFT uncovered a particularly strong emphasis on liberty in comparison to other moral foundations. See Ravi Iyer, et al., *Understanding Libertarian Morality: The Psychological Dispositions of Self-Identified Libertarians*, 7 PLOS ONE 1, 10 (“If liberty is included as a moral value, libertarians are not amoral. Rather, standard morality scales, including the Moral Foundations Questionnaire, do a poor job of measuring libertarian values.”).

²⁶¹ HAIDT, *supra* note 12, at 197-205.

²⁶² *Id.* at 215 (“[T]he liberty/oppression foundation ... makes people notice and resent any sign of attempted domination. It triggers an urge to band together to resist or overthrow bullies and tyrants.”).

²⁶³ *Id.* at 197-200 (citing the work of anthropologist Christopher Boehm for the proposition that “at some point in the last million years our ancestors underwent a ‘political transition’ that allowed them to live as egalitarians by banding together to rein in, punish, or kill any would-be alpha males who tried to dominate the group”).

²⁶⁴ *Id.* at 200-01 (discussing reactance and its role in the liberty/oppression foundation).

We see this foundation at work in many modern political settings. Modern conservatives' opposition to Obamacare often does not relate to the goals of the legislation—most people agree that it is appealing to have more Americans covered by health insurance and to lower the costs of medical care—but rather to the fact that government is forcing them to accept it.²⁶⁵ Liberals' moral sensibilities may also reflect concern for liberty and oppression, though it is usually directed at different objects, such as concern that oppressed people around the world not be subject to the tyranny of human rights violations.²⁶⁶

The liberty/oppression foundation captures a different valence of copyright's morality. The trigger for most of the other five foundations was transgression of copyright law by unauthorized copying. By contrast, what triggers the liberty/oppression foundation is copyright law itself, insofar as expansions of copyright can be read as the kind of overreaching government regulation that creates reactance among so many people, especially in America.²⁶⁷ Indeed, the very rallying cry that epitomizes moral opposition to copyright and other private rights on the internet resonates along the liberty/oppression dyad: "Information wants to be free." This phrase originated with 1960s counterculture icon Stewart Brand, who founded the Whole Earth Catalog out of concern that "technology could be liberating rather than oppressive."²⁶⁸ This slogan epitomizes a moral vision of how we should regulate technology, creativity, and the internet that places at its center a concern for freedom (of both information itself and the people that use it for creative and inventive purposes).

Appeals to the liberty/oppression foundation remain central in the public dialogue about the appropriate scope of copyright, albeit almost exclusively as a justification for limiting or resisting expansions of owners' rights. Academic critiques of copyright expansion sound in terms of concern for creative liberty and fear of regulatory oppression. The subtitle of Larry Lessig's highly influential 2004 volume *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control*

²⁶⁵ E.g., Nicole L. Hopkins, "ObamaCare Forced Mom into Medicaid," WALL ST. J. OPINION, Nov. 20, 2013 (lamenting the injustice of a relative's being forced into a certain health care plan, deprived of the opportunity to choose one of their own volition).

²⁶⁶ The Universal Declaration of Human Rights, for example, speaks in terms of both liberty and oppression. Universal Declaration of Human Rights art. 3.

²⁶⁷ The Tea Party movement, with its rabid dislike for government and regulation, is a political organization whose morality operates primarily along the liberty/oppression foundation. See HAITT, *supra* note 12, at 204.

²⁶⁸ RONALD J. BAKER, MIND OVER MATTER: WHY INTELLECTUAL CAPITAL IS THE CHIEF SOURCE OF WEALTH 80 (2007).

Creativity furnishes a perfect example of an appeal to the liberty/oppression foundation. Lessig's title portrays a powerful authority figure ("Big Media") abusing its power to oppress ("lock down" and "control") our shared creative domain,²⁶⁹ as does much of his other copyright-skeptical rhetoric:

[These] ideas that should be central to the American tradition, such as that a free society is richer than a control society. But in the cultural sphere, big media wants to build a new Soviet empire where you need permission from the central party to do anything. Americans have been reduced to an *Oliver Twist*-like position, in which they have to ask, "Please, sir, may I?" every time we want to use something under copyright.²⁷⁰

Other scholars and advocates arguing for low-protection visions of copyright similarly warn of overreaching government regulation giving giant corporations excessive rights,²⁷¹ often leveraging the "information wants to be free" mantra as a touchstone for their substantive arguments.²⁷² Activist groups committed to resisting excessive copyright have given their organizations names that invoke the moral appeal of liberty in the face of oppression, such the Electronic Freedom Foundation, the Free Software Foundation, Cultural Liberty, or the United Kingdom's Open Rights Group. And liberty also furnishes the central justification for many of the most egregious cases of hacking and security breaches in recent years. Convicted U.S. Army leaker Chelsea Manning is reported to have invoked the mantra

²⁶⁹ See also LARRY LESSIG, *FREE CULTURE* 276-87 (2004) (suggesting ways to "rebuild freedoms previously presumed" and to "rebuild free culture").

²⁷⁰ Robert S. Boynton, "The Tyranny of Copyright?" *N.Y. TIMES MAGAZINE*, Jan. 25, 2004, at 3, <http://www.nytimes.com/2004/01/25/magazine/the-tyranny-of-copyright.html?src=pm&pagewanted=3> (quoting Lessig).

