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A Research Framework on Intellectual Property and Morality

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I. Introduction

In what ways does intellectual property (IP) law intersect with the subject of morality? At first, this may seem like a juxtaposition of unrelated topics. To the extent we think about IP law as innovation policy, any notion of morality may appear to be in tension to the extent that moral judgments may cause us to disfavour or even impede the creation or circulation of certain innovations and ideas.

Even outside of the jurisprudential strand of moral philosophy, legal scholarship in general has long been interested in the role of morality.[1] An emblematic example is Cass Sunstein's work demonstrating how moral heuristics guide doctrinal approaches.[2] The relationship between morality and law has also been investigated by scholars within certain areas of law. For instance, some property law scholars have concluded that morality and property rights are undeniably interconnected and that one could not functionally exist without the other.[3]

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[1] *See* Peter Cane, *Morality, Law and Conflicting Reasons for Action*, 71 Cambridge L.J. 59, 73 (2012) (arguing that because morality plays a role in practical reasoning as a source of ultimate standards for assessing human conduct, law is subject to moral assessment, moral reasons trump legal reasons, and ultimately '[i]t does not follow … that law is irrelevant to moral reasoning'). *See also* ('Morality may be incorporated into law and lawyers may refer to moral considerations … but fundamentally the moral constraints on a lawyer's representation … are given by the law.').

[2] Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 Minn. L. Rev. 1556, 1558 (2004) ('suggest[ing] that moral heuristics play a pervasive role in moral, political, and legal judgements, and that they produce serious mistakes').

[3] *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 Wm. & Mary L. Rev. 1849, 1850–52 (2007) (arguing that a critical feature of property rights is the ability to impose 'duties of abstention on all other members of the relevant community' and that these must be viewed as moral rights and would not exist without them); Carol M. Rose, *The Moral Subject of Property*, 48 Wm. & Mary L. Rev. 1897, 1902–03 (2007) (arguing that morality is interconnected with property law such as in adverse possession, takings, and environmental policies like pollution trading); Emily Sherwin, *Three Reasons Why Even Good Property Rights Cause Moral Anxiety*, 48 Wm. & Mary L. Rev. 1927, 1933 (2007) (arguing that structurally, property rights have two attributes that cause problems for moral justification. First, property rights are rule-governed and are typically derived from legal rules or private agreements dependent on legal rules. Second, property rights operate prospectively and predate their application to particular disputes over resources.).

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Somewhat recently scholars of IP law have taken a renewed interest in questions of law and morality.[4] The scholarship that can be grouped into this category generally seeks to address to what extent, if any, the law in these regimes does or should reflect moral judgments. Scholars have investigated this question in all of the categories of IP including patent law, trademark law, and copyright law, and to a lesser extent, trade secret law and right of publicity law. This scholarship has highlighted and emphasized the various ways that IP law has invoked morality through the import of concepts such as good faith, ethics,[5] human rights, and community norms, but also illegality, and public harm.

We generally understand 'morality' as a code of conduct. Jeremy Bentham and John Stuart Mill regarded morality as the realm of right and wrong, but independent of law.[6] Even regarding law as distinct from morality, some believe that law should be evaluated on moral grounds. For instance, Ronald Dworkin contends that the interpretation of law must make use of morality.[7] Ethical relativists, however, contend that there is no universal morality, but only the morals accepted by a society or by an individual.[8] Thus, within moral philosophy there is a debate about morality in the normative sense versus morality in the descriptive sense and division of thought between moral realists and moral sceptics.

This chapter will survey the scholarship that has investigated the intersection of IP and morality. It will attempt to organize this scholarship according to the position it takes on the appropriateness of the juxtaposition, that is, are the authors moral realists or moral sceptics? Within this divide, the chapter will attempt to organize the work by the various approaches, themes, and questions that are common to these scholars.

[4] For a collection such work, *see* Intellectual Property and Ethics (Lionel Bentley & Spyros M. Maniatis eds., 1998).

[5] Although the words ethics and morality are often used interchangeably for articulating a code of right and wrong, in law they have more distinct meanings. Because an investigation of the role of ethics in IP law may widen the lens too far, this chapter will confine itself to morality.

[6] *See generally* Julia Driver, *The History of Utilitarianism*, Stan. Encyclopedia Phil. (Winter 2014), https://plato.stanford.edu/archives/win2014/entries/utilitarianism-history/ (noting that '[t]he Classical Utilitarians, Jeremy Bentham and John Stuart Mill, identified the good with pleasure, so, like Epicurus, were hedonists about value. They also held that we ought to maximize the good, that is, bring about "the greatest amount of good for the greatest number".').

[7] Nicos Stavropoulos, *Legal Interpretivism*, Stan. Encyclopedia Phil. (Summer 2014) https://plato.stanford.edu/archives/sum2014/entries/law-interpretivist/ (recognizing Dworkin as a thought leader in Interpretivism, wherein 'the justifying role of principles is fundamental: for any legal right or obligation, some moral principles ultimately explain how it is that institutional and other nonmoral considerations have roles as determinants of the right or obligation. In the order of explanation, morality comes first'.).

[8] Durkheim morality as 'a very great number of particular precepts'. *See* Émile Durkheim, On Morality and Society 267–68 (1975).

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II. Scholarship That Accepts Morality's Place in Intellectual Property Law

Many IP scholars who have done work in this space at least implicitly support morality's place in IP law. Some do so explicitly. These scholars argue that morality considerations are deservedly, historically, and firmly entrenched within IP law. In contrast with the positivist roots of their antagonists, some of these scholars draw on a natural law approach. In this legal tradition, law and morality are connected. Law cannot ignore morality, but must take it on. These scholars see morality as connected to the public policy of IP law and celebrate the law's moral commitments.

