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Beyond Bits, Memes and Utility Machines: A Theology of Intellectual Property as Social Relations

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I.   Introduction

Intellectual property is about human persons, human cultures, and human ideas. Persons, cultures, and ideas are more than epiphenomena of matter. Persons are more than utility maximizing machines; cultures are more than the sum of individual human beings or ideas, and ideas are more than discrete bits of unrelated data. Any theory of intellectual property that reduces human persons, human ideas, and human cultures to bits, memes, and utility machines will prove inadequate.

This is a problem because prevailing economic and critical theories of intellectual property are reductionistic in exactly this way. Nothing but preferences and power remain. Such theories lack any meaningful ontology either of persons or of information. We need a better theory with a richer ontology. Intellectual property needs a metaphysic of the relation between human persons, cultures, and ideas.

Some intellectual property scholars recognize the limits of existing theories and argue that a "property as social relations" approach could broaden our understanding of intellectual property.[1] A social relations perspective suggests that property rights emerge out of, and help construct, social relationships. Social relations theorists have suggested various ways in which traditional property rights can be viewed through this social lens.[2]

1. Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257, 315–16 (2006).

2. *See id.* at 315–19.

A social relations approach might help overcome the individualism that undermines the normative force of economic and critical theories.

Madhavi Sunder, for example, calls much of the existing intellectual property theory "technomics"—a "mash up" of technology and economics that merely tinkers with economic incentives for creative output.[3] Instead of this narrow vision, Sunder argues that intellectual property rights "structure social relationships and enable, or disable, human flourishing"—a new vision Sunder dubs "IP3."[4] Sunder identifies some recent initiatives, such as the proposed Access to Knowledge Treaty and the treatment of compulsory licenses under the Doha Round of the TRIPS Agreement, as examples of communitarian, social relations thinking concerning intellectual property.

But it is unclear, at best, why or how property as social relations theory could be applied to intellectual property. Is it little more than a screen for a progressive political agenda? Or is it truly something theoretically weighty?

Maybe these questions could be addressed by delving more deeply into "social relations" as a general sociological theory of culture and ethics. There exists, in fact, an important contemporary school of sociological thought called "network structuralism," in which the primary unit of society is the social network rather than the individual.[5] Network structuralism is remarkably congruous with property as social relations theory in its emphasis on the social network over the individual. One of the leading network structuralists, Donald Black, is a well-known legal theorist.[6] Network structuralism might offer the theoretical support that social relations theories of property seem so desperately to need.

Unfortunately, network structuralism as a theoretical framework is even more obtuse and politicized than property as social relations theory. At the conclusion of one of his more infamous essays on legal theory, for example, Donald Black declared "I am God."[7] This hardly seems a promising basis upon which to structure intellectual property law, or anything else.

More promisingly, some property scholars are now seeking to weave property as social relations theory into the fabric of teleological ethics—particularly virtue ethics.[8] One of the most notable of these efforts is captured in the work of Gregory Alexander and Eduardo Peñalver, who attempt to apply communitarian ethics to property law.[9] But even these important efforts attempt to ignore the elephant in the room: the basic metaphysical questions, such as the meaning of "persons" and the *telos* of cultures, that

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3. *See id.* at 315–19.

4. *Id.* at 285.

5. *See infra* Section III.

6. *See, e.g.*, Donald Black, *The Epistemology of Pure Sociology*, 20 LAW & SOC. INQUIRY 829 (1995).

7. *Id.* at 870.

8. *See, e.g.*, Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQ. L. 127, 136 (2009).

9. *See id.* at 134–45.

inevitably must drive any teleological ethic. Alexander and Peñalver state that they "do not intend to insert [themselves] into philosophical debates about the metaphysical foundations of human flourishing or how we come to know what it means to flourish in a distinctively human way."[10] They suggest, optimistically, that a "broadly appealing" concept of human flourishing can be constructed without engaging in "tangled philosophical controversies."[11]

This will not do. Pragmatism and virtue ethics cannot share the same bed. Aristotle (to whom Alexander and Peñalver appeal) would not recognize the concept of "virtue" apart from a rich realist metaphysical framework. Things have proper ends only if they have "natures" tied to purposes related to their flourishing. Without a sense of what something *is*, of why it exists, there can be no account of virtues and practices that ought to inform its use and disposition. A "property as social relations" ethic that conceives of human flourishing as a social construction all the way down ends up as a tautology. As Etienne Gilson said, "Metaphysics always buries its undertakers."[12]

Thus the crisis in intellectual property theory—and in property theory and indeed in legal theory more broadly—is a metaphysical crisis. Intellectual property theory in particular requires a thick ontology of human beings, human cultures, and human ideas. Only as we begin to develop such thick accounts of life and information can we begin to establish frameworks for mediating aporias that arise from the apparently competing goals of access and innovation. Contrary to the claims of many would-be social relations theorists of intellectual property, culture cannot be reduced to disaggregated units or memes that can be reassembled any which way. "Rip, mix, and burn," without more, is a recipe for little more than ashes.[13]

Part II of this Essay discusses property as social relations theory and suggests that, despite a helpful move towards virtue ethics, this approach remains thin and ungrounded. Part III describes and critiques the related sociological theory of "network structuralism." Part IV suggests a move towards a "phenomenology of property" and offers some metaphysical resources from which a more robust social theory of intellectual property could be gleaned. Part V seeks to connect the phenomenology of property to Christian theology. It argues that Christian theology's belief in life as a gift, and its resulting ontology of love, offers the strongest—indeed, ultimately, the richest—metaphysical basis for a theory of property and intellectual property as social relations. Part VI ties these themes together in

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10. *Id.* at 136.

11. *Id.*

12. Etienne Gilson, The Unity of Philosophical Experience 246 (Charles Scribner's Sons 1937).

13. *Cf.* Sunder, *supra* note 1.

theory of persons, cultures, and ideas that could supply richer ground for intellectual property theory. Part VII concludes.

II.   THE PROBLEM WITH PROPERTY AS SOCIAL RELATIONS[14]

In modern Western jurisprudence, property tends to occupy one of three spaces: either property represents an original state of nature developed by human effort; property represents an extension of the autonomous individual self; or property represents a fictive social construction. The first of these poles finds expression in Locke's labor theory. The second finds expression in Hegelian personalism. The third finds expression in legal realism and in most contemporary discussions of "cyberspace."

For Locke, the "state of nature" was creation, as given to humanity by God, prior to any cultivation or improvement by human beings.[15] Locke's vision of the state of nature drew heavily on the Jewish-Christian Biblical narratives of creation and Eden, in which human beings are placed in the primal Garden and instructed to cultivate and subdue it.[16] When a person exercises these functions of cultivation and dominion, Locke argued, that person possesses a natural right to the fruits of such labor.[17] Moreover, since human beings no longer inhabit Eden, the reward of a property right in labor added to nature is necessary to incentivize people to engage in productive work.[18]

For Hegel, the center of reality was not the creation of a transcendent Deity, but rather was the development of the self towards an immanent Ideal.[19] When a person creates something new, Hegel argued, that person extends his or her being into the fabric of reality—into the Ideal. Rights in property therefore were an aspect of the integrity of the person.[20]

Both Locke and Hegel embedded their notions of property within metaphysical frameworks, albeit frameworks already twisted and weakened by modernity. Postmodern, social constructivist perspectives elide metaphysics and suggest that cultural artifacts such as "property" are constructed "all the way down" by human choices that are constrained neither by "creation" nor by "being."[21] This narrative is particularly powerful for many intellectual

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14. Portions of this section are drawn from my paper *Social Network Analysis of Trade Secrets and Patents As Social Relations*, 41 AIPLA Q.J. 355 (2013).

15. *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296–300 (1988).

16. *Id.*

17. *Id.*

18. *Id.*; *see generally* JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE'S POLITICAL THOUGHT 151–87 (2002) (discussing Lockean theory of possession and equality).

19. Hughes, *supra* note 15, at 330–37.

20. *Id.*

21. *See, e.g.*, ANDRÉ KUKLA, SOCIAL CONSTRUCTIVISM AND THE PHILOSOPHY OF SCIENCE 4–6 (2000) (discussing metaphysical, epistemological, and semantic constructivism).

property scholars who press for greater openness and access to cultural goods. The possession of cultural goods is the means of control over the power to make the world. Property is power, and power is politics.[22]

Each of these common spaces of property theory offers some helpful truths. But each falls short because none addresses more than a fraction of the human experience of "property." There is more to it than just nature, being, or power; in fact, all three are important, and together they produce something greater than the sum of their parts.

Here, the social relations approach to property steps in and asserts that property rights represent a web of mutually dependent relationships—"[p]roperty rights serve human values."[23] One of the fathers of property as social relations, Joseph Singer, argues that the core of property as social relations is the reliance interest.[24] Singer describes various aspects of property law in which the right to control property is circumscribed by another person's reliance on access—including adverse possession, easements, public trust doctrine, and linkage requirements.[25] Singer also highlights circumstances under which a reliance interest can limit a property owner's freedom of contract—including warranties of habitability and eviction statutes, limitations on mortgage lenders, and good faith requirements for termination.[26]

Property as social relations theory recognizes that property rights do not function solely as boundaries between different individuals or between individuals and the state. Indeed, the notion of the "individual" itself is very much in play. Many of the first generation of property as social relations theorists, such as Duncan Kennedy, worked within a critical legal studies

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22. *See, e.g.*, Yochai Benkler, The Wealth of Networks: How Social Production Transforms Markets and Freedom (2007); Madhavi Sunder, From Goods to a Good Life: Intellectual Property and Global Justice (2012).

23. Joseph William Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 611, 663 (1988) (quoting State v. Shack, 277 A.2d 369, 372 (N.J. 1971)). Singer notes that:

> the social relations approach directs our attention in the following ways: (1) It encourages us to see people as situated in various relationships with others that will continue over time; (2) It describes social relations as comprising a spectrum from short-lived relations among strangers to continuing relations in the market to intimate relations in the family; (3) It comprehends rights as emerging out of understandings that develop over the course of relationships rather than as being fully articulated at clear decision points; (4) It encourages us to ask various questions about the relationship between the parties.

Id. at 655.

24. *Id.* at 663–65.

25. *Id.* at 663–78. As Singer concludes, "[t]he right of property owners to exclude others from their property is not absolute. Non-owners acquire rights of access or control from owners in a variety of circumstances." *Id.* at 678.