²⁷¹ Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 *CAL. L. REV.* 1331, 1333-37 (2004) (observing the emergence of a "public domain movement" founded on concern that expansive copyright will suffocate creative freedom, and that a robust public domain "facilitates free speech and free access while at the same time sustaining innovation"); cf. Jessica Litman, *Readers' Copyright*, 58 *J. COPYRIGHT SOC'Y U.S.A.* 325, 342 ("[T]he freedom to read and enjoy material without the copyright police looking over your shoulder is an interest that copyright law has respected and should protect[.]").

²⁷² Edward Rothstein, *Swashbuckling Anarchists Try to Take the \$ Out of Cyberspace*, *N.Y. TIMES*, June 10, 2000, at B1 ("'Information wants to be free' ... has become a rallying cry for copyright challenges").

“information wants to be free” when justifying her release of hundreds of thousands of documents to WikiLeaks.²⁷³

For one example of a legal controversy whose roots lay largely in the liberty/oppression foundation, consider the constitutional challenge to copyright term extension. The Copyright Term Extension Act of 1998 gave all present and future U.S. copyright holders twenty more years of protection. It took public opposition to CTEA some time to coalesce, but when it eventually did, the core objection to the law was that instead of letting works become free to all as part of the public domain, it locked up information and restricted Americans’ ability to freely access it. The legal arguments in support of Eric Eldred, the plaintiff in the (ultimately unsuccessful) constitutional challenge to CTEA, expressed the wrongfulness of the law in terms of the concern that it was oppressive to creative liberty.²⁷⁴ The briefs for Eldred cited the opposition of the Constitution’s framers to “perpetual monopolies [, which] are forbidden by the genius of free governments,” and that the federal government’s power to create monopolies like copyright must be “guarded with strictness against abuse.”²⁷⁵ And Eldred’s advocates emphasized the extent to which excessive copyright infringed the liberty of all people to freely use works of authorship after copyright expiration, stressing that CTEA was unconstitutional in part because “the people were entitled to have their freedom guarded as much from indirect oppression” (i.e., copyright monopolies for owners) “as from direct oppression” (i.e., despots throwing innocent citizens in jail).²⁷⁶ Indeed, opposition to copyright term extension made strange political bedfellows because it joined in common cause liberals who were concerned mainly about harm to the “cultural

²⁷³ Steve Fishman, “How Bradley Manning Became One of the Most Unusual Revolutionaries in American History,” *NEW YORK MAGAZINE*, July 3, 2011.

²⁷⁴ LESSIG, *supra* note 269 (describing genesis of Eldred case and its relation to concerns about government expansion of copyright leading to excessive private control over creative works of authorship).

²⁷⁵ James Madison, “Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments”, published posthumously in Galliard Hunt, Ed., “Aspects of Monopoly One Hundred Years Ago, *Harper’s Magazine*, Vol 128, Number 766, March, 1914, p. 489, 490.

²⁷⁶ Draft brief in support of Eldred, Timothy R. Phillips, Americans for Prosperity, available at <http://homepages.law.asu.edu/~dkarjala/opposingcopyrightextension/constitutionality/phillips02.html>.

environment” as well as libertarians who found concerning the extent to which CTEA restricted liberty by locking up expression in private hands.²⁷⁷

IV. NORMATIVE IMPLICATIONS

“Man will become better when you show him what he is like.”

—Anton Chekhov

To this point, our claims have been solely descriptive. In Part I, we showed that contra the conventional wisdom, copyright is in fact a deeply moral system. In Parts II and III, we explored the varied contours of copyright’s moral domain, first showing that people have a variety of moral responses to copyright-relevant behavior, and then illuminating the architecture of those responses by using MFT. In this final Part, we consider two normative implications of our descriptive claims. First, MFT can help guide private and public copyright discourse in a way that promises to make that discourse more productive and less rancorous. Second, MFT bears promise as a way to more effectively achieve copyright’s goal of optimizing creative production. Importantly, this is not because understanding the diverse morality of copyright should lead us to abandon its consequentialist aspirations, but rather because by understanding the nature and variety of our moral reactions to copyright-relevant behavior, we can engage in a richer and more accurate analysis of how copyright law affects people’s motivations and their subjective experiences.

A. *Toward More Constructive Copyright Discourse*

As the metaphors and language used in Part III.B illustrate, the tenor of U.S. debate about copyright has grown especially hostile and polarized. Content industries deride unauthorized users as pirates, thieves, and even pedophiles, and suggest that their conduct threatens the economic well-being of America itself. Authors are no kinder when it comes to copyright infringement, referring to it as akin to sexual violation and fantasizing about violent retaliation against infringers. On the other side of the aisle, users regard owners in similarly contemptuous terms, portraying them as overbearing tyrants bent on destroying creative freedom due to their

²⁷⁷ See, e.g., Richard Epstein, *Liberty Versus Property? Cracks in the Foundation of Copyright Law*, 42 SAN DIEGO L. REV. 1, 26-28 (2005) (critiquing CTEA on libertarian grounds).

unquenchable greed. In court, too, copyright litigants often deploy inflammatory terms in an attempt to sway juries.²⁷⁸ Both the tone of this public discourse and the roadblocks it has placed in the way of constructive copyright reform have led groups to form in order to achieve some conciliation,²⁷⁹ but these efforts are in their infancy, and their impact to date has been limited.²⁸⁰