Human rights and human dignity are central to the contemporary conception of morality.[9] Therefore scholars whose work argues that IP law must be consistent with human rights norms can be grouped in this category.[10] Perhaps a subset of these scholars ascribe to the view that to be consistent with human rights norms, IP law should be ethical, principled, and moral.[11]

One strain of this position is that certain exclusions to protection are necessary because otherwise IP law would be in conflict with morality. These rules are not supported because they underpin morality, but because the law would otherwise be immoral without them. These scholars are in harmony with Thomas Aquinas's notion that proper human law must not conflict with the natural law, which is law with moral content.[12] Scholars who take this view focus their research on rules in which morality is used to challenge the natural law of IP.

A. Immorality Exclusions to Intellectual Property

Perhaps the clearest example of the intersection of morality and IP is the immorality exclusions in IP law. For example, art. 6*quinquies* of the Paris Convention for the Protection of Industrial Property expressly permits the denial of trademark protection for marks that are 'contrary to morality or public order'.[13] Although the Paris

[9] Mike Adcock & Deryck Beyleveld, *Morality in Intellectual Property Law: A Concept-Theoretic Framework,* 4 Intell. Prop. Rights 154 (2016).

[10] *See, e.g.*, Graeme W. Austin & Laurence R. Helfer, Human Rights and Intellectual Property: Mapping the Global Interface (2011).

[11] *See, e.g.*, Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U. C. Davis L. Rev. 971 (2007).

[12] Thomas Aquinas, On Law, Morality and Politics xiii–xxii, 11–83 (2d ed. 2010).

[13] *See* International Convention for the Protection of Industrial Property, art. 6*quinquies*, as modified at The Hague on 6 November 1925, 47 Stat. 1789, 1804–05, T.S. 834 and London on 2 June 1934, 53 Stat. 1748, 1776–78, T.S. 941 (The Paris Convention entered into force as to the United States on 30 May 1887). This provision has been in the Paris Convention since the original convention of 1883. The provision was then in para. 4 of art. 6. *See* G.H.C. Bodenhausen, Guide to the Application of the Paris Convention for the Protection of Industrial Property 96 (1969).

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Convention does not include a similar provision for patents, the TRIPS Agreement permits WTO Members to exclude from patentable subject matter immoral inventions. Under art. 27.2 of the TRIPS Agreement, Member States may, at their discretion, 'exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality'.[14] These are the starkest examples of the intersection of morality and IP.

At the outset, we may observe that these morality exclusions in IP treaties inhabit a middle ground on the question of the universality of morality. They could have absolutely prohibited the protection of immoral marks and patents in all Member States. Such a provision would evidence the view that morality is universal. Instead, these provisions merely permit Member States to exclude immoral marks and patents should they choose to. As a result, in some locations, such as Europe, morality exclusions appear firmly engrained in IP statutes, while in other places the exclusion is not a feature of local IP law. Moreover, even among states that deny registration on the basis of morality, the standard or its application may vary. The approach taken by the treaties seems to accept that moral standards vary across cultures. This approach is consistent with Émile Durkheim's ideas that morality is a phenomenon conditioned both socially and historically and relates to concrete circumstances.[15] As a result, law attains its authority only when it reflects the morality of a community.[16]

A growing body of fairly recent scholarship has focused on the morality exclusion in trademark law. The words 'immoral' or 'contrary to morality' still appear in trademark acts in many jurisdictions barring immoral marks from registration and sometimes broader protection.[17] Although such an exclusion has been a feature of statutory trademark law in the United States, for instance, since 1905,[18] a recent United States Supreme Court decision has struck down this provision as

[14] Art. 27(2) of the TRIPS Agreement states that '[WTO] Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment'. Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

[15] Émile Durkheim, Sociology and Philosophy 25 (1974).

[16] Roger Cotterrell, *Common Law Approaches to the Relationship between Law and Morality*, 3 Ethical Theory & Moral Prac. 9 (2000) ('Law must be understood as having the function of reflecting and expressing society's most prominent unifying moral norms').

[17] *See, e.g.*, 15 U.S.C. § 1052 (a) (prohibiting registration for any mark that 'consists of or comprises immoral … or scandalous matter.'); United Kingdom Trade Marks Act 1994, c. 26, § 3(3)(a) ('A trade mark shall not be registered if it is—(a) contrary to public policy or to accepted principles of morality'.). An absolute grounds for refusal of an EU Trade Mark is for marks 'which are contrary to public policy or to accepted principles of morality.' EMTR, art. 7, para. 1, § (f). In Canada, marks that consist of, or so nearly resemble as to be likely to be mistaken for, any scandalous, obscene or immoral word or device are prohibited. *See* § 9(1)(j) of the Trade Marks Act.

[18] Congress first implemented the bar to registering 'immoral' or 'scandalous' marks in 1905. Trademark Act of 1905, c. 592, § 5, 33 Stat. 724, 725 (1905).

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unconstitutionally interfering with the freedom of expression.[19] In part due to this litigation, this area of trademark law has recently been an area of interest to scholars.

Some scholars have investigated the history of these provisions excluding immoral marks.[20] Others have investigated contemporary decisions denying registration because the marks conveyed messages that governments deemed unacceptable.[21] Many have focused on how the policy deals with marks involving racial slurs.[22] Because the morality bar has run up against the First Amendment in the United States, many scholars have focused on how morality fares when pitted against free speech.[23] My own work argues that morality bars are worth defending on public policy grounds, but acknowledges that the First Amendment challenge has forced the government to articulate what that policy objective is, which it has not successfully done.[24] The opacity of the public policy behind the morality exclusion did not fare well against the clarity of the public policy behind the freedom of expression. Ned Snow argues that part of the push back against this exclusion stems from judges' discomfort with the idea of some universal morality, if only for the United States.[25] This uneasiness with the government making 'moral judgments' to determine trademark eligibility stems from the belief that not all people share the same morals.

A similar debate has raged in patent law. In some jurisdictions, patent law prohibits the registration of immoral inventions or the patenting of living material.[26]

[19] Iancu v. Brunetti, 139 S.Ct. 782 (2019). A corollary provision prohibiting registration of disparaging marks was previously ruled unconstitutional by the Court in 2017. *See also* Matal v. Tam, 137 S.Ct. 1744 (2017).