26. *Id.* at 679–92. Singer concludes this section by noting that "[i]n a variety of instances, compulsory contract terms are implied into agreements that force the parties to share property rights in ways that protect the ability of the more vulnerable party to rely either on continuation of the relationship itself or upon continued access to property putatively owned by the more powerful party." *Id.* at 692.

framework.[27] That framework seeks to dissolve power relationships in a way that appears to eliminate any human subject as the potential beneficiary of any sort of property interest.[28] Others, such as Jennifer Nedelsky, more explicitly challenge the ontological basis of personhood.[29]

Drawing on sources such as the process philosophy of Alfred North Whitehead and the pagan-feminist writer "Starhawk," Nedelsky suggests that "we need new ways of conceiving of the tension between the individual and the collective for which boundary is not an apt metaphor."[30] A true notion of autonomy, Nedelsky claims, "must begin with the recognition that relationship, not separation makes autonomy possible."[31]

For Nedelsky, the centrality of private property rights to the structure of the U.S. Constitution reflected a fixation on personal boundaries that was ripe for dissolution.[32] "Property (at least as the Framers understood it)," she argues, "must distort because it makes inequality rather than liberty, or individual autonomy, the central problem of government."[33] Indeed, Nedelsky thinks that "[t]he entire vision of constitutionalism – the tension between democracy and individual rights, the distinction and hierarchy between civil and political rights, the notion of rights as boundaries – rests on a flawed conception of individual autonomy, a conception captured, amplified, and entrenched by its association with property."[34]

Property, for Nedelsky, no longer "has a single, fixed meaning," but instead, "[t]he concept of property reflects collective choices about what sorts of goods should be given the status of secure entitlement – and those choices change."[35] However, Nedelsky offers no theory of how social relations, autonomy, and property should relate. Indeed, she concludes that the subject is "irreducibly mysterious."[36] Like Kennedy, her solutions devolve to power and politics: "Not only will the task of law cease to be drawing boundaries of rights between the individual and the collective, but the boundary between law and politics will blur."[37]

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27. *See* Steven R. Munzer, *Property as Social Relations*, *in* New Essays in the Legal and Political Theory of Property 38–44 (Stephen R. Munzer ed., 2001). As Munzer notes, Kennedy's project is difficult to define because of Kennedy's intent in drawing on postmodern theorists such as Michael Foucault is unclear. *Id.* at 39.

28. *See id.* at 38–44.

29. *See* Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, 30 Representations 162 (1990); *see also* Munzer, *supra* note 27, at 56–58.

30. Nedelsky, *supra* note 29, at 182.

31. Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism 273 (1990).

32. *See* Nedelsky, *supra* note 29, at 164–67.

33. *Id.* at 165.

34. Nedelsky, *supra* note 31, at 272.

35. *Id.* at 269.

36. Nedelsky, *supra* note 29, at 182; s*ee* Munzer, *supra* note 27, at 56–58 (critiquing Nedelsky's conclusions).

37. Nedelsky, *supra* note 31, at 274.

This drive towards the bottom line of politics exposes a glaring problem with the property as social relations approach: it does not seem to make any meaningful predictions about ownership interests. It offers no stable principles under which transactions could be executed or disputes adjudicated. As Steven Munzer has noted, once the conceptual move is made towards viewing property as social relations, "it is unclear whether [existing] legal relations . . . become social relations for purposes of defining property, and whether all or only some social relations are, or help to constitute, property."[38] This tends to devolve into a play for political control without a defense of the underlying political commitments that motivate the move.[39]

Much of this ambiguity, as Munzer also has noted, arises because property as social relations theory typically offers, at best, a muddy conception of the human subject.[40] An account of human will and autonomy is essential to any property theory because all property theories must explain how, when, and why personal interests in property holdings can arise; how, when, and why different sets of relations among persons create property interests; and how, when, and why personal interests in property holdings, or the interests of particular social groups, must give way to other interests.[41] If personhood is "irreducibly mysterious" as Nedelsky suggests, then property theory is in trouble.

A new generation of property as social relations scholarship seeks to provide a more stable foundation for a socially-oriented alternative to the dominant paradigms. For example, Joseph Singer, together with Gregory Alexander, Eduardo Peñalver, and Laura Underkuffler, recently issued "A Statement of Progressive Property" in conjunction with a symposium at Cornell Law School.[42] The Statement asserts that property "implicates plural and incommensurable values," including "life and human flourishing, the protection of physical security, the ability to acquire knowledge and make choices, and the freedom to live one's life on one's own terms," as well as "wealth, happiness, and other aspects of individual and social well-being."[43] The resolution of conflicting claims over such values, the authors assert, "cannot be adequately understood or analyzed through a single met-

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38. Munzer, *supra* note 27, at 45. Munzer notes that Joseph Singer in particular, "does not explain the metes and bounds of the social-relations approach." *Id.* at 63.

39. *Cf. id.* at 75 (making the argument that there is a defense, however weak, of the underlying political commitments).

40. *Id.* at 52–56.

41. *See id.* at 73–74.

42. Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 Cornell L. Rev. 743 (2009).

43. *Id.* at 743.

ric."[44] Nevertheless, they suggest that "rational choice" about competing claims "remains possible through reasoned deliberation."[45]

In a series of individual papers, the authors of the Statement set out their ideas about the grounds for such reasoned deliberation. Professor Alexander promotes what he calls a "social-obligation norm" as the guiding principle.[46] He connects this norm to the "capabilities" approach to ethics championed by Amartya Sen and Martha Nussbaum.[47] He offers as a general principle that "all individuals have an obligation to others in their respective communities to promote the capabilities that are essential to human flourishing (e.g., freedom, practical reasoning)."[48] Professor Peñalver mines from a similar vein and advances an Aristotelian virtue ethics of property.[49] Professor Singer looks to the tradition of the Hebrew Bible, particularly the Levitical gleanings laws, and suggests a "democratic" approach that emphasizes freedom and equality.[50]

In a response to Professor Peñalver, Katrina Wyman raises a series of questions that could be asked of each of these contributions.[51] To paraphrase Professor Wyman: Why *these* normative values? How are they *different* than the consequentialist economic theories they would replace? Or as Alisdair MacIntyre put it in the context of ethics considered more broadly: "Whose Justice? Which Rationality?"[52]

These questions are as acute in the intellectual property context as in the case of real property. At a meta level, the sorts of values emphasized by these social relations theorists are already embedded in the substrate of Western intellectual property law. The U.S. Constitution's patent clause encodes the Enlightenment scientific norms that continue to inform our ideals of scientific practice: that "science and the useful arts" ought always to "progress," and that scientific and literary practices are the means to achieve that end.[53] From the earliest modern multilateral intellectual property treaties—the Berne Convention of 1886 and the Paris Convention of 1883—principles of "fair use," compulsory licenses, and other similar limitations have circumscribed intellectual property rights.[54]

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44. *Id.* at 744.

45. *Id.*

46. Gregory S. Alexander, *The Social Obligation Norm in American Property Law*, 94 Cornell L. Rev. 745, 745 (2009).

47. *Id.* at 745–46.

48. *Id.* at 745.

49. *See* Eduardo M. Peñalver, *Land Virtues*, 94 Cornell L. Rev. 821 (2009).

50. Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 Cornell L. Rev. 1009, 1029 (2009).

51. *See* Katrina Wyman, *Should Property Scholars Embrace Virtue Ethics? A Skeptical Comment*, 94 Cornell L. Rev. 991 (2009).

52. Alisdair MacIntyre, Whose Justice? Which Rationality? (1989).

53. U.S. Const., art. I., § 8, cl. 8.

54. *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised July 24, 1971, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221 *available at* http://www.wipo.

But the Devil is in the details of adjudication. Utilitarian approaches to intellectual property rights at least possess the surface advantage of supplying quantifiable principles for courts and juries to follow. Social relations theorists, of course, question whether economic analysis of law truly provides any kind of objective quantification of social preferences. As Professor Peñalver notes, "legal economists have not adequately defended the notion that the diverse and seemingly incommensurable values implicated by land-use questions can be reduced to such a unitary measure" of utility.[55] Law and Economics scholars respond that their "rough and ready" measures of utility, while not perfect, at least supply a meaningful heuristic for decision-making.[56]

Social relations theorists greet this sort of pragmatic posture with reference to broader notions of justice. If property is a central social institution, they suggest, just judgments about property rights can only be obtained through "non-deductive, non-algorithmic reflection," which "should be both principled and contextual, and should draw upon critical judgment, tradition, experience, and discernment."[57] But social relations theorists seem to pass over whether the social costs and unpredictability of such contextual, equitable adjudication implicate still other obligations, capacities, or virtues that might favor settled rules.

Perhaps a basic reason for this impasse is that, even if a "social relations" approach to property offers more than the reductive Law and Economics story, it remains ontologically thin. The *Statement of Progressive Property* tells us something merely instrumental about "property": "Property *operates as* both an *idea* and an *institution*."[58] It tells us nothing, however, about what property *is.* Indeed, the presumption seems to be that property is not anything at all—"property" still seems socially constructed all the way down.

In fact, Alexander and Peñalver state that they "do not intend to insert [themselves] into philosophical debates about the metaphysical foundations of human flourishing or how we come to know what it means to flourish in a distinctively human way."[59] They suggest, optimistically, that a "broadly

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int/treaties/en/ip/berne/trtdocs_wo001.html; *see also* Paris Convention for the Protection of Intellectual Property, March 20, 1883, as revised July 28, 1979, 21 U.S.T. 1583, *available at* http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html; *see also* Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 Colum. J. Transnat'l L. 75, 107 (2000) (discussing history of the fair use doctrine).

55. Peñalver, *supra* note 49, at 858. Singer echoes this critique: "efficiency analysis is actually premised on a controversial version of a controversial moral theory." Singer, *supra* note 50, at 1036.

56. *See* Peñalver, *supra* note 49, at 858; *see also* Matthew D. Adler & Eric Posner, New Foundations of Cost-Benefit Analysis 145–46 (2006).

57. Alexander et al., *supra* note 42, at 744.

58. *Id.* at 743 (emphasis added).

59. Gregory S. Alexander & Eduard M. Peñalver, *Properties of Community*, 10 Theoretical Inq. L. 127, 136 (2009).

appealing" concept of human flourishing can be constructed without engaging in "tangled philosophical controversies."[60] But what is the basis upon which any such concept might become "broadly appealing" without a thick account of what "human flourishing" could mean? Even pure law and economics accounts of property assume that human beings are rational utility-maximizing agents. A thicker account of "human flourishing" requires some underlying theory about why human beings are more than utility machines; why human ideas are more than disembodied "memes"; and why human cultures are more than computational structures for disaggregated bits of data.

III.   THE PROBLEM WITH NETWORK STRUCTURALISM

This ontological problem, of course, is not unique to legal studies. In some ways, with respect to legal studies, the problem can be understood as a subset of the philosophical and methodological crisis that bedevils the discipline of sociology.[61] Indeed, it is revealing to compare property as social relations theory with an analogue in the sociological literature: network structuralism.[62]

Network structuralists eschew conventional sociology's emphasis on variable attributes that might characterize an individual, such as gender, race, or economic class, and focus instead on "the overall structure of social relations in networked systems of interaction."[63] For network structuralists, the network, not the individual, creates social meaning.[64] This approach obviously resonates with property as social relations theory, which likewise attempts to move beyond methodological individualism towards an integrated social model of analysis.