The scholars who developed MFT share an interest in trying to improve America's fractious, divided public dialogue about politics and morality. A major section of one of Haidt's books is devoted to exploring the hopeful question, "Can't we all disagree more constructively?"²⁸¹ The reason MFT may provide an affirmative answer to this question is that it illuminates the nature of the types of disagreements that divide Americans and especially Washington politicians.²⁸² When people disagree strongly about moral issues, they typically dismiss each other as either unintelligent or disingenuous.²⁸³ But MFT research suggests that when exasperated parties to such disagreements claim that the other side "just doesn't get it," what they are really disagreeing about (without realizing it) is their moral foundations. Liberals and conservatives disagree about flag burning, for example, because liberal morality tends to be driven by concern for harm and fairness, and no one is harmed when a flag is burned. But conservatives' moral matrices are activated by concerns for loyalty, which are deeply offended by the perceived un-Americanism of burning the U.S. flag. This is just one example of what MFT research has termed a "moral empathy gap," whereby we lack the "ability to empathize with moral

²⁷⁸ *Disney Enters, Inc. v. Hotfile Corp., Omnibus Order*, Case No. 11-204277-CIV (S.D. Fla. Nov. 27, 2013)

²⁷⁹ The best such example of an effort at copyright reform that includes representatives of diverse viewpoints is the Copyright Principles Project. See Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1 (2010).

²⁸⁰ Congress held hearings on the Copyright Principles Project in May 2013 in order to encourage civil, constructive dialogue about copyright reform. See *supra* note 11 (transcript of this hearing). But as the recent fraught legislative conflict over DMCA takedown notices that erupted only this past month illustrates, the aims of the CPP have yet to take hold. See Halper, *supra* note 9.

²⁸¹ HAIDT, *supra* note 12, at 319-71.

²⁸² *Id.* at 320-21 (discussing and citing evidence for the proposition that Americans are highly politically polarized, but that Washington politicians are even more so).

²⁸³ Ditto & Koleva, *supra* note 110, at 331 (arguing that when we do not share others' moral intuitions, we tend to assume that their views are "stupid and irrational"); cf. SIMON BARON-COHEN, *MINDBLINDNESS: AN ESSAY ON AUTISM AND THEORY OF MIND* (1995) (coining the term "mind-blindness" to describe our difficulty understanding each other's points of view).

reactions different than our own—both difficulties appreciating when others feel things that we do not ... and difficulties appreciating when others do not feel things that we do[.]”²⁸⁴

MFT scholars have suggested that these moral empathy gaps transcend American’s “hyper-partisan political culture,” and arise “whenever two people or groups have differing moral intuitions.”²⁸⁵ This model certainly fits plausibly to what have come to be termed the “copyright wars,” whereby owners and users profoundly disagree over the appropriate scope of copyright. On the one hand, content industry representatives dismiss the liberty-based concerns of users, suggesting that the entire movement for free culture is a disingenuous smoke screen for a base desire to take stuff without paying. For example, Jack Valenti’s condescending and angry rhetorical questions aimed at a group of students imputes to them rank dishonesty rather than legitimate moral disagreement about the appropriate scope of owners’ rights in the digital environment:

[Do you engage in filesharing] because ... conscience is something you refer to when you are about to get caught? Is that an unwanted truth? Or words like principle, integrity, ethics, are those words that have been expunged from the student lexicon? And if so, why in the hell is that so?²⁸⁶

Nor do critics of copyright do any better at expressing empathy for owners’ concerns. For instance, in William Patry’s broadside against content industries, he accuses them of creating “moral panics” and disingenuously invoking property rhetoric in defense of their copyrights.²⁸⁷ And even when Patry pauses to consider the underlying psychological motivations behind the content industries’ use of this rhetoric, he ignores the possibility that they might be honestly concerned about harm to their industry and to artists, and instead argues that “they have a psychological block in accepting reality.”²⁸⁸

MFT signals two ways that we may be able to move past the toxic rhetoric of the copyright wars. First, understanding moral foundations can enable people to make more appealing arguments, even to those who are inclined to disagree with them. Haidt suggests that “If you want to

²⁸⁴ Ditto & Koleva, *supra* note 110, at 332.

²⁸⁵ *Id.*

²⁸⁶ Valenti, *Don’t Be a Scene Stealer*, *supra* note 223.

²⁸⁷ PATRY, *supra* note 1, at 124-29.

²⁸⁸ *Id.* at 124.

understand another group, follow the sacredness.”²⁸⁹ So when the task is to persuade a more homogeneous group, then the right move would be to identify whatever moral foundations are most relevant to that group and appeal directly to them.²⁹⁰ If you wanted to make a successful copyright-related appeal to the MPAA or the RIAA, be sure to frame your rhetoric in terms of the care/harm foundation (and particularly in terms of economic harm). But if you want to score points with the Electronic Freedom Foundation, better to couch your concerns in terms of liberty/oppression. When seeking to appeal to a broad-based group, this may mean appealing to all the different moral foundations in an attempt to appeal to the inevitably very different moral makeups of the group’s diverse constituents. Jack Valenti was a master of this. His arguments for stronger copyright touched on economic harm, reciprocal justice to creators, American patriotism, and the stability of the social order.²⁹¹

Consider how this may play out in the context of the filesharing debates. Copyright skeptics tend to be concerned about losing their liberty to create freely, especially insofar as increasing owners’ rights tend to diminish the public domain. But this appeal, rooted in the liberty/oppression foundation, is never going to get very far with content industries and authors, because they are concerned primarily with economic harm occasioned by increasingly frequent copyright infringement in the digital environment. But the low-protectionists might be able to convince industry that weaker copyrights are not all bad by appealing to the care/harm foundation. They could stress to content industries that the open digital environment is not an unalloyed threat of economic harm, but actually creates new vistas of profit potential. Steve Jobs was able to make billions when he conceived of a system—iTunes—that both respected owners’ copyrights and reflected an understanding of contemporary music consumers’ desire not to have to buy a whole album to get a single track. And they could emphasize to authors that infringement may not really harm them that much, since modern bands make most of their money on tours and merchandise, and may actually help them by increasing their public profile and generating other sources of revenue.²⁹²

²⁸⁹ Haidt, *supra* note 12, at 364. This strategy is useful for any argument, legal or otherwise. As Henry Ford said, “If there is any one secret of success, it lies in the ability to get the other person’s point of view and see things from their angle as well as your own.”