[20] *See, e.g.*, Colin Manning, *Moral Bars on Trade Mark Registration*, U.C. Cork L. Sch. (2017) (recounting the adoption of Paris art. 6*quinquies* in several European national laws.).

[21] *See, e.g.*, Enrico Bonadio, *Brands, Morality and Public Policy: Some Reflections on the Ban on Registration of Controversial Trademarks*, 19 Marq. Intell. Prop. L. Rev. 39 (2015) (analysing several decisions concerning refusal of registration on morality and public policy grounds in the UK and the EU).

[22] *Id. See also* Christine Haight Farley, *Stabilizing Morality in Trademark Law*, 63 Am. U. L. Rev. 1019 (2014) (arguing that § 2(a)'s morality bars are worth defending on public policy grounds); Christine Haight Farley, *Registering Offense: The Prohibition of Slurs as Trademarks*, *in* Diversity in Intellectual Property: Identities, Interests, and Intersections 105, 116–118 (Irene Calboli & Srividhya Ragavan eds., 2015).

[23] *See, e.g.*, Ned Snow, *Moral Judgments in Trademark Law*, 66 Am. U. L. Rev. 1093 (2017) (writing about the morality test applied to trademarks in the US and the freedom of speech issues implicated).

[24] Farley, *Stabilizing Morality in Trademark Law*, *supra* note 22; Farley, *Registering Offense: The Prohibition of Slurs as Trademarks*, *supra* note 22; Christine Haight Farley, *Public Policy Limitations on Trademark Subject Matter: A US Perspective*, *in* Cambridge Handbook on International and Comparative Trademark Law (Irene Calboli & Jane Ginsburg eds., forthcoming 2020) (manuscript on file with author); Christine Haight Farley and Robert L. Tsai, *Racial Slurs Shouldn't Be Trademarked: The Washington Football Team's Name Is an Obstacle to Interstate Commerce*, Slate (20 April 2015).

[25] Ned Snow, *Denying Trademark for Scandalous Speech*, 51 U.C. Davis L. Rev. 2331 (2018) (arguing that this discomfort in adding a morality component to trademark law is unjustified and that morality is a necessary bar to trademark registration.).

[26] For example, art. 2 of the Strasbourg Convention, art. 53(a) of the European Patent Convention of 1973 provides that: 'European patents shall not be granted in respect of ... inventions the publication or exploitation of which would be contrary to "ordre public" or morality, provided that the exploitation

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Scholars have been particularly interested in morality as it relates to patentable subject matter involving things that are found in nature or are natural phenomenon.[27] For instance, Margo Bagley has investigated the now-defunct moral utility doctrine in US patent law and what it sought to 'protect'.[28] She laments that the US patent office no longer considers the moral aspects of patents as the biotechnology industry develops technology around cloning and its application to genetic disorders.[29] Similarly, Joshua Sarnoff takes both a comparative and historical approach to demonstrate how patent subject-matter eligibility rules were closely tied to religion, especially in regard to living things and natural phenomena as these were 'created by a larger being'.[30] The inventor's rights, consistent with the Lockean

shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States.' Biotechnology Directive 1998 (98/44/EC). *See* Robin Nott, *The Proposed EC Directive on Biotechnological Inventions*, 16 EUR. INTELL. PROP. REV. 191 (1994) (providing background on the proposed Biotechnology Directive, which was intended to clarify and harmonize the laws of the EU as it pertained to the patentability of biotechnical inventions). In particular, art. 2.3—Public Policy and Morality of the proposed Directive provided specific examples of what should be unpatentable, including the 'processes for modifying the generic identity of the human body contrary to the dignity of man'. *Id.* at 192; *see also* Margret Llewelyn, *The Legal Protection of Biotechnical Inventions: An Alternative Approach*, 19 EUR. INTELL. PROP. REV. 115, 121–22 (1997) (discussing how the first version of the Biotechnology Patent Directive was rejected in 1995 and that the draft Directive simply restated the morality clause in art. 53(a) of the European Patent Convention (EPC) with a few alterations; Margret Llewelyn, *The Patentability of Biological Material: Continuing Contraction and Confusion*, 22 EUR. INTELL. PROP. REV. 191, 191 (2000) (discussing the proposed Anglo-American Agreement under the Clinton Administration between the UK and US directed at preventing patent protection for human genes); Amanda Warren-Jones, *Finding a 'Common Morality Codex' For Biotech: A Questions of Substance*, 39 INT'L REV. INDUST. PROP. & COPYRIGHT L. 638 (2009) (recounting the major inconsistencies apparent in the language of the 'core morality provisions' as it relates to patent law and the biotech industry within Europe).

[27] *See* Deryck Beyleveld & Roger Brownsword, MICE, MORALITY AND PATENTS: THE ONCO-MOUSE APPLICATION AND ARTICLE 53(A) OF THE EUROPEAN PATENT CONVENTION (1993); Stephen R. Crespi, *The Human Embryo and Patent Law: A Major Challenge Ahead?*, 28 EUR. INTELL. PROP. REV. 569, 569 (2006) (delving into the law of the EPC which, unlike the US, explicitly excludes certain types of matters due to public policy such as those which 'is contrary to ordre public or morality' and particularly exploring patent applications for embryonic stem cells); Graeme Laurie, *Patenting Stem Cells of Human Origin,* 26 EUR. INTELL. PROP. REV. 59 (2004) (discussing the European patent provisions to meet the ethical challenges posed by patenting embryonic stem cells).

[28] Margo A. Bagley, *Patent First, Ask Questions Later: Morality and Biotechnology in Patent Law*, 45 WM. & MARY L. REV. 469 (2003).