The most infamous manifesto of network structuralism in relation to the law is perhaps Donald Black's article, *The Epistemology of Pure Sociology*.[65] Black claimed to have discovered a scientific principle that described the operation of law without any reference to individual agency, personal judgment, values, or purposes—indeed, without human beings *qua* human

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60. *Id.*

61. For a discussion of the crisis of legitimacy in contemporary sociology, *see generally* CHRISTIAN SMITH, WHAT IS A PERSON: RETHINKING HUMANITY, SOCIAL LIFE, AND THE MORAL GOOD FROM THE GROUND UP 221–76 (2010).

62. For an overview of network structuralism, *see id.* It should be noted that "structuralism" here refers to the structures of social relationships, and is not linked to the "structuralism" of postmodern Continental philosophy.

63. *Id.* at 220.

64. *Id.* (stating that "[n]etwork structuralists argued that 'variables sociology' was stuck with an atomized, individualistic, psychological ontology inappropriate for a discipline on a mission to study *the social*. The alternative unit of analysis and level of explanation, therefore, should be the structured system of social relations that characterizes the real social world.") (emphasis in original).

65. *See* Donald Black, *The Epistemology of Pure Sociology*, 20 LAW & SOC. INQUIRY 829 (1995).

beings.[66] Black's Rule was this: "*Third-party intervention varies directly with relational distance*."[67] The stronger the social relationship between disputatious parties, the less likely an outsider, such as a Magistrate, will be called upon to resolve the dispute.[68]

Black conceived of the "social universe" as a distinct entity "with its own ontology—its own existence—something unlike people in the ordinary sense."[69] For Black, law, as encapsulated in his Rule, "is a natural phenomenon with its own patterns of behavior. Just as matter and light behave according to the same principles throughout the physical universe, so law behaves according to the same principles throughout the social universe."[70] Black celebrated the fact (or belief) that his Rule "deviates from legal scholarship of all kinds—legal formalism and legal realism, natural law and legal positivism, law-and-economics and critical legal studies."[71] Indeed, he considered all prior notions of jurisprudence to be utterly bankrupt.[72]

Black's approach can be considered a form of network structuralism, though Black claimed to have discovered something *sui generis.*[73] It bears obvious affinities to property as social relations theory in its effort to find a basis for law in social structures rather than in the decisions, preferences, and rights of individuals. In fact, in Black's Rule, it appears to provide a firmer basis for decision-making than property as social relations theorists have thus far developed.

Any such appearance, however, is illusory. Black's claims, in fact, reject the very notion of "decision-making." For Black, there are no "persons" making "decisions" about how to adjust things like trade secret and patent rights. There is only a deterministic Rule governing the degrees of third party intervention that inevitably will characterize certain sets of social relationships. Ironically, rather than describing or predicting how "law" will function, Black's Rule elides "law" by *reducing* "law" to social relations. Contrary to Black's claims then, his Rule allows for no predictions about how entities such as human persons will act because there are no such entities. In Black's logic, the only real entity is the social network. Black's Rule cannot help us make decisions about intellectual property policy, or anything else, because the operation of his Rule precludes genuine "decisions."

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66. *See, e.g., id.* at 859 ("my paradigm . . . eliminates the individual as an active force in human behavior. It removes people from the center of the social universe."); *id.* at 864 ("[i]n my sociology, social life has no goals, purposes, values, needs, functions, interests, intentions, or anything else not directly observable by anyone. It simply behaves. It just is."); *id.* at 867 ("It is pure science.").

67. *Id.* at 835 (emphasis in original).

68. *See id.*

69. *Id.* at 859.

70. *Id.* at 860–61.

71. Black, *supra* note 65, at 868.

72. *Id.* at 869 (Black said, "I long ago declared my independence from lawyers. I largely ignore them.").

73. *See* the discussion in SMITH, *supra* note 61.

If Black has correctly identified what reality is like, the political vision behind Joseph Singer's view of property as social relations and Sunder's vision of "IP3" are but epiphenomenal byproducts of the inexorable mechanism of Black's Rule. Does property as social relations theory necessarily succumb to this kind of reduction? It is difficult to see how such a fate could be avoided. If the final unit that matters is a social structure and not any individuals, the usual currencies of jurisprudence—intention, agency, purpose, and values—become essentially worthless. Under such circumstances, "law" tends to serve only as a description of the unprincipled exercise of power by whatever social group is able to obtain it. In the concluding section of *The Epistemology of Pure Sociology*—under the heading "The Death of the Person"—Black described this process poetically:

> I too was a person. I too lost my place. Epistemologically speaking, I killed myself. What, then, happened to me? Where did I go? Who am I?
> I am social life: I call the police, and I am law. I inflict pain, and I am violence. I sing, and I am music. I pray, and I am God. I write these words, and I am sociology. I obey the laws of social life, and I am greater than myself.[74]

Fortunately for those of us not yet ready for epistemological suicide and equally unready to self-identify as God, Black's Rule is easily falsified. This is apparent even in the paradigmatic example Black offered to prove his Rule: "a marital conflict," he said, "attracts less partisanship than, say, a conflict between acquaintances or strangers."[75] Anyone who has ever been involved in an actual litigation in which close colleagues or relations were pitted against each other—say, a messy divorce—will greet this example with bemusement.[76]

IV.   IPRs and Catholic Social Teaching

Can religious perspectives offer the thick account of human flourishing that might inform a social relations approach to Intellectual Property Rights (IPRs)? Perhaps religious perspectives, at least those drawn from the Abrahamic faiths, could at least counter Donald Black's inclination to self-identify as God. Indeed, perhaps the inclination to self-identify as God is a core problem for *all* theories rooted ultimately in radical personal auton-

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74. Black, *supra* note 65, at 870.

75. *Id.* at 835.

76. In this writer's many years of litigation experience, it usually was far, far easier to settle disputes between dispassionate business people than to resolve cases in which the litigants felt personally betrayed by a family member, friend, or valued colleague. The most venomous cases this writer handled involved breaches of fiduciary duties in closely held corporations, in which the dueling principles were family members or had been close friends. And the vitriol in those cases, which flowed freely and burned hot, paled in comparison to the typical contested divorce.

omy. The "romantic author," after all, is the bastard child of the rational Enlightenment.[77]

Although intellectual property has not been foregrounded in many conversations about theologically informed legal theory, it has not gone entirely unnoticed, particularly within the framework of Catholic Social Teaching ("CST"). In his Encyclical *Caritas in Veritate*, for example, Pope Benedict XVI stated that,

> On the part of rich countries there is excessive zeal for protecting knowledge through an unduly rigid assertion of the right to intellectual property, especially in the field of health care. At the same time, in some poor countries, cultural models and social norms of behavior persist which hinder the process of development.[78]

This statement was built on a number of earlier statements by Vatican officials and Bishops' conferences on the problems strong intellectual property rights can pose for access to medicines in developing countries.[79]

Professor Thomas Berg has developed this theme in terms of CST's "preferential option for the poor."[80] Professor Berg notes that "[i]ntellectual property, like other forms of property, serves important purposes related to human dignity, productivity, and especially creativity," and therefore "Catholic teaching affirms intellectual property."[81] However, he argues, limits on intellectual property are "equally important," particularly where such limits are "important to benefiting and empowering the poor."[82]

This dual sense of the benefits and limits of intellectual property, Professor Berg notes, relates to CST's approach to private property in general.[83] Private property in CST is not an end in itself, but rather is an instrument that serves human dignity and flourishing—a "social mortgage" on goods that "'are originally meant for all.'"[84] In particular, intellectual property implicates the Biblical theme that human beings mirror and participate in God's creative activity.[85] CST holds that every human being

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77. Romanticism, from which the "romantic author" trope springs, can be viewed as a response to the rational Enlightenment—an effort to locate transcendentality in art and beauty, once rationalism had killed off God. *See, e.g.*, Kathryn Calley Galitz, *Romanticism*, Heilbrunn Timeline of Art History, THE METROPOLITAN MUSEUM OF ART, http://www.metmuseum.org/toah/hd/roma/hd_roma.htm (last visited Jan. 26, 2014).

78. Pope Benedict XVI, *Caritas in Veritate* [*Encyclical Letter on Charity in Truth*] ¶ 22 (June 29, 2009), *available at* http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html.

79. *See* Thomas C. Berg, *Intellectual Property and the Preferential Option for the Poor*, 5 J. CATHOLIC SOC. THOUGHT 193 (2008).

80. *Id.* at 199.

81. *Id.*

82. *Id.*

83. *Id.* at 200.

84. *Id.* at 200–01 (quoting Pope John Paul II, *Sollicitudo Rei Socialis* [*Encyclical Letter on Social Concern*] ¶ 42 (Dec. 30, 1987), *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis_en.html.).

85. Berg, *supra* note 79, at 204.

should be empowered to participate in productive, creative work.[86] Professor Berg therefore concludes, cautiously, "that a degree of skepticism about IP rights, and an appreciation of the value of limits on those rights, fits with the general teachings on the option for the poor."[87]

Nevertheless, Professor Berg echoes the standard economic justification for IPRs; without them, the free rider problem will reduce incentives for creativity and invention.[88] He looks to the flexibilities already built into Western intellectual property law (and encoded globally in the TRIPS agreement), along with the growth of voluntary associations in the form of open source communities, as checks against over-propertization.[89] He also suggests that governments should act to limit IPRs when such rights limit "access to essential human needs," such as life-saving drugs; when IPRs are used by the poor for "education and other noncommercial uses"; for experimental use to encourage innovation; for technology transfer to poor societies; and for the protection of communal traditional knowledge.[90] Although these recommendations seem to echo standard non-religious treatments such as the WIPO Development Agenda, Professor Berg concludes that CST provides a distinctive perspective on property rights and IPRs, rooted in essential human dignity, rather than merely in welfare maximization.[91]

Professor Frank Pasquale takes up the themes developed by Professor Berg while critiquing prevailing law-and-economics approaches to access to lifesaving drugs in light of CST and *Caritas in Veritate*.[92] Professor Pasquale asks a basic question about CST: "To what extent does it conflict with traditional economic analysis of law?"[93] His response, narrated with reference to the encounter between intellectual property theory and the high fashion industry, is rich and nuanced. In short, for Professor Pasquale, the issue is whether the concept of "virtue" can have meaning within, or against, economic theories of IPRs.[94] A virtue ethic of fashion production would require asking basic questions about vanity and avarice as well as deeper questions about the fair treatment of wage laborers in developing

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86. *Id.* at 205.

87. *Id.* at 210.

88. *See id.* at 212, 214. He later notes, however, that "[t]here are longstanding debates over to what extent, if at all, copyrights and patents are necessary to encourage creation and innovation." *Id.*

89. *Id.* at 219–21.

90. *Id.* at 223–30.