²⁹⁰ “As a first step, think about the six moral foundations and try to figure out which one or two are carrying the most weight in a particular controversy.” *Id.*

²⁹¹ Valenti, *supra* note 159.

²⁹² Dave Fagundes, *Market Harm, Market Help, and Fair Use*, 14 STAN. TECH. L. REV. ___ (forthcoming 2014) (cataloguing the ways that unauthorized use can benefit authors).

MFT may provide a tonic for the fraught tenor of the copyright wars for a second reason. Scholars have suggested that merely filtering our opponents' arguments through the lens of MFT can help to bridge the moral empathy gaps that tend to increase the temperature (and decrease the productivity) of hotly disputed political issues, like filesharing and the appropriate scope of copyright protection. Peter Ditto and Sena Koleva argue that "a hard-won empathy for the moral intuitions of our political adversaries could lead to more benign (and perhaps more productive) interpretations of their character, motivations, and policy preferences."²⁹³ This may be the case because we tend to default to an assumption that those who disagree with us are lying or stupid, and those assumptions make for a contemptuous mutual regard. But if we instead understood one another as disagreeing simply because we possess differing moral foundations, that might enable dialogue to ensue on a more generous and empathetic basis.²⁹⁴ This is especially true insofar as people on different sides of a moral dispute are still likely to share many moral foundations but simply disagree about whether and how those foundations have been activated in a given setting. This may enable both sides to create common ground (i.e., "We both care about what's good for America, we just have differing view about how to get there.").

Consider how this might unfold in the context of the copyright wars. As we have detailed above, the public dialogue about copyright exhibits very little empathy. Owners regard users as coldly indifferent to their economic well-being, and users regard owners as greedy tyrants. But when refracted through the lens of MFT, a more generous reading of the other side comes into focus. Users could see owners as sincerely concerned about harm not only to their own economic position, but also to the economically vulnerable, such as entertainment-industry service providers and struggling artists. Owners could see users as legitimately concerned about creative

²⁹³ Ditto & Koleva, *supra* note 110, at 332. This particular point remains a conjecture unsupported by empirical evidence, and thus our conclusion on this point remains tentative. Some critics have expressed deep skepticism about the possibility that merely understanding MFT as a descriptive theory would lead people to be more empathetic about their disagreements. See Tamler Sommers & David Pizarro, "How Many Moralities Are There? Pt. 2 (with Jesse Graham)," Very Bad Wizards Podcast, Episode No. 40, <http://verybadwizards.com/episode-list/>. There is some evidence from other contexts suggesting that a speaker's empathy is positively correlated with their ability to persuade. See, e.g., Lijiang Shen, *Mitigating Psychological Reactance: The Role of Message-Induced Empathy in Persuasion*, 36 HUMAN COMM. RESEARCH 397 (2010).

²⁹⁴ See Graham et al., *Pragmatic Validity*, *supra* note 15, at 43 ("MFT ... helps ... the general public look beyond the moral values that are dearest to them, and understand those who live in a different moral matrix.").

freedom and a long-term sustainable cultural environment. This reframing would be unlikely to resolve their substantive disagreements, but it may improve the rancorous tenor of the copyright wars by reminding each side that their opponents' views come from reasonable, and even similar, places rather than being rooted in lies or stupidity.

B. *MFT and Copyright Policy*

We have argued that copyright's moral domain is much richer than the conventional wisdom suggests. Each of the different moral foundations seems to play an animating role in some aspects of copyright discourse. The previous Subpart discussed the implications of these insights for copyright discourse, but that leaves open the question of what MFT tells us about copyright law itself. Copyright law's consequentialism is rooted in the Constitution, and it has been widely supported by courts and scholars over the last two centuries. This consequentialism attempts to optimize creative production by balancing what is given to creators with what is reserved for users and subsequent creators. Accordingly, U.S. copyright law is almost exclusively concerned with reasoning that tracks the care/harm foundation.²⁹⁵ How if at all, then, should a new appreciation for the richness of copyright's morality change positive law? Do the various moral intuitions that fall outside of copyright's utilitarian story need to be accommodated or accounted for? And if so, how?

First, we want to emphasize that the existence of moral intuitions that are not encompassed by copyright's consequentialism or that conflict with its goals does not mean that copyright law in the U.S. must alter its philosophical orientation. That aspect of our argument is a solely descriptive account of people's moral intuitions about copyright-relevant behavior, just as MFT itself is billed only as a descriptive general theory of morality.²⁹⁶ This is one of many examples where "is" does not equal "ought."²⁹⁷ For example, simply because opposition to gay marriage appears to be rooted in the moral foundation of purity does not mean that society should roll back all the advances made on the marriage equality front. By the same token, simply because some or even many people intuit

²⁹⁵ Unlike individuals, where intuitions play a dominant role in moral judgment, we expect that as a matter of copyright's governing laws, moral reasoning should take precedence.

²⁹⁶ See Graham, et al., *Pragmatic Validity*, *supra* note 15, at 34.