[29] *Id.* at 470 (stating that patent applicants and scientific inventors, not Congress or the representatives of the people, are 'deciding matters of high public policy through the contents of the applications they file with the USPTO', particularly when it comes to biotechnology). In Europe, Patent Boards' address morality but have difficulties deciding which evidence to take into account. *See, e.g.*, Amanda Warren-Jones, *Identifying European Moral Consensus: Why Are the Patent Courts Reticent to Accept Empirical Evidence in Resolving Biotechnological Cases?*, 28 EUR. INTELL. PROP. REV. 26–37 (2006) (discussing the difficulties European Patent Courts have when considering empirical evidence, such as public opinion polls and surveys, when gauging the public's stance on the 'abhorrence' standard in the patent morality criterion within EPO Guidelines); Amanda Warren-Jones, *Vital Parameters for Patent Morality: A Question of Form*, 2 J. INTELL. PROP. L. & PRAC. 832, 841–42 (2007) explaining that Patent Boards prefer to adopt decision-making 'on the basis of current practice', accepting scientific evidence, but rejecting empirical evidence 'tailor-made to the specific invention under analysis as being unfeasible'. Patent Boards also believe that opinion polls 'do not necessarily reflect . . . moral norms'. *Id.*

[30] JOSHUA D. SARNOFF, RELIGIOUS AND MORAL GROUNDS FOR PATENT ELIGIBLE SUBJECT MATTER EXCLUSIONS IN PATENTS ON LIFE (forthcoming 2020) (manuscript on file with author); Joshua D.

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theory of property, were limited to his or her labour and further constrained by the moral duty to freely share knowledge of science, nature, and ideas, as these are common property. Sarnoff suggests that the prior-art treatment of newly discovered science, nature, and ideas reflects long-standing and deeply held deontological and utilitarian moral commitments to protecting the public domain and to assuring its free availability and dissemination for the development and use by the public of their many applications.

In contrast to the international law on trademarks and patents, the Berne Convention does not include a provision for the exclusion from copyright protection on morality grounds. The analogy would be the prohibition of registering immoral works of authorship.[31] Justine Pila has made a case for adopting a morality exclusion in copyright law.[32] Citing as examples plays and films depicting the sexual exploitation of children and Goebbels diaries, she queries 'why the threat to morality and public policy that the production and dissemination of each these subject matter might be said ... to represent outweighs the expressive rights and interests of the individuals who produce and disseminate them, and of the public who are thereby given access to them'.[33]

Some scholars have done historical research on the intersection of copyright and obscenity in Anglo-American law whereby copyright protection was withheld from works deemed immoral or obscene.[34] If there is no copyright in obscenity, should there be copyright in pornography? This is a question Ann Bartow takes up as she attempts to find ways to use copyright law to reduce the risk of harm of pornography.[35] Bartow raises questions about the propriety of according pornography the full benefits of copyright law without taking into account the harms that pornography production can inflict on subordinated or coerced 'performers' and proposes excluding from copyright pornography in which a subject has been filmed or photographed unknowingly or the work is distributed against the subject's wishes.

The morality exclusions above concern the subject matter of IP, but another lens to view morality exclusion focuses on the reach of IP rights. Some scholars have considered the morality in IP enforcement. In patent law, examples of concern

Sarnoff, *Patent Eligible Inventions After Bilski: History and Theory*, 63 Hastings L.J. 53 (2011) (the inventor is 'no more than God's instrument in bringing His gifts to the community').

[31] For example, in the United States courts have held that immoral works are not protected by copyright. *See, e.g.*, Broder v. Zeno Mauvais Music Co., 88 F. 74 (C.C.N.D Cal. 1898); Martinetti v. Maguire, 16 F. Cas. 920 (C.C.D. Cal. 1867); Stockdale v. Onwhyn, 5 B. & C. 173.

[32] Justine Pila, *Copyright and Related Rights: Outlining a Case for European Morality/Public Policy Exclusion*, *in* Copyright Law: A Handbook of Contemporary Research 3 (Paul Torremans ed., 2d ed. 2017) ('it is not clear why the production and dissemination of subject matter that offends European or domestic standards of morality or public policy ought to be encouraged and rewarded with the grant of this particular species of intellectual property').

[33] *Id.* at 3–4.

[34] *See, e.g.*, David Saunders, *Copyright, Obscenity and Literary History*, 57 English Literary Hist. 431 (1990).

[35] Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 Vand. J. Ent. & Tech 101 (2008).

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include the enforcement of patent rights in generic drugs destined for developing countries[36] and the monopolization of surgical procedures.[37] Here scholars assert that the enforcement of certain patent rights is immoral because they limit the public's access to life-saving products and procedures.[38] In copyright law, an example of an analogous concern is the effect on the freedom of expression with certain enforcement of copyrights.[39]

B. Morality as the Basis for Intellectual Property Rights

Rather than considering morality as the basis of excluding IP rights, some scholars have considered morality as the basis for IP rights themselves.[40] James Grimmelmann's descriptive account of copyright law's 'default ethical vision' is an example of scholarship that ascribes to the idea that IP law is rooted in morality. For Grimmelmann, whether one is a low or high protectionist, it is impossible to discuss copyright policy without evincing an ethical vision.[41] Others have noted the explicit invocation of morality into copyright policy discussions such as the assessment of counterfeiting and copyright piracy as 'immoral'.[42] Others, like William Patry, counter that 'from its inception, copyright has never regarded unauthorized uses as inherently unethical or immoral'.[43] But to Grimmelmann's point, each side resorts to morality to support its view of how copyright law best serves its stakeholders.

The area of IP law that is perhaps the most overt about its basis in morality is unfair competition law. Due to the scarcity of legal doctrines in this area, historically

[36] *See* Monica Steffen Guise Rosina & Lea Shaver, *Why are Generic Drugs Being Held up in Transit?: Intellectual Property Rights, International Trade, and the Right to Health in Brazil and Beyond*, 40 J. L. Med. & Ethics 197 (2012) (arguing that developing countries, specifically Brazil, are facing challenges as a result of new patent rules restricting a country's ability to access generic medicines as a result of 'border enforcement' of IP).

[37] *See* Margo A. Bagley, *Patent First, Ask Questions Later: Morality and Biotechnology in Patent Law*, 45 Wm. & Mary L. Rev. 469, 495–96, 499 (2003) (commenting on the various issues with the 'patent first, ask questions later' method to determine patent eligibility and discussing 'the morality of allowing anyone to limit the practice of the patent's underlying subject matter' within medical procedures).