91. *Id.* at 232–33. *Cf.* World Intellectual Property Organization, 2007 General Assembly, *The 45 Adopted Recommendations Under the WIPO Development Agenda*, *available at* http://www.wipo.int/ip-development/en/agenda/recommendations.html.

92. *See* Frank Pasquale, *Joining or Changing the Conversation? Catholic Social Thought and Intellectual Property*, 29 Cardozo Arts & Ent. L.J. 681 (2011).

93. *Id.* at 695.

94. *Id.* at 716–18.

countries who produce the physical garments in accordance with the "author's" designs.[95]

Professors Berg and Pasquale identify important loci for any "theology of intellectual property," including IPRs in relation to the poor and IPRs in relation to an overarching virtue ethic of production. Professor Berg suggests that such a religiously-informed ethical stance, as reflected in CST, could be *complementary* to other perspectives in a pluralistic society. Professor Pasquale asks whether a specific religiously-informed perspective, CST, inherently *conflicts* with other narratives, but does not really answer that question. Professors Alexander and Peñalver wish to offer a virtue ethic of property that *correlates* with presumptions that are broadly held by religious and non-religious people.

In the following sections, I will attempt to move beyond these themes of complementarity, conflict, and/or correlation. My radical claim is that *only* theology and metaphysics can save the "person," and that only the "person" can save intellectual property.

V.   CULTURE, INTELLECTUAL PROPERTY, AND THE QUEEN OF THE SCIENCES

The models of complementarity, conflict, and correlation that are described in Part IV above each, in their own way, presume that there is something "other" than a "religious" or "theological" perspective to which religion and theology must respond. The fact is that *all* perspectives are at base metaphysical, and therefore theological.[96] It is of course true that an account based in Christian theology will at points complement, conflict with, or correlate with accounts offered by other theologies, including "secular" theologies. But Christian theology asserts that it ultimately provides the most coherent and complete picture of reality, including social reality. Christians who wish to offer a theoretical account of social reality, including things like IPRs and other forms of positive law, must therefore go beyond complementarity, conflict, or correlation. Christian thinkers finally should explain themselves boldly in the grammar and narrative of Christian theology. The question is one of *coherence* and *completion*.

This stance highlights two obvious problems: (1) what about theorists from other religious traditions; and (2) what about discourse in the public square?

As Alasdair MacIntyre has observed, at some point differing traditions become incommensurable.[97] Nevertheless, there can be points of meaning-

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95. *Id.* at 720–23.

96. *See* JOHN MILBANK, THEOLOGY AND SOCIAL THEORY: BEYOND SECULAR REASON (2d ed. 2006).

97. *See* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEOLOGY (3d ed. 2007).

ful contact and dialogue among disparate traditions, particularly when they share common roots, as do the three major Abrahamic faiths. In fact, this truth is broadly recognized in the Christian tradition. As theologian David L. Schindler notes, "love finds an echo, a resonance, in every human heart, not just in explicitly Christian hearts," and this is true even if Christians assert that such love, "is fully revealed only in Jesus Christ."[98]

Schindler here echoes Pope Benedict's widely misunderstood address at the University of Regensberg. As the Pope stated there, "the faith of the Church has always insisted that between God and us, between his eternal Creator Spirit and our created reason there exists a real analogy . . . ."[99] This analogy of being ("*analogia entis*") does not imply that God is a being like human beings—there is no "univocity of being" between humanity and God—but it does imply that all human beings, made in God's image, can know something of the truth inherent in God's creation.[100] Moreover, openness to truth wherever it is found is a hallmark of authentic Christian theology. As Anglican theologian John Milbank reminds us,

> Christianity is peculiar, because while it is open to difference—to a series of infinitely new additions, insights, progressions towards God, it also strives to make all these differential additions a harmony, 'in the body of Christ,' and claims that if the reality of God is properly attended to, there can be such a harmony.[101]

The second question is perhaps more difficult to answer. An important function of the public square is to provide a forum for mediating such dif-

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98. DAVID L. SCHINDLER, ORDERING LOVE: LIBERAL SOCIETIES AND THE MEMORY OF GOD 168 (2011).

99. Pope Benedict XVI, Faith, Reason and the Universities: Memories and Reflections (Sept. 12, 2006), *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html.

100. *Cf.* Pope Paul VI, *Nostra Aetate* [*Encyclical Letter on the Relation of the Church to Non-Christian Religions*] ¶ 2 (Oct. 28, 1965), *available at* http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_nostra-aetate_en.html, (proclaiming:

> Religions . . . that are bound up with an advanced culture have struggled to answer the same questions by means of more refined concepts and a more developed language. Thus in Hinduism, men contemplate the divine mystery and express it through an inexhaustible abundance of myths and through searching philosophical inquiry. They seek freedom from the anguish of our human condition either through ascetical practices or profound meditation or a flight to God with love and trust. Again, Buddhism, in its various forms, realizes the radical insufficiency of this changeable world; it teaches a way by which men, in a devout and confident spirit, may be able either to acquire the state of perfect liberation, or attain, by their own efforts or through higher help, supreme illumination. Likewise, other religions found everywhere try to counter the restlessness of the human heart, each in its own manner, by proposing "ways," comprising teachings, rules of life, and sacred rites. The Catholic Church rejects nothing that is true and holy in these religions. She regards with sincere reverence those ways of conduct and of life, those precepts and teachings which, though differing in many aspects from the ones she holds and sets forth, nonetheless often reflect a ray of that Truth which enlightens all men. Indeed, she proclaims, and ever must proclaim Christ "the way, the truth, and the life" (John 14:6), in whom men may find the fullness of religious life, in whom God has reconciled all things to Himself.

101. John Milbank, *Postmodern Critical Augustinianism: A Short Summa in Forty Two Responses to Unasked Questions*, 7 MODERN THEOLOGY 225, 227–28 (1991).

ferences and for working out compromises that allow differing communities and traditions to coexist in a civil society. The difficulty is well-illustrated by the exchange between Joseph Ratzinger and Jürgen Habermas shortly before Ratzinger became Pope Benedict.[102] Habermas argued that political liberalism is "a nonreligious and postmetaphysical justification of the normative bases of the democratic constitutional state."[103] The stability of such a state in light of competing religious and secular interests, Habermas claimed, depends on legal and democratic procedures that provide a neutral procedural framework for adjudicating disputes.[104] He identified this as a "proceduralist understanding of the constitutional state, inspired by Kant . . . ."[105] For Habermas, this opens space for both religious and non-religious viewpoints: "The neutrality of the state authority on questions of world views," he says, "guarantees the same ethical freedom to every citizen."[106] And this means that religious citizens possess, "the right to make contributions in a religious language to public debates."[107]

Cardinal Ratzinger noted that he was "in broad agreement," with Habermas "about a postsecular society, about the willingness to learn from each other, and about self-limitation of both sides."[108] Yet Ratzinger focused not on procedure but on the substantive relationship between law and power.

For Ratzinger, the key question was, "what must be the characteristics of law if it is to be the vehicle of justice rather than the privilege of those who have the power to make the law?"[109] Ratzinger agreed with Habermas that democratic forms of government help secure the justice of the law against the will to power, "precisely because it is everyone's law."[110] Yet, he argued, "majorities, too, can be blind or unjust, as history teaches us very plainly," and so, "the majority principle always leaves open the question of the ethical foundations of the law."[111] A purely procedural state, then, will not suffice. A just society always must inquire, "whether there is something that is of its very nature inalienably law, something that is antecedent to every majority decision and must be respected by all such decisions."[112]

Ratzinger illustrated this problem with reference to the Catholic jurist Francisco de Vitoria, who argued that the Spanish Catholics were not le-

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102. Jürgen Habermas & Joseph Cardinal Ratzinger, Dialectics of Secularization: On Reason and Religion (2006).

103. *Id.* at 24.

104. *Id.* at 27.

105. *Id.*

106. *Id.* at 51.

107. *Id.*

108. Habermas & Ratzinger, *supra* note 102, at 77.

109. *Id.* at 58.

110. *Id.* at 59.

111. *Id.*

112. *Id.*

gally justified in making war against native peoples in the Americas, even though sources of positive law at the time authorized Christian princes to punish heretics and others who refused the Christian faith.[113] De Vitoria appealed to an overarching concept of *ius gentium*, an unwritten law of the nations that governs even Christian princes. This was not only a procedural construct.[114] Rather, it was rooted in God's ultimate dominion over all of creation.[115] A similar notion of substantive justice, Ratzinger suggested, informs contemporary ideas of universal international human rights.[116] For Ratzinger, "reason" and "religion" inhabit the same dialectical space over matters of public concern:

> Religion must continually allow itself to be purified and structured by reason; and this was the view of the Church Fathers, too. However, we have also seen in the course of our reflections that there are also pathologies of reason, although mankind in general is not as conscious of this fact today. There is a hubris of reason that is no less dangerous.[117]

Habermas' procedural mediation and Ratzinger's substantive natural law orientation offer two possible frames for explicitly religious discourse in the public square. Perhaps these are in fact two sides of the same coin. As John Milbank notes, "[f]or Christianity, true community means the freedom of people and groups to be different, not just to be functions of a fixed consensus, yet at the same time it totally refuses *indifference* . . . ."[118] This insight brings us back full circle to the specific context of intellectual property and social relations. "Culture" is the *substantive* product of human relationships that are structured according to various *procedural* norms.[119] Intellectual property law is one of the key legal systems that governs the production and diffusion of culture in our society. Our task is to articulate both transcendent substantive grounds for legal rules about cultural exchange and procedural mechanisms for resolving disputes about the nature of those transcendent grounds without refusing the hospitality of hearing such competing claims on their own terms. The next two sections offer one effort at such an account in relation to IPRs.

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113. *Id.* at 67–68. *See also* Francisco de Vittoria, De Indus De Jure Belli (Ernest Nys, ed. 1964), *available at* http://en.wikisource.org/wiki/De_Indis_De_Jure_Belli/Part_2.

114. De Vittoria, *supra* note 113; Habermas & Ratzinger, *supra* note 102, at 67–68.

115. De Vittoria, *supra* note 113; Habermas & Ratzinger, *supra* note 102, at 67–68.

116. Habermas & Ratzinger, *supra* note 102, at 70.

117. *Id.* at 77.

118. Milbank, *supra* note 101, at 228.

119. *See* D. Stephen Long, Theology and Culture: A Guide to the Discussion 8 (2010) (stating "[c]ulture is a metaphor for a kind of 'cultivation' that occurs to people through their practices, language, communities, doctrine, etc.").