²⁹⁷ DAVID HUME, A TREATISE ON HUMAN NATURE 335 (1737); Rachel Cohon, *Hume's Moral Philosophy*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta, ed., 2010), available at <http://plato.stanford.edu/archives/fall2010/entries/hume-moral/>.

that copyright should be concerned with authority or purity, for example, does not require that the legal system must formally adopt rules that are consistent with those intuitions. Legal systems do not exist merely to track people's intuitions about appropriate conduct; they also exist to mold intuitions and behaviors.²⁹⁸ Even though people exhibit non-utilitarian responses to copyright issues, this does not mean that U.S. copyright law should come unmoored from its utilitarian foundations.

The approach to copyright morality that we have described above changes nothing and everything about copyright law and jurisprudence.²⁹⁹ U.S. copyright law should retain its consequentialist moorings, but its consequentialism should incorporate a more nuanced understanding of people's moral reactions to copyright-relevant behavior.³⁰⁰ In order to make laws that optimize creative production and promote cooperation and social welfare, copyright systems need to be able to comprehend and shape people's moral intuitions—even when those moral intuitions are not grounded in consequentialist concerns about care/harm.

As we have repeatedly noted, U.S. copyright law always has been based on the goal of promoting learning and knowledge by providing sufficient incentives to creators to produce new works without overburdening users' and subsequent creators' interests in access to those works. This goal is best achieved through the kinds of consequentialist cost-benefit analysis that are generally thought to animate copyright law.³⁰¹ To

²⁹⁸ Indeed, sometimes law operates on the assumption that people's moral instincts are essentially bad and that the purpose of regulation is to counter them. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (explaining how bad men care little about the moral grounding of the law but instead about predictions of which behaviors will lead to punishment).

²⁹⁹ Our claim is similar to the one made by Joshua Greene and Jonathan Cohen about neuroscience and criminal law. Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANS. ROYAL SOC. LONDON 1775 (2004) (explaining how neuroscience discoveries about the causes of criminal behavior do not necessarily mean that legal concepts have to change but that these discoveries will fundamentally alter the ways in which many people think about punishment).

³⁰⁰ We do not offer a full-throated defense of U.S. copyright's consequentialism in this Article. Surprisingly few such defenses actually exist. See LANDES & POSNER, *supra* note 19. Sunder presents a "complex consequentialist approach that seeks to expand the purpose of this law beyond incentives and efficiency to promoting the broad range of values we hold dear in the twenty-first century." SUNDER, *supra* note 36, at 15.

³⁰¹ This is not to say that Congress or the courts are routinely engaging in anything like a structured cost-benefit analysis of copyright doctrine. In fact, the opposite appears to be true. See JESSICA LITMAN, *DIGITAL COPYRIGHT* 22-35 (2001) (discussing how copyright

us, copyright law should be almost exclusively concerned with the care/harm foundation (although as we explain below, on broader grounds than usual). Copyright law needs a balanced system of rights and exceptions that provide sufficient opportunities for creators to recoup their investments but that do not unduly interfere with users and subsequent creators. This analysis is fundamentally one that trades off harms to users' and future creators' access with harms to current creators' incentives. Subject to the exceptions discussed below, moral intuitions about the wrongfulness of copyright-relevant behavior that arise from foundations other than care/harm have little place as normative criteria for copyright jurisprudence and policy.³⁰² In some cases, authors' concerns about purity or authority may be legitimate manifestations of true suffering, and, to the extent that they reflect harm, they should be folded into copyright law's utilitarian calculus. In many cases, however, these concerns may simply be the result of moral heuristics—shortcuts the moral mind takes when attempting to deal with difficult problems.³⁰³ Copyright-related concerns about purity, loyalty, authority, and liberty, when they are disengaged from care/harm, are manifestations of our moral minds' development in situations that are vastly differently from, and inapposite to, thinking about contemporary copyright policy. Moral intuitions that served humans well on the African plains or that are helpful for dealing with small group conflict are unhelpful,

legislation emerges primarily from negotiation between affected parties rather than through detailed analysis of costs and benefits).

³⁰² Joshua Greene has recently argued that people's moral intuitions that arise outside of concerns about harm and fairness may, on some occasions, be disregarded by society. JOSHUA GREENE, *MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM* (2013). We adopt a similar approach to copyright law.

Distinguishing his view from Haidt's, Greene writes, "One might say, as Haidt does, that liberals have narrow moral tastes. But when it comes to moral foundations, less may be more. Liberals' moral tastes, rather than being narrow, may instead be more refined." *Id.* at 339. Greene supports what he calls "deep pragmatism," a metamorality based on utilitarianism. *Id.* at 290.

³⁰³ Cass R. Sunstein, *Moral Heuristics*, 28 *BEHAVIORAL & BRAIN SCI.* 531 (2005) (suggesting that people use biased shortcuts to solving moral problems that are similar to those they use to solve other kinds of problems).