[38] *See, e.g.*, Patricia H. Werhane & Michael Gorman, Intellectual Property Rights, Moral Imagination, and Access to Life-Enhancing Drugs (2015).

[39] *See* Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. Intell. Prop. L. 319 (2003).

[40] *See, e.g.*, Peter Drahos, A Philosophy of Intellectual Property (1996) (emphasizing the humanist moral values central to instrumentalism); Steven Ang, The Moral Dimensions of Intellectual Property Rights (2013) (finding that morality has 'a persistent force' in IP law despite the powerful economic imperatives that shape it).

[41] James Grimmelmann, *The Ethical Visions of Copyright Law*, 77 Fordham L. Rev. 2005, 2007–10 (2009).

[42] Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. Rev. 731 (2003) (stating that '[i]nfringment is sometimes presented as immoral because it is like stealing; infringement is then per se immoral').

[43] William Patry, *Role, or Not, of Ethics and Morality in Copyright Law*, 37 Ohio N. U. L. Rev. 445, 456 (2011) (arguing that many uses that are unauthorized 'have an equal claim to being ethical or moral').

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at least, courts were guided by morality.[44] Robert Bone has observed that the 'moral argument for misappropriation-based liability assumes that it is morally wrong to free ride on goodwill'.[45] Beyond just unfair competition law, scholars have written about the moral foundations of trademark law.[46] For example, Mark Bartholomew reveals numerous instances in trademark law's history that invoke morality, such as deeming trademark counterfeiting a crime of moral turpitude meriting deportation, and argues that 'the same ethical approaches that shaped trademark law at its beginnings also determine decisions a century later, … these approaches form an unbroken, yet largely unstated, bedrock of the law'.[47] Likewise, taking a historical approach, Mark McKenna suggests that notions of commercial morality rather than consumer protection informed trademark law's normative framework.[48] Also recognizing the law's ties to morality, Jeremy Sheff argues for a new philosophical framework to replace the utilitarian search costs model that currently dominates trademark law, and suggests applying the Kantian 'contractarian' tradition in philosophy.[49]

Considerations of morality are similarly inescapable in moral rights law. Moral rights recognize that an author has a right over his or her creation that reaches beyond exploitative rights and are 'inalienable and fundamental rights' owed to the person.[50] The Berne Convention for the Protection of Literary and Artistic Works mandated the protection of moral rights in 1928 in art. 6*bis*.[51] Although all Member States are obligated to protect moral rights, many scholars have done comparative work to expose how the IP laws of some jurisdictions have a strong underlying moral tone while others resist the moral imperative, finding it to be in tension with utilitarian and property-based theories.[52] An interesting recent invocation of the moralistic approach can be found in the body of scholarship devoted

[44] For example, the Court of Appeals for the Second Circuit in Int'l News Serv. v. Assoc. Press., 245 F. 244, 247, 252 (2d Cir. 1917) was explicit about its reliance on morality to guide it where the law was not clear. It stated: 'If the facts are as we have now found them, no party asserts that the acts restrained by the injunction as issued can be justified, either in law or morals' and '[i]t is immoral, and that is usually unfair to someone'.

[45] Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 Va. L. Rev. 2099, 2105–16 (2004).

[46] Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. Rev. 547 (2006).

[47] Mark Bartholomew, *Trademark Morality*, 55 Wm. & Mary L. Rev. 85, 92 (2013).

[48] Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 Notre Dame L. Rev. 1839 (2007).

[49] Jeremy N. Sheff, *Marks, Morals, and Markets*, 65 Stan. L. Rev. 761 (2013).

[50] Elizabeth Schéré, *Where Is the Morality? Moral Rights in International Intellectual Property and Trade Law*, 41 Fordham Int'l L.J. 773, 775 (2018).

[51] Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, as revised at Paris on 24 July 1971 and amended in 1979 S. Treaty Doc. No. 99-27 (1986).

[52] *See, e.g.*, Schéré, *supra* note 50; Jean-Luc Piotraut, *An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 Cardozo Arts & Ent. 549 (2006); Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, Vand. L. Rev. *1 (1985); Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 Intell. Prop. L. Rev. 1 (1997) (using a comparative lens, argues that VARA does not go far enough to protect artists.).

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to copyright issues raised by tattoos where some scholars articulate a moral rights theory.[53]

Some scholars have revealed how the theory that authors have moral rights extends beyond that specific doctrine. For example, David Saunders' historical account of Anglo-American copyright and obscenity shows that the nineteenth-century concern for protecting the morals of the reader eventually gave way to a more continental view that recognized the author's personal right to control the products of his or her intellectual creation.[54] Morality was central both before and after, its place just shifted from the reader to the author. This shift evidenced an ethical judgement that the work is an integral part of the author's personality.

Some scholars have considered the right of publicity and the right to privacy as protecting human dignity and self-determination.[55] Roberta Rosenthal Kwall argues that the right of publicity harm can be a 'dignity harm' rather than an economic one, and requires protection because damage to the human spirit is 'deemed objectionable on moral grounds'.[56] Similarly, privacy protection has sometimes been grounded on the sense that a person is owed the sense of control over their image or the perception of that image.[57]

Finally, trade secret law can be said to be based on commercial morality. Some scholars have teased out how 'business ethics', which is generally acknowledged as animating this area of law is intertwined with morality. For instance, Kurt Saunders demonstrates how the misappropriation of trade secrets is deemed immoral under certain moral theories such as Kantian formalism.[58]