VI.   Culture, Social Relations, and Metaphysics

A.   Towards a Phenomenology of Persons and Culture

Nothing we observe in the universe is flat. By "flat" I mean having only one aspect or "layer." Consider an apple tree. What *is* it? Is it the product of a small seed? Is it the seed-carrier—the potentiality—of new apple trees? A collection of plant cells? A system of sap, bark, and leaves? A particular arrangement of DNA? An expression of physical laws? Is it something aesthetically satisfying to me, something beautiful, fragrant with blooms in spring, heavy with fruit in autumn, stark and serene in winter? Is it a source of nourishment for humans and other animals? All of these things (and more) comprise some of what we mean by "apple tree," but none of them are what an "apple tree" *is*. The reality that is "apple tree" cannot be reduced to any one of its aspects or layers.[120]

It is possible to think of these aspects or layers hierarchically, with "higher" layers that emerge from "lower" ones. Physical laws emerge from quantum probabilities; molecules emerge from physical laws; seeds, wood, bark, sap, and leaves emerge from complex arrangements of molecules; and beauty and delight emerge from the connection of skin, flesh, and core to human sense perception.[121] "Apple tree" emerges from all of this (and more) combined with the human cultural experience of these things we call "apple trees."

Notice that some "layers" can impinge or "supervene" on lower ones—for example, human sense perception and cultural experience *do something* to this thing confronting the subject in order for it to *become* an "apple tree." But notice also that an "apple tree" is not merely a cultural construction. The word or signifier "apple tree," of course, could be arbitrary, but there is an objective reality to the thing signified. The layer of human sense perception and cultural experience supervenes upon, but does not create, the lower-order reality from which it emerges.

Sociologist Christian Smith draws these strands together in a critical realist framework. In a critically realist approach to culture and human personhood, Smith suggests, "[h]uman beings do have an identifiable nature that is rooted in the natural world, although the character of human nature is such that it gives rise to capacities to construct variable meanings and iden-

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120. For a discussion of this sort of phenomenological reasoning, *see* Robert Sokolowski, Introduction to Phenomenology 4 (2000) (noting that "phenomenology, in its classical form, insists that parts are only understood against the background of appropriate wholes, that manifolds of appearance harbor identities, and that absences make no sense except as played off against the presences that can be achieved through them.").

121. Human sense perception, of course, is an emergent property of an even more complex set of relations that give rise to the human "person." *See, e.g.*, Smith, *supra* note 61 (explaining that human persons are composed through emergence of elements that together create a higher level of existence than those elements that created them).

tities . . . ."[122] Culture is a social construction, but it is not *merely* a social construction. Human beings are social, but they are not *subsumed by* the social. The reality we inhabit is "stratified": it includes both the reality of individual conscious human agents and the reality of the social structures that emerge from the cultures created by those agents.[123] These "personal" and "cultural" layers of the world interact with each other dynamically, each continually informing and changing the other.[124]

Smith's approach is helpful, but perhaps it does not go far enough. For Smith, as for critical realists in general, the phenomena of human culture remain subject to some degree of granular disaggregation, at least analytically. A phenomenological approach suggests that no "thing" can be broken into components and still comprise that "thing." The genes that encode for apple trees are not apple seeds, apple seeds are not apple trees, and apple trees are not apples. The critical realist framework of stratification, emergence, and supervenience functions as a very useful heuristic device, but to describe what an apple *is*, we must approach the phenomenon of "apple" in its fullness. To know whether something falls into the kind "apple," we must hold an ideal of everything an apple is, and compare the subject to the ideal.

And because of the transcendence of the ideal concept of "apple tree," we can begin to speak of the relative excellence of particular instantiations of apple trees. What is an "excellent" apple tree? What distinguishes the excellent example of an apple tree from a poor one? We can only ask such questions if "apple tree" means something more than the particular physical specimen at hand, whether robust and fecund or diseased and withered.

How does all of this apply to "property" and "intellectual property?" The connection to property as social relations theory should be obvious. The thing we call "property" in patents, copyrights, and trade secrets is the reality that emerges from particular arrangements of human subjects to each other. Joseph Singer helpfully speaks of this as the "reliance interest" in property, although he does not seem to ascribe an ontological significance to this "interest."[125] But a "phenomenology" of property suggests that something irreducibly *real* does, indeed, both lie under and arise from these relations.

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122. SMITH, *supra* note 61, at 10.

123. *See* CRITICAL REALISM: ESSENTIAL READINGS XI (Margaret Archer, et al. eds., 1998) (noting that "critical realism claims to be able to combine and reconcile *ontological realism*, *epistemological relativism*, and *judgmental rationality*.") (emphasis in original); *see also* ROY BHASKAR, A REALIST THEORY OF SCIENCE (2d ed. 1997) (critiquing a positivist view of science in favor of a realist view, drawing on the connection between the natural world and the social world).

124. BHASKAR, *supra* note 123, at 39; DONALD JUDD, CRITICAL REALISM AND COMPOSITION THEORY 50 (2003) (stating that "society must be regarded as an ensemble of structures, practices and conventions which individuals reproduce or transform, but which would not exist unless they did so.") (internal quotation omitted).

125. Singer, *supra* note 23.

Such a phenomenological approach supports a metaphysically thick or "realist" account of entities.[126] For "apple" to remain irreducible to skin, flesh, seeds, genes, and so-on, there must exist an ideal concept of "apple." Any such concept necessarily transcends any particular instantiation of an apple. There must be an ideal transcendent of our physical reality to which our physical reality relates.

As with apple trees, so it is with persons. Despite the persistent efforts of eliminative materialists and many neuroscientists, and despite the constructivist reductionism of social theorists such as Donald Black, it is impossible to reduce the human person to any one aspect or layer of what comprises a human being. As theologian Connor Cunningham notes,

> [T]he problem with any bid to eliminate commonsense psychology—and normative, teleological explanations with it—is that the remaining physical explanations will be much more mysterious. An ersatz spiritualism would take the stage to perform its *danse macabre* of 0's and 1's, and we would be forced to live in a wholly skeptical, inexplicable world. For example, why did Susan get the cork-screw? Why did NASA fly to the moon?[127]

And since "writings and discoveries" are produced by persons, the same is true of the stuff of intellectual property law. As Cunningham also argues, "we cannot even form meaningful sentences if there are no subjects of experience (us, in other words) to interpret them; otherwise they would simply be a random string of sounds. Science would be impossible."[128] In the specific language of intellectual property law, there is no "secret" without a social-linguistic context for secrecy. There is no "invention" without a social-linguistic context for "science" and the "*useful* arts."[129] There is no copyrightable "work" without the social-linguistic context for creativity. These irreducible qualities provide the meaning for legal claims when the relational context is disrupted and delimit the scope of any potential remedy. Only a realist account of the person as a social being puts the "social" into intellectual property as social relations.

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126. As discussed in Section VI *infra*, I believe Christian theology offers resources for the construction of a metaphysically robust phenomenology of intellectual property as social relations: the generative, creative act as participation in the gift of culture. As a law professor with aspirations to the status of Christian theologian, I would assert that *only* Christian theology finally and fully offers the necessary resources. Indeed, as a Christian theologian I ultimately would argue that there is no such category as the "secular." *See* Milbank, *supra* note 96, at 9 ("Once, there was no 'secular.'"). But Christian theology emphasizes the presence of wisdom and reason in all traditions that seek the truth—and therefore the project of construing intellectual property as social relations in terms of participation and gift can be pursued in common by persons of various religious traditions or of no religious tradition.

127. Connor Cunningham, Darwin's Pious Idea: Why the Ultra-Darwinists and Creationists Both Get it Wrong 354–55 (2010).

128. *Id.* at 355.

129. *See* U.S. Const. art. I, § 8, cl. 8.

B.   Ontology of the Social: the Gift of Culture

What sort of narrative could underwrite such a realist account of the social? This question echoes a long and rich debate in Western philosophical and religious thought over the problem of "universals." The problem of "universals" refers to whether there are real universal "types" of things or only "particular" things that happen to go by certain names ("nominalism").[130] In Section IV above, for example, I asked what we mean by the term "apple tree." This sort of question inquires about whether "apple" reflects a universal type, ideal, form, substance, or entity common to all things called "apple," or whether there are merely particular entities that are called "apple" for reasons of only convenience or convention.

Western philosophical and theological thought, at least until the Mediaeval Period, mostly assumed the truth of universals. This includes the Hebraic focus on Wisdom; Platonic, Aristotelian, and Neo-Platonic efforts to articulate a transcendent causal principle that does not render the material world illusory; and the Patristic Christian relocation of Hebrew and Greek idealism into the mind of God.[131]

In Platonic and Neo-Platonic philosophy, for example, the excellence of a particular instantiation of a thing inheres in that particular instantiation's participation in the perfect "Form" of the thing. The reality of the perfect Form permits us to understand the relations between particular things—"these are all *apples*"—as well as to appraise the virtues of some instance of a thing—"*this* is a really excellent (or really bad) apple." For Neo-Platonic thinkers such as Plotinus, the "One" or "the Good" was the cause of all things in the universe. Other principles emanated from the "One," including the "Intellect," which was the first entity that derived from or depended upon the "One," and was the source of the "Forms*"* and the "Soul," which was the principle of desire in embodied things.[132] This instantiated a hierarchy of being, with all things deriving from and participating in the "One."[133]

In the Hebraic tradition, "Wisdom" is often personified as a creative gift from God in which all people are invited to share. The Hebrew Scriptures frequently speak of Wisdom as the source of creation:

> By wisdom the LORD laid the earth's foundations,
> by understanding he set the heavens in place;

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130. For a discussion of the problem of universals in relation to nominalism, *see* Gonzalo Rodriquez-Pereyra, *Nominalism in Metaphysics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/nominalism-metaphysics/#Uni (last visited Jan. 26, 2014).

131. For an excellent discussion of the relation between Christian theology and Greek philosophy, *see* ADRIAN PABST, METAPHYSICS: THE CREATION OF HIERARCHY (2012).

132. *See* Lloyd Gerson, *Plotinus*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/plotinus/ (last visited Jan. 26, 2013); *see also* FREDERICK COPLESTON, S.J., A HISTORY OF PHILOSOPHY, VOL. I: GREECE AND ROME 486–90 (1993) (providing further explanation of the Platonic forms).

133. COPLESTON, *supra* note 132, at 486–90.

by his knowledge the watery depths were divided,
and the clouds let drop the dew.[134]

Wisdom's call encompasses all of humanity and is the source of life itself:

Does not wisdom call out?
Does not understanding raise her voice?
At the highest point along the way,
where the paths meet, she takes her stand;
beside the gate leading into the city,
at the entrance, she cries aloud:
"To you, O people, I call out;
I raise my voice to all mankind.
You who are simple, gain prudence;
you who are foolish, set your hearts on it.
. . . .
For those who find me find life
and receive favor from the LORD."[135]

"Life," then, extends beyond any particular material example of a person or thing and reaches into, as it flows down from, the mind of God.