Greene's research on people's reactions to the famous "trolley problem" and "footbridge problem" is similarly relevant. Although people seem to behave differently in different circumstances—as utilitarians in the trolley problem and deontologists in the footbridge problem—Greene has shown that these differences have less to do with morally relevant distinctions between the dilemmas and more to do with variations in the emotional salience of the dilemmas. People reject the utilitarian approach in the footbridge problem, because they feel an immediate flash of negative emotion associated with physical social interaction with the person. See GREENE, *supra* note 302, at 105-31.

or worse, when trying to craft national and international laws that govern millions of people in the twenty-first century. These kinds of decisions are best left to systematic analysis of the optimal regime for balancing authors' incentives and the public's access.³⁰⁴

The independence of law from people's moral intuitions does not mean, however, that the law can glibly ignore how people think about legal issues. People's moral reactions to copyright law are relevant for a number of reasons. Stark divergences between legal doctrines and people's beliefs about what the law should be risk undermining the law's legitimacy. If people do not believe that a law is being applied fairly or that it prohibits conduct that should be allowed, they will view the law as illegitimate.³⁰⁵ Numerous examples of this kind of legal illegitimacy arise in federal drug laws.³⁰⁶ Hugely disproportionate sentences for crack and powder cocaine and the criminalization of marijuana, which many people think should be legal, affect people's judgments of the morality of the legal system. Similar issues can arise in copyright law.³⁰⁷ Most prominently, laws against online filesharing, especially criminal prosecutions,³⁰⁸ may violate many people's intuitions about what should be allowed.³⁰⁹ The law should be concerned

³⁰⁴ Indeed, leading moral psychologists acknowledge that while our ethical instincts may be plural as a descriptive matter, the best normative approach to organizing society and dictating policy is consequentialist cost-benefit analysis. *Id.* at 289-92 (explaining why he supports a weak version of utilitarianism as a guiding metamorality for resolving moral conflicts); Haidt, *supra* note 12, at 272 (“[W]hen we talk about making laws and implementing public policies in Western democracies that contain some degree of ethnic and moral diversity, then I think there is no compelling alternative to utilitarianism.”).

³⁰⁵ TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 227 (1996) (“[T]he law can have an important symbolic function if it accords with public views about what is fair, but it loses that power as the formal law diverges from public morality”).

³⁰⁶ See Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 PSYCHOL. BULL. 497 (1993) (explaining how people's judgments of drug laws' legitimacy affect their behaviors).

³⁰⁷ Geraldine Szott Moohr, *Defining Overcriminalization through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 AM. UNIV. L. REV. 783, 794 (“Under any theory of deterrence, it is more difficult to induce law-abiding behavior when underlying social norms do not support the law.”).

³⁰⁸ See Christopher Buccafusco & Jonathan S. Masur, *Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Laws*, S. CAL. L. REV. (forthcoming 2014).

³⁰⁹ Tyler, *Compliance with IP*, *supra* note 305. See LEE RAINE & MARY MADDEN, PEW INTERNET PROJECT AND COMSCORE MEDIA METRIX DATA MEMO: THE STATE OF MUSIC DOWNLOADING AND FILE-SHARING ONLINE (2004), available at http://www.pewinternet.org/pdfs/PIP_Filesharing_April_04.pdf.

that these kinds of divergences between legal sanctions and popular moral beliefs can erode its legitimacy.

While legal legitimacy may be an independent value in its own right, it is not just that. Popular perceptions of legitimacy are essential to the efficient functioning of the law. A substantial body of research shows that people's beliefs that the law is just and fair affect their willingness to comply with law's dictates.³¹⁰ If people do not feel like they are going to be treated fairly, their incentives and motivations to comply with the law decrease.³¹¹ Why worry about being a law-abiding citizen if you might get thrown in jail anyway? In the context of copyright law, if many people think that the laws are oppressive to their creative liberty, or represent big corporations taking more than their fair share through aggressive lobbying, people will be less likely to follow the law.³¹² As this sense of illegitimacy grows stronger, people may shift from simple non-compliance to active disobedience and dissent. The protests of the so-called Pirate Party about IP law and internet freedom are examples.³¹³

But it is not just users of copyrighted works who may believe that the law is illegitimate and refuse to comply. Creators, too, may feel like the law does not sufficiently protect them. If authors routinely feel like their rights are not being respected, they may cease to publish or they may look for extra-legal ways of enforcing their rights. Authors who believe that the legal system does an insufficient job of protecting their work may turn to technological protection measures that limit access to their work in ways that copyright law would not.³¹⁴ This is, in a sense, non-compliance with copyright law. Copyright law is thought to enact a bargain between creators and users: the public grants authors certain rights in their works on condition that the works are fairly useable by the public and will eventually go into the public domain. If copyright authors use technological means to

³¹⁰ Summarized in TYLER, *supra* note 305.

³¹¹ *Id.*; TYLER, *supra* note 305, at 227; Moohr, *supra* note 307, at 294.

³¹² See Mans Svensson & Stefan Larsson, *Intellectual Property Law Compliance in Europe: Illegal File Sharing and the Role of Social Norms*, 14 *NEW MEDIA & SOC.* 1147 (2012); Yuval Feldman & Janice Nadler, *The Law and Norms of File Sharing*, 43 *SAN DIEGO L. REV.* 577 (2006).

³¹³ Christian Engstrom, "The Pirate Party on Copyright Reform," Christian Engstrom, Pirate MEP, *available at* <http://christianengstrom.wordpress.com/the-pirate-party-on-copyright-reform/>.

³¹⁴ Dan L. Burk, *Anti-Circumvention Misuse*, 50 *UCLA L. REV.* 1095, 1100 (2003) ("Copyright holders might prefer a world in which the rights granted under statute or asserted via license became self-enforcing. Something close to this can be achieved through the employment of technological devices accompanying copies of a work as they are distributed.").

obtain greater rights than copyright law allows, they are renegeing on their half of the bargain.³¹⁵ Just because authors may believe that they should have more rights does not mean that copyright law has to provide them, but this example illustrates why copyright law cannot ignore people's moral intuitions. The law's ability to accomplish its goals is fundamentally affected by how people judge its goals and means of reaching them.