[53] *See, e.g.*, Thomas F. Cotter & Angela M. Mirabole, *Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art*, 10 UCLA Ent. L. Rev. 98, 112 (2003) (analysing unauthorized uses in the tattoo industry and how tattoo artists could potentially bring claims for violating their exclusive right to prepare derivative works or for a violation of their moral rights under VARA); Yolanda M. King, *The Enforcement Challenges for Tattoo Copyrights*, 22 J. Intell. Prop. L. 29, 55 (2014) (looking at a tattoo artist's exclusive right to display and stating that '[a] moral rights claim … is more complicated in light of the tattoo being incorporated into the very being of another individual') (quoting Roberta Rosenthal Kwall, The Soul of Creativity: Forging a Moral Rights Law for the United States 106 (2010); Aaron Perzanowski, *Tattoos & IP Norms*, 98 Minn. L. Rev. 511, 532 (2013) (explaining that tattooers 'uniformly acknowledge that control over that image, with some limited exceptions, shifts to the client' once an image is inked into a client's skin even though a client has some input into the design of the tattoo). Perzanowski argues that this 'deeply engrained' norm, client autonomy over their bodies, contradicts those 'copyright lawyer['s]' who would be tempted to consider the relationship between a tattooer and their client as a work made for hire or a joint authorship; however, 'disputes situated at the edge of the client autonomy norm may prove the most likely to spur formal enforcement efforts'). *Id.* at 534–35, 538.

[54] Saunders, *supra* note 34 at 431.

[55] Rex D. Glensy, *The Right to Dignity*, 43 Colum. Hum. Rts. L. Rev. 65, 116 (2011) (discussing the 'right to dignity' and further stating that 'the tort of misappropriation of the right of publicity grants a person the right of control over his image' and having control of your image is essential to 'one's identity', which is intertwined with a person's human dignity).

[56] Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. Rev. 1345, 1353 (2009).

[57] James H. Moor, *The Ethics of Privacy Protection*, 39 Library Trends 69 (1990); J. Angelo Corlett, *The Nature and Value of the Moral Right to Privacy*, 16 Pub. Aff. Q. 329 (2002); W.A. Parent, *Privacy, Morality, and the Law*, 12 Phil. & Pub. Aff. 269 (1983).

[58] Kurt M. Saunders, *The Law and Ethics of Trade Secrets: A Case Study*, 42 Cal. W. L. Rev. 209 (2006).

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III. Scholarship Disputing Morality's Place in Intellectual Property

Many scholars reach the opposite conclusion about morality's place in IP law. These scholars, in one way or another, question whether the IP system is the appropriate arena for the exploration of morality. Many argue that morality, and even wider public policy concerns, should play no part in the question of the grant of IP rights.

These scholars either explicitly or implicitly draw on the legal positivism theories famously expounded by Jeremy Bentham[59] and H.L.A. Hart,[60] which assert that law and morality should remain separate.[61] Legal positivists view invocations of morality as simply a vehicle for judges to justify an outcome; they do not think that law has any underlying morals except when attached by judges interpreting it with a moral lens.[62] Like legal positivists in other areas of the law, some scholars want to keep morality separate from IP law.

One strand of the resistance to morality is the viewpoint that morality simply has no relationship with IP. For example, some argue that normative concerns outside of economic efficiency have no place in current patent policy, which is not meant to pursue such goals. Under this view, certain doctrines are suspect, such as patent misuse. Supporters of the doctrine maintain that patent overreaches create more harm to society than benefit. Some scholars see this view as moral disapproval of the intensely self-interested competitive behaviour legitimately fostered by patent law, and argue that attaching 'moral approbation' to patent owners' behaviour is irreconcilable with the current economic efficiency paradigm.[63]

Relatedly, some hold the view that to the extent that moral concerns relate to important public policy, they are better addressed outside IP law. For instance, some scholarship reveals the mismatch between morality exclusions and the public policy concerns that may underlie them.[64] In many instances, such laws will not placate the animating concern. For instance, the morality exclusion in trademark

[59] Jeremy Bentham, The Principles of Morals and Legislation (1907).

[60] H.L.A. Hart, The Concept of Law (1994) (according to Hart, the law is composed of two things: duty imposing rules and power-conferring rules, i.e. rules about duty imposing rules).

[61] *See* Roger Cotterrell, *Common Law Approaches to the Relationship between Law and Morality*, 3 Ethical Theory & Moral Prac. 9 (2000) ('While classical common law treated a community and its morality as the cultural foundation of law, legal positivism's analytical separation of law and morals, allied with liberal approaches to legal regulation, have made the relationship of legal and moral principles more complex and contested.').

[62] *See generally,* William C. Starr, *Law and Morality in H.L.A. Hart's Legal Philosophy*, 67 Marq. L. Rev. 673 (1984).

[63] *See* Vincent Chiappetta, *Living with Patents: Insights from Patent Misuse*, 15 Marq. Intell. Prop. L. Rev. 1, 67 (2011); *see also* Manuela Cabal Carmona, *Dude, Where's My Patent?: Illegality, Morality, and the Patentability of Marijuana*, 51 Val. U. L. Rev. 651, 653 (2017) (arguing that illegality should not be considered when determining patentable utility for marijuana-related inventions in part due to blurred line on what is 'legally moral' but federally illegal, and should instead depend on state legality).

[64] *See, e.g.*, Bonadio, *supra* note 21, at 52 ('The refusal of registration, the argument goes, does not prohibit use of the immoral sign by the applicant and would therefore be useless.').

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law is usually directed only at registration and not the use of the mark.[65] As a result, the law offers no prohibition on the adoption or use of immoral marks in public.[66] Likewise in patent and copyright law, the exclusion only serves to deny inventors and authors the ability to enjoin third party use or distribution of the immoral matter.[67] Ironically, in all cases of moral exclusion the grant of the IP right may better serve to limit the circulation of immoral matter than the exclusion would because the exclusion may serve to free up the use and circulation of immoral matter. Accordingly, some scholars conclude that moral concerns are more appropriately addressed elsewhere such as in consumer purchasing decisions, industry standards, professional ethics, organization's policies, or under other regulatory hurdles.

At root in much of this scholarship is the idea that there is a dichotomy between law and morality. Under this view, law is rational and morality is not. For example, when discussing the conflict over genetic patents, one author posited that patent law is 'objective, technical, and legal, in contrast to ethics, which are malleable, subjective, and emotive'.[68] Thus, law and morality are conceptually distinct such that morality is simply not intelligible in a legal system.[69] In so characterizing morality as law's opposite, the deep suspicion of it is evident. Indeed, opening the door to morality is seen as dangerous.