In Patristic Christian theology, the locus of perfection is not Plato's Forms, or the Neo-Platonic "One," or Wisdom personified but unidentified, but rather is the Triune God revealed in Jesus Christ. It is God the Father, Son, and Holy Spirit—three persons and one substance, each a person yet each interpenetrating the other and participating together in the simple perfection of mutual fellowship and love. Whatever else exists is not God but is God's *creation*. The being of all creation is the pure gift of the Triune God who lacked nothing in Himself. And as God's creative gift, all of creation participates in God's own life—His fellowship and love.[136]

For Patristic Christian theology, Creation had *purpose*: to participate in God's own life. The virtues of things in creation, including human beings, inhered in their participation in this gift of being. Where there is vice there is disorder, a sort of *anti*-creation or *un*-making—a refusal to participate in "life" and an inexplicable participation instead in death. In this sense, Patristic Christian theology adopted some of the grammar and structure of Greek and Hebraic thought, but significantly modified elements of both streams of thought, to preserve both the "otherness" of God from creation *and* the participation of creation in God's life.[137]

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134. Proverbs 3:19–20 (New International Version).

135. Proverbs 8:1–5, 35 (New International Version).

136. *See generally, e.g.*, DAVID BRADSHAW, ARISTOTLE EAST AND WEST: METAPHYSICS AND THE DIVISION OF CHRISTENDOM (2007) (discussing Eastern and Western traditions and their fundamental metaphysical themes); COPLESTON, *supra* note 132 (discussing the theory of God and metaphysics); FREDERICK COPLESTON, S.J., A HISTORY OF PHILOSOPHY, VOL. II: MEDIEVAL PHILOSOPHY (1993) (further discussing the theory of God and metaphysics).

137. *See, e.g.*, JAROSLAV PELIKAN, THE CHRISTIAN TRADITION: A HISTORY OF THE DEVELOPMENT OF CHRISTIAN DOCTRINE, VOL. 1: THE EMERGENCE OF THE CATHOLIC TRADITION (100–600) (1975) (explaining the development of the Christian church between 100 and 600).

So what happened? Many contemporary historical theologians and historians of ideas have narrated how "nominalism" and "voluntarism" subsequently came to influence Christian theology, beginning in earnest in the High Scholastic period of the late Middle Ages.[138] To our modern ears, the term "Ockham's Razor" signifies a principle of the "scientific method": the notion that, all other things being equal, between a simpler and a more complex explanation for a set of observations, the simpler explanation should initially be preferred. But this methodological principle derives, perhaps somewhat tenuously, from the fourteenth-century monk William of Ockham, whose voluntarist philosophy tended to reduce all principles of causation to the pure, unbridled will of God. In consequence, this reduced both the "otherness" of God and creation's participation in that otherness to inconsequentiality.[139]

Ockham's theology was influenced by other Scholastic thinkers, such as Duns Scotus, who flattened the analogical distance between God's being and creation in a way that seemed to erase the distance between them.[140] The tendencies to equate of God's being with the being of creation (the "univocity of being"), to reduce God's being to His will ("voluntarism"), and to view things in creation only as particulars instantiated by God's arbitrary will ("nominalism"), filtered through the social upheavals of the Reformation period and were distilled in the secularizing force of the Enlightenment.[141] The French mathematician Pierre Simon-Laplace (1749–1847) could dismiss God as an unnecessary hypothesis because the *being* of God had already been rendered superfluous.[142]

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138. *See, e.g.*, Brad S. Gregory, The Unintended Reformation: How a Religious Revolution Secularized Society (2012); Michael Allen Gillespie, The Theological Origins of Modernity (2010) (discussing the role of religion and theology in the development of modernity); Charles Taylor, A Secular Age (2009) (discussing the development of secularism in Western society and emphasizing that secularism and religion are not rival, mutually-exclusive theories).

139. *See* Conor Cunningham, *Natura Pura, the Invention of the Anti-Christ: A Week With No Sabbath*, 37 Communio: International Catholic Review 244, 246 (2010) (noting that "naturalism is itself a product of bad theology . . . religious people have bought into the idea that faith is 'supernatural.' And here the atheist is in complete agreement, religion is indeed something extra . . . but for them, in the name of economy, again Ockham's razor, we can just ignore it, setting it adrift, to the point where it becomes irrelevant.").

140. For a general discussion of Duns Scotus' life and work, *see* Thomas Williams, *John Duns Scotus*, Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/duns-scotus/ (last visited Dec. 7, 2013).

141. Of course, intellectual history is never this simple. As Michael Hanby notes, we should not "suggest a neat genealogy linking Ockham directly to the architects of early modern science. It is enough that Ockhamism shaped the ambient scholasticism of the seventeenth century." Michael Hanby, No God, No Science?: Theology, Cosmology, Biology 111 (2012).

142. *See* Carl Boyer, A History of Mathematics 494 (2d ed. 1991). This account of Laplace's comments might be apocryphal, but it remains influential. *See, e.g.*, Fundamentalisms and Society: Reclaiming the Sciences, the Family, and Education 30 (Martin E. Marty, R. Scott Appleby, Helen Hardacre, Everett Mendelsohn, eds., 1997).

And so, popular contemporary theories of culture seek to elide God and metaphysics as useless vestigial appendages. The market-driven legal systems of the West view culture as something reducible to atomistic, commoditizable bits of "information." Our dominant legal structures governing access to "information" focus primarily on the monetary incentives required for individuals to produce cultural "products" for exchange. The exceptions built into these structures, such as "fair use" of copyrighted material and compulsory licensing of patents, typically are theorized according to a purely utilitarian calculus. In this calculus, aggregate "public welfare" is putatively enhanced through somewhat broader dissemination of "inputs" or "infrastructure" that might facilitate even greater production—whether of units of cultural goods or years of life. Neither the rules nor their exceptions can explain "why" any of this is "good," aside from the fact that it "works" at a "pragmatic" level—whatever terms like "works" or "pragmatic" might mean in a nominalistic world.[143]

C.   Theology and Social Relations

1.   The Purposes of Persons and Cultural Gifts

Here we reach a crucial question: Can theology once again redeem the ashes of Western philosophy? Can theology save metaphysics?[144] Can theology save even something as mundane as intellectual property?

In his encyclical *Caritas in Veritate*, Pope Benedict argues that theology is *necessary* and that concerns about economics, politics, and property cannot be reduced to a presumptive "science":

> The excessive segmentation of knowledge, the rejection of metaphysics by the human sciences, the difficulties encountered by dialogue between science and theology are damaging not only to

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143. Still, Idealism, though gravely wounded, never died. The Continental philosophical tradition, exemplified by thinkers such as George Friedrich Hegel, Edmund Husserl, Martin Heidegger, Maurice Merleau-Ponty, and Jean-Paul Sartre, has focused on "the structure of various types of experience ranging from perception, thought, memory, imagination, emotion, desire, and volition to bodily awareness, embodied action, and social activity, including linguistic activity." David Woodruff Smith, *Phenomenology*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/phenomenology/ (last visited Jan. 26, 2014). The experience of something, in Continental phenomenological thought, is always directed towards that thing through ideas, concepts, images and the like, which are distinct from the thing signified. *Id.* Things, then, are never merely atomistic things-in-themselves, but rather exist always in relation to social and linguistic structures and the purposes of intentional agents. *Id.* Yet—and this is crucial—the naiveté of earlier ontologies, for these modern Continental thinkers, has forever been lost. Modernity, for most of their present-day acolytes, destroyed its antecedents, but in turn has dissolved into *post*-modernity, in which "transcendent" reality is really immanently constructed through subjective experiences and grammars. So it may seem that any "social relations" based theory of culture and intellectual property must boil down to power and politics after all.

144. The title of this subsection plays on MILBANK, THEOLOGY AND SOCIAL THEORY: BEYOND SECULAR REASON, *supra* note 96. *See also* John Milbank, *Only Theology Saves Metaphysics: On the Modalities of Terror*, *in* BELIEF AND METAPHYSICS 452 (Peter M. Candler & Conor Cunningham, eds., 2007).

the development of knowledge, but also to the development of peoples, because these things make it harder to see the integral good of man in its various dimensions. The "broadening [of] our concept of reason and its application" is indispensable if we are to succeed in adequately weighing all the elements involved in the question of development and in the solution of socio-economic problems.[145]

A deep sense of relation between the human person and a God who bestows creation as gift is essential to CST's political vision, including its comments on IPRs. As Pope Benedict further argues in *Caritas in Veritate*,

If man were merely the fruit of either chance or necessity, or if he had to lower his aspirations to the limited horizon of the world in which he lives, if all reality were merely history and culture, and man did not possess a nature destined to transcend itself in a supernatural life, then one could speak of growth, or evolution, but not development.[146]

For Christian thinkers, there can be no notion of "development" apart from the goal for which human beings were created: union with God. The project of recovery then—certainly for intellectual property scholars working within the Christian tradition—is one of excavating the ancient Christian ontology of the gift. Indeed, argues theologian John Milbank, "the transcendental norm of universal gift-exchange can only be recognized by a combination of moral commonsense and Christian faith. For only love can desire that there *should be* unlimited association in the true sense: a society of unlimited reciprocation, a society of friends."[147] In his essay "The Transcendality of the Gift," Milbank asks, "[i]s the gift purely a social matter, or is it also ontological," and "[i]s the gift the echo of divine creation and of divine grace? And otherwise, does it lose all reality?"[148] Milbank traces two streams of thought about the notions of "gift," the "given," and "exchange." One is the stream of Continental phenomenology, which tended to reduce the "given" to the experience of the individual subject, and thereby to elide the "given" and flatten the "gift" to something unilaterally given within a relationship of power and hierarchy.[149] The other is the analytic stream in which the "gift" is "only disguised contract . . . a kind of loan secured by capitalized, ungivable items . . . ."[150] Seeking a way forward, Milbank notes that,

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145. Pope Benedict XVI, *Caritas in Veritate*, *supra* note 78, at ¶ 31 (quoting, in part, Pope Benedict XVI, *Aula Magna of the University of Regensburg* (Sept. 12, 2006)).

146. *Id.* at ¶ 29.

147. John Milbank, *The Transcendality of the Gift*, *in* The Future of Love: Essays in Political Theology 363 (Cascade 2009).

148. *Id.*

149. *Id.* at 357–58 (asking, "Is the gift unilateral or is it reciprocal?" and "Is the unilateral/reciprocal contrast absolute?").

150. *Id.* at 357.