In this respect, we part company with other copyright scholars who have argued that copyright law should seek to banish all non-utilitarian claims from its realm.³¹⁶ Although we share the conviction that U.S. copyright law should be based on consequentialist aspirations, we do not believe that non-consequentialist moral intuitions can be rooted up and discarded. People's moral foundations are innate and firmly held reactions to the world around them. People cannot be expected to respond to copyright law solely along the care/harm dimension when they use some or all of the other foundations throughout their lives. As we described above, people's moral foundations can be changed, and people can learn to view issues in new ways. But the law cannot believe that people will simply shut off a substantial portion of their moral intuitions because the law explicitly says that they are inappropriate. And failing to consider how people's actual morality interacts with copyright law threatens the effective application and enforcement of that law.

More fundamentally, a thoroughly grounded copyright consequentialism should take into account at least some of people's moral responses, even when those responses emerge from foundations other than care/harm. When artists suffer from seeing their "children" mutilated by corporate film studios that dumb down a work's content and message in order to make more money, that suffering is a legitimate welfare loss even though it derives from concerns about purity and authority rather than from anxiety about economic loss. Or when a creator feels like she is being unjustly cheated out of her hard work, her feelings should still count as part of copyright law's utilitarian welfare calculus even though the law does not formally recognize hard work as legitimate grounds for granting rights. In these examples, the authors' negative affect will tend to be swamped by the benefits that others receive from being able to freely use and adapt their

³¹⁵ Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462, 471 (1998) ("Digital technologies allow more effective fencing of intellectual property, and thus cure some of the market failure problems associated with creative and informational works—although...they have the potential to create market failures of a different sort.").

³¹⁶ See e.g., PATRY, *supra* note 1.

works. But that does not mean that their feelings should be ignored. As we noted with the technological protection example above, if, in its attempt to maximize social welfare, copyright law routinely ends up enacting policies that people view as illegitimate or leading to immoral outcomes, the law's means of reaching its desired ends will be frustrated.

The debate over whether the U.S. should adopt a right of attribution provides a good example of our claim. There is strong evidence, from both qualitative and quantitative empirical studies, that creators value attribution.³¹⁷ Some of the reasons why creators value attribution are consistent with care/harm—receiving attribution helps creators make more money and increases their chances of success. Creators also may value attribution for other reasons. They may believe that fairness compels them to receive credit for their work and that it would be unfair for others to take credit for their efforts. Or they may feel that their works are like children, embodying their legacy. While these last two concerns are not directly relevant to copyright's consequentialist goal of optimizing creative output and access, they may indirectly feed back into an assessment of how copyright can best achieve its ends. For example, if creators are substantially motivated by attribution, for whatever reason, copyright might be well served by granting authors attribution rights instead of other, more expensive, incentives.³¹⁸ On the other hand, if negative emotions associated with the prospect of selling attribution create systematic biases that make markets inefficient, copyright law might be better off ignoring authors' moral intuitions about attribution.³¹⁹ Thus, moral intuitions derived from foundations other than care/harm can be relevant to copyright's consequentialist goals by contributing to an overall assessment of the tradeoffs between authors and the public. Ultimately, however, answers to

³¹⁷ Sprigman, Buccafusco & Burns, *What's a Name Worth? Experimental Tests of the Value of Attribution in Intellectual Property*, 93 B.U. L. REV. 1389 (2013) (showing experimentally that photographer subjects are willing to trade off significant amounts of money to obtain attribution for their work); Fisk, *supra* note 75, at 76–101 (2006) (discussing examples of attribution regimes); Tushnet, *supra* note 173; Fromer, *supra* note 18, 1765–71 (2012) (reviewing much of this research).

³¹⁸ Fromer, *supra* note 18 (arguing that IP law's utilitarian goals may best be served by providing attribution to creators as an incentive).

³¹⁹ See Sprigman, Buccafusco & Burns, *supra* note 317. See also Fromer, *supra* note 18, at 1748 (“Expressive interests, however, ought to be protected only when the utilitarian analysis indicates that the benefits of doing so exceed the costs. Moral-rights interests ought to yield to the utilitarian calculus whenever there is a conflict between the two, largely because extensive protection of moral rights is likely to harm society's cultural, scientific, and technological progress.”).

these questions may have to be derived from empirical studies of the costs and benefits of granting authors attribution rights.

Finally, the heterogeneous morality of copyright affects copyright's consequentialism in the way law and norms shape and frame relationships. Perhaps most importantly, copyright systems should recognize (and manipulate) certain moral intuitions that fall outside of care/harm because doing so can serve the system's consequentialist goals. Focusing on harm is not the only way of motivating the kinds of cooperative pro-social behavior that copyright cares about. In the norms-based communities discussed above, creativity abounds even without formal IP protections against copying. This is often the case because members of these communities feel like they are united in a common enterprise (loyalty) where sharing and reciprocity are essential (fairness).³²⁰ Society benefits greatly from these communities' commitments to loyalty and fairness, because we all reap the benefits of their creativity without the attendant costs of formal IP protection—deadweight losses, secrecy, and litigation expenses.