One reason the invocation of morality into IP law is seen as dangerous is because it may mask other, unsuitable intentions. Some scholars express the concern that morality standards merely invite judges to apply their personal moral intuitions. This in turn introduces inherent subjectivity.[70] For instance, when considering an obscenity bar to copyright protection, some have questioned what implications application of the US Supreme Court's *Miller v. California*[71] test would have on creativity.[72] Would the inherent aesthetic subjectivity of a

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[65] INTELLECTUAL PROPERTY RIGHTS: CRITICAL CONCEPTS IN LAW 117 (David Vaver ed., 2006) (proposing introduction of a 'non-mark', using existing legal means to protect public interest by regulating the use of offensive words and names through registration).

[66] *See* Iancu v. Brunetti, 139 S.Ct. 2294, 2297 (2019) (noting that US law may even grant common law protection for such marks).

[67] *See, e.g.*, Jeremy Phillips, *Copyright in Obscene Works: Some British and American Problems*, 6 ANGLO-AM. L. REV. 138, 139 (1977)('The effect of [denying copyright protection] is that all such works fall instantly into the public domain and may be sold or copied with impunity.'); *see also* Cynthia M. Ho, *Splicing Morality and Patent Law: Issues Arising from Mixing Mice and Men*, 2 WASH. U. J. L. & POL'Y 247, 247–48 (2000) (citing the example of an application for a patent for embryos containing both human and non-human cells for the express purpose of preventing others from creating what the applicants considered to be immoral).

[68] Julia Black, *Regulation as Facilitation: Negotiating the Genetic Revolution*, 61 MODERN L. REV. 621, 649 (1998).

[69] Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005) (discussing the discomfort in making moral determinations even when the law permits it).

[70] *See* Megan M. Carpenter & Kathryn T. Murphy, *Calling Bulls**t on the Lanham Act: The 2(a) Bar for Immoral, Scandalous, and Disparaging Marks*, 49 U. LOUISVILLE L. REV. 465, 472 (2011) (arguing that the morality bar introduces 'vague' and 'highly subjective' guidelines).

[71] Miller v. California, 413 U.S. 15 (1973).

[72] *See* Morris D. Forkosch, *Obscenity, Copyright, and the Arts*, 10 NEW ENG. L. REV. 1 (1974).

test that asks if a work has 'serious literary, artistic' value interfere with artistic expression?[73]

US Supreme Court Justice Oliver Wendell Holmes Jr.'s opinion in *Bleistein v. Donaldson Lithographing Co.*[74] is often quoted for the proposition that in copyright it would be 'a dangerous undertaking' for courts to substitute their own aesthetic judgments for legal standards.[75] What we often forget, however, is that one of the copyright standards applied by the district court in that case, was the morality bar.[76] Counsel for the defendant made it plain: 'The specific objection to this one, the Ballet, is that it is an immoral picture', and the trial court agreed.[77] Such was the moratorium on copyright's protection of morality. Justice Holmes's suggestion of 'danger' thus wraps itself around both aesthetic and moral judgments. *Bleistein* therefore stands for the proposition that due to the risk of legal repression of artistic expression, copyright judgments should be free of any aesthetic and moral judgments.

Another aspect of morality in IP law that troubles some scholars is the close connection between religion and morality. Some work here has pointed out that countries that have banned certain immoral matter from IP protection have been very heavily Christian-centred.[78] Religious predilections are thus another aspect of a judge's subjectivity that morality introduces into the law.

[73] Miller, 413 U.S. 15 at 37 (affirming that the Roth holding that obscene material is not protected by the First Amendment and holding that: (1) such material can be regulated by States, subject to specific safeguards without a showing that material is 'utterly without redeeming social value'; and (2) obscenity is to be determined by applying 'contemporary community standards', not 'national standards'.).

[74] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).

[75] *Id.* at 251–52 ('It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.'). This quote reflects Holmes's view that law should reflect changing social norms rather than embodying absolute moral principles. Holmes was a moral relativist.

[76] Bleistein v. Donaldson Lithographing Co., 98 F. 608, 609 (C.C.D. Ky. 1899): '[T]he prime question is whether the things copyrighted here are pictorial illustrations connected with the fine arts, or are such as are intended to be perfected as works of the fine arts.'

[77] *Id.* at 612–13: '[T]he things copyrighted in this case were by no means such as either the Constitution or the legislation of Congress intended to protect by the privilege of copyright. The court cannot bring its mind to yield to the conclusion that such tawdry pictures as these were ever meant to be given the enormous protection . . . [of copyright].'

[78] *See, e.g.*, Cheryl Greig, Public Order and Morality as Grounds of Refusal, European Concept and Comparative Approach (2011–2012) (unpublished LL.M dissertation, University of Glamorgan). In contrast, some scholars have celebrated the religious underpinnings of the morality strain in IP law. *See, e.g.*, Roberta Rosenthal Kwall, *Reinvention with Authenticity: A New Journal on a Familiar Road*, 16 Rutgers J. L. & Relig. 308 (2015) (using 'Jewish Law' to reveal how religion ties in with IP and creativity).

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Perhaps less dangerous, but also posing a difficulty of using morality as a legal standard, is the fact that morality is not static. The ever-changing standards of morality, it is argued, are in natural tension with the articulation of an applicable legal standard. For instance, a typical framework for deeming matter immoral is to determine whether the matter is contrary to 'accepted principles of morality'.[79] This standard necessarily entails questions of context. For example, in some countries, for a trademark to be deemed immoral, it should exhibit a probability that it would cause a significant degree of 'disgrace, shock or outrage' when used in its intended context.[80] The fluidity of moral acceptability acknowledged by the law raises alarms for some scholars.