In a sense, the Christian project searches for the "middle" between gift-exchange on the one hand, and distributive justice with market exchange on the other. Yet the latter are essential to ensure the true appropriateness of the gift, which is essential to the gift as such. A global gift-exchange, as inaugurated by Christianity, ceases to be one of fetishized items, but becomes one of all that is truly valuable from the perspective of love and universal harmony.[151]

The gift then, for Milbank, is rooted in love, which is the true source of justice. The central fact of love is that given by which we must pursue, "the continuous task of judgment and discernment as to what is valuable and when and where."[152] While Greek theology emphasized the city and the gift and the reciprocity of virtues among people whose varying social stations defined their ends, "Christianity stresses [reciprocity] still more by seeing justice as fulfilled in charity—an unlimited concern to fulfill the real potential of all, and of all in harmony with all."[153] The phenomenon of gift-exchange is thus, "like a natural anticipation in all human societies of the society of supernatural grace."[154]

But if this is so, if gift-exchange anticipates grace, why do we so often experience it as a desiccated thing, as mere power or mere contract? The problem is *theological.* "Deviant forms of Christianity themselves," Milbank says, "underwrite this ride to an earthly Tartarus."[155] It is a loss in Western culture of God's transcendence, a reduction of God to a being univocal with our own, a voluntaristic prioritization of God's will and an ontotheological reduction of God to just another, though very powerful, being-in-the-universe.[156] The gift is thus no longer given within a society of love, but is rather something arbitrarily imposed or withheld. And this, in turn, produced a social simulacrum of a gift culture:

> The simulacrum unites us all only by bonds of contract which seek to make one egoistic desire match with another—without friendship, generosity, or concern for the whole social organism. But this requires ever more draconian state policing in order that contractual freedom not be abused—for nothing in this system *can* ever explain to the individual why he or she should not abuse it. Indeed, it rather suggests that it *ought* to be abused, if the individual can get away with it.[157]

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151. *Id.* at 360.

152. *Id.*

153. Milbank, *supra* note 147, at 360.

154. *Id.*

155. *Id.*

156. *See id.* at 361–63 (stating that "[t]ranscendental gift-exchange was theologically undone" and that "the loss of transcendental gift-exchange is the result of a heterodox Christian development.").

157. *Id.* at 362.

This culture of the false gift produces grave consequences for creativity and cultural production:

> In this way, the system tends to increasing delirium: increasing innovation for the sake of it; increasing attempts by individuals or groups to gain arbitrary power over each other and at the same time increasing attempts to counteract anarchy with iron discipline.[158]

Perhaps many intellectual property scholars, particularly those disposed in some way towards social relations theory, might offer this last quote as a description of some of the activities of the RIAA, MPAA, PhARMA, or BIO.[159] The Western intellectual property system embedded globally in the TRIPS agreement assumes that creativity and innovation will not occur unless self-regard can be secured as a primary interest. Many commentators have observed that this presents a deracinated picture of culture and innovation.[160] Even scholars who advocate "open source" production methods speak in individualistic terms. Yochai Benkler, for example, emphasizes that open source methods can best enable individuals to accomplish their "life plans."[161] It is all about self-actualization.

Self-regard, of course, is not in itself a vice, and mutuality of exchange is a healthy component of a flourishing community.[162] Creators and innovators who contribute generously to their communities often hope for, and receive, satisfaction and recognition from their contributions. The desire to be part of something bigger than one's self, to employ one's talents in a way that benefits the broader human community, and to "make a difference" are proper desires. As Pope Benedict stated in his encylcial *Caritas in Veritate*, "*Charity goes beyond justice*, because to love is to give, to offer what is 'mine' to the other; but it never lacks justice, which prompts us to give the other what is 'his,' what is due to him by reason of his being or his acting."[163] Yet, like all normal desires, it can be twisted away from its proper ends and become something grotesque. Something is amiss when the law reinforces misplaced desires and discourages desires ordered to their true ends.

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158. *Id.*

159. RECORDING INDUSTRY ASSOCIATION OF AMERICA (RIAA), http://www.riaa.com/ (last visited Jan. 26, 2014); MOTION PICTURE ASSOCIATION OF AMERICA (MPAA), http://www.mpaa.org (last visited Jan. 26, 2014); THE PHARMACEUTICAL MANUFACTURERS ASSOCIATION OF AMERICA (PHARMA), http://www.phrma.org/ (last visited Jan. 26, 2014); THE BIOTECHNOLOGY INDUSTRY ORGANIZATION (BIO), http://www.bio.org/ (last visited Jan. 26, 2014).

160. *See, e.g.*, BENKLER, *supra* note 22; SUNDER, *supra* note 22.

161. BENKLER, *supra* note 22.

162. *See, e.g.*, Eberhard Schockenhoff, *The Theological Virtue of Charity*, *in* THE ETHICS OF AQUINAS 244 (Stephen J. Pope, ed., 2002); JEAN PORTER, NATURE AS REASON: A THOMISTIC THEORY OF THE NATURAL LAW 203–30 (2004).

163. Benedict XVI, *Caritas in Veritate*, *supra* note 78, at ¶ 6 (emphasis in original).

The law should instead recognize the value of the gift and encourage habits of generosity. Already in Western intellectual property law there is encoded a broader social purpose—"to encourage the progress of science and the useful arts"—although recent U.S. Supreme Court precedents have emasculated that notion.[164] Intellectual property should more closely align with this broader purpose, within an overarching framework of cultural policy in support of the virtue of generosity.

A "gift" produces good for its recipients. The receipt of a gift allows the receiver to flourish and, in turn, to become a giver. Gifts are thus "generative." Such generativity is reflected in the creation poem in the first chapter of Genesis: each kind of life produces more life "after its kind."[165] It is also embedded in the cultural mandate given to humanity: "Be fruitful and multiply."[166]

The proper response to such abundance is gratitude. In the Torah, God's people are required to offer a substantial portion of their wealth back to God in thanksgiving for his generous provision.[167] A portion of these offerings were designated to support the Priestly class, whose ministrations were understood as essential to the health and prosperity of the nation.[168] The Hebrew Bible's historical books describe the construction of the First Temple, for which the greatest craftsmen and artists in the land provided exquisite ornamentation and articles of worship.[169] In the great summary vision in the New Testament Book of Revelation, the kings of the earth bring their wealth into the heavenly city, where God and his people dwell.[170] These are each pictures of the right communal human response to God's gracious gift of creation and salvation.

These images suggest that it is good and proper for citizens of "the city" to recognize and respond to the gifts of culture makers with offerings from the abundance made possible by those gifts. For a creator to receive recognition and material substance from the community is a fitting response. A system of intellectual property that expresses gratitude for the

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164. U.S. Const. art. I, § 8, cl. 1; *see* Eldred v. Ashcroft, 537 U.S. 186 (2003).

165. *See Genesis* 1.

166. *Genesis* 1:28.

167. For a discussion of the Hebrew Bible's economic laws, *see* Christopher J. H. Wright, Old Testament Ethics for the People of God (2013).

168. *See Numbers* 18:8–10 (New International Version): "Then the Lord said to Aaron, 'I myself have put you in charge of the offerings presented to me; all the holy offerings the Israelites give me I give to you and your sons as your portion, your perpetual share. You are to have the part of the most holy offerings that is kept from the fire. From all the gifts they bring me as most holy offerings, whether grain or sin or guilt offerings, that part belongs to you and your sons. Eat it as something most holy; every male shall eat it. You must regard it as holy.'"

169. *See 2 Chronicles* 2:4.

170. *See Revelation* 21: 9–27. For a wonderfully evocative discussion of what it might mean for the "kinds of the earth" to bring their treasures into the heavenly city, see Richard J. Mouw, When the Kings Come Marching In: Isaiah and the New Jerusalem (2002).

generativity of its creators can therefore be virtuous. It can be good for authors and inventors to receive income from their work.

But notice that what is given is first a *gift*, what is exchanged is *gratitude*, and the result is continual *generativity*. In contrast, a system built on *greed* will distort these values. It will not "incentivize" true invention and creativity; it will turn the creators of culture away from common flourishing and in on themselves.

A gift is something freely given. When the recipient has not earned the gift, that is grace. In any Christian ontology, such as the one I have tried to develop in this paper, grace must occupy a central place alongside love. The Triune God's act of ecstatic self-giving in the creation of the universe was not something God needed, nor was it something the universe had earned. Creation, therefore, is already grace. There is in fact no way to utterly separate "nature" from "grace," for there is no such thing as "pure nature" (*natura pura*) apart from God's gracious act of creation.[171] Nature anticipates grace, and grace perfects nature.[172]

The link between creative human activity and grace is evident in the Torah's gleanings laws. During the harvest, some portion of the produce would fall to the ground. The gleanings laws required land owners to leave this produce for the poor to collect.[173] The poor were not required to earn their right to the gleanings. It was a rule designed to enculturate practices of grace.

There are ways in which modern intellectual property law reflects some similar concepts, for example copyright's fair use doctrine, or the compulsory license system for patents under TRIPS. These policies, however, are not always effective and often are not specifically tied to the needs of the poor. Perhaps one reason for this impasse is a lack of faith and imagination concerning the true nature and super-natural purpose of human culture, which is really to say the same thing: culture is always a gracious gift *to* humanity, and as such its cultivation must encompass and benefit all humanity.

Consider the paradigmatic example of the access to medicines and orphan drug problems.[174] The pharmaceutical industry in the United States and Europe, and increasingly in India, has provided great benefits to humanity. A model of drug discovery that depends utterly on private capital

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171. *See* Cunningham, *supra* 139, at 244. As Cunningham notes, "if the hypothetical idea of a pure nature is allowed to become real, so to speak, if it is allowed to materialize, or even if the hypothesis is conferred too much importance then we do indeed participate in the lie of the Anti-Christ: that there could be such a thing as a man without the Christ." *Id.* at 244.

172. *See* Thomas Aquinas, Summa Theologica, I, Q.1, Art. 8 (*in* vol. 1 of Benziger 1948).

173. *See Leviticus* 23:22 (New International Version): "When you reap the harvest of your land, do not reap to the very edges of your field or gather the gleanings of your harvest. Leave them for the poor and for the foreigner residing among you. I am the Lord your God."

174. *See, e.g.*, David W. Opderbeck, *Patents, Essential Medicines, and the Innovation Game*, 58 Vand. L. Rev. 501 (2005).

and blockbuster patents, however, is unsustainable and inequitable. The stock markets should not serve as the primary source of health care finance. The access to medicines and orphan drug problems that are caused or exacerbated by TRIPS-type patent policies will never be resolved as long as drug discovery is primarily funded by private capital.

This is not to suggest that publicly traded pharmaceutical and biotechnology companies whose valuations are tied to patents should be shut down or controlled by the government. In purely econometric terms, this sort of model can offer important direct and spillover benefits. Nevertheless, the legal, or at least perceived, need to maximize shareholder welfare at the expense of other values inevitably undermines the kinds of social relationships that inculcate virtues such as generosity and gratitude.

Present debates over health care finance, particularly in the United States, are of course extensive and heated in the present historical moment, and it is beyond the scope of this essay to attempt any kind of comprehensive resolution. For now, I simply highlight the notion that a thick metaphysic of culture, in which culture is understood as gift, demands significant change to the means by which drug discovery and development is presently financed.