Joshua Greene has recently argued that our moral intuitions serve ourselves and society best in moral dilemmas that he characterizes as Me vs. Us, where an individual has to decide whether to sacrifice for the group.³²¹ He suggests that our moral intuitions tend to be suboptimal in situations characterized as Us vs. Them, where the goals and beliefs of our group confront those of another group.³²² The cooperative successes of the norms-based creative communities are, in essence, situations of Me vs. Us—individual group members tend to set aside their own concerns about harm in favor of greater community success and fairness.³²³ And the benefits extend to everyone—not just those within the group but all of society. Contrast this with the relationship between the recording industry and music consumers, clearly an example, on both sides, of Us vs. Them. The two groups see each other as competitors over scarce resources and

³²⁰ See Schultz, *supra* note 70, at 653 (“Jambands can trust their fans because the fan community has developed social norms against copying musical works that jambands have designated as ‘off limits.’”); Lior J. Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359 (2003).

³²¹ GREENE, *supra* note 302, at 293. Greene writes, “Our moral emotions—our automatic settings—are generally good at restraining selfishness, at averting the Tragedy of the Commons. ... Thus, when the problem is Me versus Us...we should trust our moral gut reactions...” *Id.* at 294.

³²² *Id.* at 293-94 (“[W]hen it’s Us versus Them...it’s time to stop trusting your gut feelings and shift into manual mode”).

³²³ Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and the Law*, 102 MICH. L. REV. 71, 71 (2003) (arguing that people behave more prosocially in cooperative environments).

view the other as either causing them immense harm (in the case of the recording industry) or tyrannically restricting their freedom (in the case of consumers). And both sides exhibit what Greene calls “biased fairness,” the tendency to focus only on ourselves and to ignore others’ interests when making judgments of fairness.³²⁴ Moral psychology thus also reminds us that copyright law, and the broader copyright system, should encourage the creation of Me vs. Us relationships where moral intuitions will tend to prove successful for promoting social welfare.³²⁵ It can do this, at least in part, according to the suggestions outlined in Subpart IV.B. When Us vs. Them relationships emerge, however, copyright should be less willing to rely on moral intuitions about appropriate behavior, because parties’ biased fairness judgments will tend to undermine cooperation and social welfare.

CONCLUSION: BEYOND COPYRIGHT

In this Article, we have challenged the received view that U.S. copyright is a stranger to the moral domain. We have shown that copyright law and the norms-based communities around it, in fact, make up a complex moral system through which selfishness is limited and cooperative, prosocial behavior is promoted. Looking at copyright through the lens of intuitionist social psychology and MFT, we have argued that the subjective experience of copyright disputes is also moral, involving a heterogeneous panoply of moral foundations beyond traditional concerns about harm and fairness. Copyright is, in these respects, inextricably bound up with morality, and efforts to regulate copyright-relevant behavior must take this into account. In future work, we look forward to further developing our vision of copyright’s moral domain with quantitative studies that will dovetail with this Article’s qualitative approach.

The approach we have adopted here could be fruitfully applied to a variety of other fields of law, inside and outside of IP.³²⁶ Patent law provides a promising example. Like copyright law, U.S. patent law is believed to be either non-moral or solely concerned about harm. A cursory analysis, however, suggests many patent disputes are shaped by moral

³²⁴ GREENE, *supra* note 302, at 83-89. Greene writes, “There are different ways of being fair, and we tend to favor, often unconsciously, the version of fairness that suits us best. Because biased fairness is a kind of fairness, it’s hard to see that it’s biased, especially in ourselves.” *Id.* at 351.

³²⁵ See Schultz, *supra* note 70, at 719-22 (suggesting how music companies and fans can better understand each other in reciprocal cooperative terms rather than as competitors).

³²⁶ See Bartholomew, *supra* note 43 (discussing the morality of trademark law).

foundations other than care/harm. Anxieties about patent “trolls,” otherwise known as non-practicing entities, seem to indicate that companies that accumulate patents for litigation without producing anything are reaping where they have not sown (fairness/cheating).³²⁷ Debates about the propriety of gene patents, which often refer to the legitimacy of “patenting life,” demonstrate concerns about purity and liberty.³²⁸ And discussions of the international reach of patent law and extraterritoriality likely raise the specter of impure products created by disloyal companies.³²⁹ Physical property law furnishes another area that intuitionism and MFT can illuminate. In contrast to IP, scholars more readily embrace the notion that tangible property law has moral overtones.³³⁰ Yet for all its merit, this work tends to focus on the role that morality should play in crafting the normative aims of real and chattel property and, as yet, lacks a rich and systematic descriptive account of how the ownership of land and personalty triggers our moral instincts.³³¹

These two examples are far from exhaustive. The affective revolution in cognitive science and social psychology is of relatively new vintage, and MFT is in its relative infancy. The implications of these fields for the study of law are very promising but have yet to be explored, and we intend that this Article represents only the first of a series that will further investigate how intuitionist social psychology and MFT can help us understand the moral instincts we have about the laws that govern so many aspects of our daily lives.

³²⁷ See generally, Gerard N. Magliocca, *Blackberries and Barnyards: Patent Trolls and the Perils of Innovations*, 82 NOTRE DAME L. REV. 1809 (2013).

³²⁸ See Lori B. Andrews, *Patenting Life*, 1 J. LIFE SCI. 38 (2007).

³²⁹ See Daniel R. Cahoy, *Patent Fences and Constitutional Fence Posts: Property Barriers to Pharmaceutical Importation*, 15 FORD. INTELL. PROP. MEDIA & ENT. L.J. 624 (2005).

³³⁰ E.g., Thomas Merrill & Henry Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007) (arguing that property and morality are mutually constitutive).

³³¹ Indeed, we have already begun empirical research on the moral intuitions that people exhibit when responding to unauthorized uses of copyright that are framed as “infringement” versus “theft” or “stealing.” We presented an early version of this work at the Chicago-Kent/USPTO Roundtable on Empirical Studies of IP in October 2013.