Not only does morality vary over time, but it also varies by geography. Although IP is regulated territorially, it is a creature of the globalized world and therefore also responds to internationalized minimum standards. While treaties may permit state discretion with regard to application of community moral standards, it means that these IP laws may become a trade barrier. Some scholars have taken a comparative law approach and concluded that a more universal standard would therefore be preferable.[81]

Some scholars express a concern that moral considerations would render IP law uncertain.[82] This view also derives from the dichotomous view of law and morality. According to this view, morality is inherently subjective and this leads to uncertainty. Most of the scholarship on the morality exclusion in trademark law is opposed to the policy in large part due to evidence of the law's inconsistent treatment of immoral marks.[83] As a result, much of this work is devoted to gathering evidence of this disparate treatment.[84] Some scholars argue that legal

[79] *See, e.g.*, Regulation 2017/1001, of the European Parliament and of the Council of 14 June 2017 on the European Union Trade Mark Regulation, art. 7(f), 2017 O.J. (L 154) (enumerating trademarks which are contrary to public policy or to accepted principles of morality among those which shall not be registered and subject to absolute refusal).

[80] *See Australia Trade Marks Act 1995* (Cth) s 42(a) (prohibiting 'scandalous' marks from registration). *See also* Cosmetic, Toiletry and Fragrance Assn Foundation v. Fanni Barns Pty Ltd. [2003] 57 IPR 594 (finding that trademarks are rarely refused because they are 'scandalous' and holding that rejection requires something more than giving offense).

[81] Greig, *supra* note 75 (surveying laws that include morality as a ground of trademark refusal and proposing that the international community address trademark morality issues in a uniform manner).

[82] *See, e.g.*, Anne Gilson LaLonde & Jerome Gilson, *Trademarks Laid Bare: Marks That May Be Scandalous or Immoral*, 101 Trademark Rep. 1476, 1477 (2011).

[83] *Id.* at 1476 (arguing that section 2(a)'s purpose is incompatible with the overall trademark protection scheme, which aims to protect consumers from deception and unfair trade practices); Carpenter & Murphy, *supra* note 70, at 468, 472 (recognizing that the content-based approach for determining what is scandalous or disparaging varies in each case and is highly subjective); *see also* Michelle B. Lee, *Section 2(a) of the Lanham Act as a Restriction on Sports Team Names: Has Political Correctness Gone Too Far?*, 4 Sports L. J. 65, 66 (1997) (maintaining that section 2(a)'s prohibition is a 'content-based regulation, which uses vague language, and is essentially unrelated' to the Trademark Act's purpose). *Cf.* Andrew R. Smith, *Monsters at the Patent Office: The Inconsistent Conclusions of Moral Utility and the Controversy of Human Cloning*, 53 DePaul L. Rev. 159 (2003) (providing examples of machines that were considered un-patentable because they were immoral, including gambling machines).

[84] *See, e.g.*, LaLonde & Gilson, *supra* note 82; Megan M. Carpenter & Mary Garner, *NSFW: An Empirical Study of Scandalous Trademarks*, 33 Cardozo Arts & Ent. L.J. 321, 332 (2015); Barton Beebe

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decision-makers lack competence to apply moral standards. This argument is most frequently made in the context of patents, but is not exclusive to this area. For instance, it is argued that the patent office lacks the ability to carry out moral assessments.[85] Because patent office examiners are 'not sufficiently trained in philosophy or jurisprudence to tackle moral issues surrounding patent law',[86] application of moral standards would therefore cause them to act outside of their proper function.

Perhaps due to the slipperiness of morality, it is sometimes argued that morality exclusions will not be granted narrowly enough and will therefore interfere in IP policy. Again, this argument is most often made in the context of patent exclusions.[87] There it is feared that a moral bar will be given too wide a scope, resulting in the exclusion of patents in important research. For example, the mere use of human embryos could lead an examiner to reject the patent.[88]

IV. Conclusion

The scholarship described above is representative of the scholarly work to date that considers the ways in which IP and morality intersect. These scholars disagree about whether morality has a place in IP law. Some scholars look at IP through the lens of morality; some see only a disconnect between IP law and morality. For some, morality serves as a basis for IP rights, while others find law and morality to be so conceptually distinct as to be irreconcilable. Some see a danger in IP laws being in conflict with morality, while others view the introduction of morality as a danger.

Whether one views morality as that which IP law should embody or as an interference, all of this disagreement should suggest to future researchers a robust and

& Jeanne C. Fromer, *Immoral or Scandalous Marks: An Empirical Analysis*, 8 N.Y.U. J. Intell. Prop. & Ent. L. 169 (2019).

[85] Taiwo A. Oriola, *Ethical and Legal Issues in Singapore Biomedical Research*, 11 Pac. Rim L. & Pol'y J. 497, 512 (quoting the European Patent Office Board of Appeals finding in Case T-0356/93, Plant Genetic Systems N.V. v. Greenpeace Ltd. (1995) that it would be 'difficult to see how examiners could ever be in the position to take a stand on such [ethical] questions [as those related to challenging biotechnology inventions on environmental grounds in the absence of conclusive scientific evidence]').

[86] Rebecca Ford, *The Morality of Biotech Patents: Differing Legal Obligations in Europe?*, 19 Eur. Intell. Prop. Rev. 315, 317 (1997). *But see* Lionel Bently, *Sowing Seeds of Doubt on Onco Mouse: Morality and Patentability*, 5 King's C. L. J. 188, 190–91 ('[I]t is arguable that examiners are exactly the right people to make these decisions.').

[87] Directive 98/44 of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions, art. 6(2)(c), 1998 O.J. (L 213) (EC).

[88] Thomas Gummer, *Rethinking Morality: Human Embryonic Stem Cell Innovation, to Patent or Not to Patent? (Part 2)*, Student J. L. (January 2012), https://sites.google.com/site/349924e64e68f035/issue-3/stem-cells-2, § 5.

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provocative area of scholarship. The complexity of IP scholars' relationship to morality is matched only by the complexity of morality itself as a concern of law. Morality has always had a certain magnetism for legal scholars. Over the past two decades, IP scholars have taken a greater interest in this area, but there is still plenty of room for others to contribute to this investigation.

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