2. *Persons, Social Relations, and Echoes of the Triune Creator-God*

A robust theology of the gift can inform a view of human persons and cultures that is metaphysically rich enough to support a social relations perspective on property and IPRs. Theologian David L. Schindler develops the relation between gift, anthropology, and markets in his penetrating essay, *Market Liberalism and an Economic Culture of Gift and Gratitude*.[175] Schindler argues that human beings are constituted as "individuals" only *in relation* to God: "Each man has his meaning as an individual only from within this original and abiding ontological community with God."[176] This ordering of social relations between God and humans extends to human relationships with other humans: "The human person has an inherent social dimension which calls a person from the innermost depths of self to communion with others and to the giving of self to others."[177] While liberal anthropologies emphasize self-determination and creativity, they do so from an individualistic framework.[178] In contrast, Schindler argues, "self-determination and creativity, understood in their rightful creaturely structure, are

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175. David L. Schindler, *Market Liberalism and an Economic Culture of Gift and Gratitude*, *in* Ordering Love: Liberal Societies and the Memory of God, at 166–218 (2011).

176. *Id.* at 169 (emphasis in original). Schindler notes that "[i]n the words of John Paul II, 'relation to God is a constitute element of [one's] very "nature" and "existence": it is in God that we 'live and move and have our being' (Acts 17:28).'"

177. *Id.* at 169.

178. *Id.* at 186.

grateful-responsive acts of self-giving; and the freedom of the self, accordingly, is first not simply an option or act of choice, but an act of love."[179]

Most Christians who have thought seriously about creation and anthropology will agree with Schindler about the basic claim that human beings are created for relationship with God and others. Many, however, will adopt the "realist" stance that public policy and public markets cannot instantiate this belief in a fallen, sinful world.[180] In response, Schindler argues that this is not a "realist" view at all. If, as Augustine and Aquinas said, man always desires God, then "the desire for God, community, and love . . . are never merely 'ideal.'"[181] These are, in fact, what is *real*.[182]

That which is *un*-real seeks to deny and resist such desire. Bald instances of individual self-interest cannot aggregate into "real" justice because bald self-interest is a vice.[183] Like all vices, bald instances of self-interest require, "conversion, however much it is also simultaneously recognized that this vice will never, in the present condition of the world, be entirely removed from the heart of man."[184]

For Schindler, the "reality" of a relational ontology further explains why appeals to the fecundity of the market, standing alone, will not suffice. "Efficiency" and "productivity" are terms that beg fundamental questions: Efficient at *what*? Productive for *what*? "Both the process of production itself and the artifact produced," Schindler suggests, "are of higher quality when formed in love and indeed as love than they are when formed primarily in profitable self-interest . . . . Furthermore, the persons of both the self and the other are enhanced more fully and truly in the former case than in the latter."[185] Indeed, Schindler argues, the very notion of "abundance" requires definition:

> Rightful material abundance involves dynamic integration of the
> self into the fullness of the truth, goodness, and beauty of the
> others (including God and all others in relation to God) to whom

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179. *Id.*

180. The father of modern "Christian Realism" is Reinhold Niebuhr. *See* REINHOLD NIEBUHR, CHRISTIAN REALISM AND POLITICAL PROBLEMS (Scribner 1953). Niebuhr's "Christian Realism," which stresses the need for pragmatic action in a fallen world, should be distinguished from *metaphysical* realism. Many contemporary political theologians who emphasize metaphysical realism would not agree with Niebuhr's thoroughgoing pragmatism. *See, e.g.*, STANLEY HAUERWAS, WITH THE GRAIN OF THE UNIVERSE: THE CHURCH'S WITNESS AND NATURAL THEOLOGY (2011).

181. SCHINDLER, *supra* note 175, at 182.

182. *Cf.* PABST, *supra* note 131, at xxvii ("the relational ordering of all things suggests a priority of relation over substance, which intimates a first principle and final end that is itself relational—the creative relationality of the three divine persons that brings everything out of nothing into actuality and gives all beings a share of Trinitarian being in which the created order participates.").

183. SCHINDLER, *supra* note 175, at 183.

184. *Id.*

185. *Id.* at 183.

the self is constitutively related . . . abundance is to be integrated in terms of the need 'to be rich toward God' (Luke 12:21).[186]

A Trinitarian relational ontology of culture suggests that the offering of cultural goods is inherently valuable. God pronounced the creation "very good" not because it maximized His utility—God has never lacked anything and so "maximization" with respect to God is nonsense—but because it was, in itself, as given by Him, very good. By analogy, when a musician or painter or other artist extends himself or herself into a creative work, that gift to the world possesses inherent worth. We ought to value such gifts and respond to them with appropriate gratitude, including the material support of the artist's work, just as the Torah required God's people to support the work of the Temple.[187]

Here we must acknowledge that the analogy becomes strained because of another important theological category: the imperfection of humanity. In the Christian tradition, humanity is "fallen" as a result of our primordial and continual rebellion against God. Though the nature and result of the "fall" are debated, the breadth of the Christian tradition clearly holds that human beings are unlike God not only in our inherent creaturely limitations, but also in our separation from God resulting from our own refusal of the good and choice of evil.[188] One implication of this truth is that human culture is never just as it should be. Not every act of human creation is truly a participation in the gift of God's creativity—indeed, the bulk of the Christian tradition would suggest that no human being, this side of the eschaton, ever *completely* participates in the Divine.

It follows that human creation should not be valued merely *as* creation, but rather that the value of human creation inheres in the extent to which it *participates* in the good. In other words, a robust theology of culture requires a theological aesthetic. As Eastern Orthodox theologian David Bently Hart has noted, there is "a marvelous naïveté in the response most immediately provoked by the beautiful: neither in the Bible nor in patristic theology is God's goodness, truth or lordship distinguished from his glory, savor, or awesome holiness; that God is good may be seen and tasted; and this means that a theology of beauty should not scruple to express itself at times as an ontology, an epistemology, or an ethics."[189]

All of this means that concepts such as "open source" or "open culture"—the darlings of many liberal intellectual property scholars—are not enough. A notion of "open" culture is a necessary condition for democratic exchange, and therefore systems of oppressive surveillance and censorship

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186. *Id.* at 184.

187. *See Numbers* 18:8–20.

188. For an excellent Patristic treatment of this subject, written around 335 A.D., see SAINT ATHANASIUS, ON THE INCARNATION (St. Vladimir's Seminary Press 2011).

189. DAVID BENTLEY HART, THE BEAUTY OF THE INFINITE: THE AESTHETICS OF CHRISTIAN TRUTH 21 (2003).

should be opposed.[190] But "open" culture is not sufficient for the cultivation of beauty. Much of what happens on the open Internet, for example, is foul and ugly: child pornography is perhaps the most plain, pervasive, and disturbing example. In fact, things like child pornography are not acts of *cultivation* at all—they are acts of destruction, of anti-creation, and of death. Public patronage of the arts that includes discernment about beauty as a meaningful aspect of created reality is therefore essential.

In this respect I agree with Professor Paul Griffiths, a keynote presenter at this Symposium on "Intellectual Property and Religious Thought."[191] In his Symposium paper and in his book *The Intellectual Appetite*, Professor Griffiths emphasizes the theme of human cultural production as a form of creaturely participation in the Divine gift of creation.[192] For Professor Griffiths, it is improper to speak of human beings as "creators" of anything, for "creation" refers to the act of bringing forth something new *ex nihilo*.[193] Griffiths would take issue, it seems, with the delightful lyric from Stephen Sondheim's *Sunday in the Park with George*:

> Look, I made a hat—
> Where there never was a hat![194]

In fact, Professor Griffiths might say to Sondheim's "George" character that there was a hat—in the models, ideas, and raw materials that informed George about what a "hat" is and should be. Of course, this would not imply that God literally dreams of "hats," but just that humans conceive of nothing that is not already inherent in the *logos* of creation, received from God as gift. And so, Professor Griffiths concludes, human beings cannot "own" intangibles like they might own or possess physical things.[195] This leads him to argue that material support for artists, musicians, scholars, and other "creative" types *should* usually come in the form of patronage rather than from market exchanges.[196]

I am broadly sympathetic to Professor Griffiths' conclusion. Returning to the example of pharmaceutical products, "patronage" could involve funding from public resources, as currently is the case for the large amount of basic biomedical research in the United States that is funded through the National Institutes of Health.[197] The present model, in which

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190. *See, e.g.*, David W. Opderbeck, *Cybersecurity and Executive Power*, 89 WASH. U. L. REV. 795 (2012).

191. *See* Paul J. Griffiths, *The Natural Right of Property and the Impossibility of Owning the Intangible: A Tension in Catholic Thought*, 10 U. ST. THOMAS L.J. 101 (forthcoming 2014).

192. PAUL J. GRIFFITHS, INTELLECTUAL APPETITE: A THEOLOGICAL GRAMMAR (2009).

193. *See id.*

194. Stephen Sondheim, LOOK, I MADE A HAT: COLLECTED LYRICS (1981–2011) WITH ATTENDANT COMMENTS, AMPLIFICATIONS, DOGMAS, HARANGUES, DIGRESSIONS, ANECDOTES, AND MISCELLANY 27 (2011).

195. Griffiths, *supra* note 191.

196. *Id.*

197. *See generally* NATIONAL INSTITUTES OF HEALTH, http://www.nih.gov.

basic research is substantially publicly funded and downstream end-product research is funded through stock and venture capital markets (via private or publicly traded biotech and pharmaceutical firms), ensures that applied drug research responds to private financial rewards rather than global public health needs. This is particularly problematic when differing demand elasticities skew research and development priorities away from populations that bear the bulk of the world's disease burdens.[198] A more just and loving order would seek to allocate the gift of scientific and technological discovery in medicines towards afflicted populations regardless of their ability to pay prices that can sustain patent rents.

At the same time, the reception of some kinds of creative goods properly may involve the reciprocity of morally conditioned markets. As Pope Benedict also stated in *Caritas in Veritate*,

> authentically human social relationships of friendship, solidarity and reciprocity can also be conducted within economic activity, and not only outside it or "after" it. The economic sphere is neither ethically neutral, nor inherently inhuman and opposed to society. It is part and parcel of human activity and precisely because it is human, it must be structured and governed in an ethical manner.[199]

Indeed, Pope Benedict continued, "in *commercial relationships* the *principle of gratuitousness* and the logic of gift as an expression of fraternity can and must *find their place within normal economic activity*."[200] For this reason, the Pope argued,

> alongside profit-oriented private enterprise and the various types of public enterprise, there must be room for commercial entities based on mutualist principles and pursuing social ends to take root and express themselves. It is from their reciprocal encounter in the marketplace that one may expect hybrid forms of commercial behaviour to emerge, and hence an attentiveness to ways of *civilizing the economy*.[201]

These concerns extend particularly to the use of education, social media, and technology to promote human development.[202]

In these statements from *Caritas in Veritate*, we can perhaps discern a place for the many "hybrid" forms of market exchange that have begun to characterize cultural production in the information age: the Creative Commons, open source and peer production models, "maker" and "crafter" culture, fair trade practices, community cooperatives, e-publishing, and so-on, along with more "traditional" markets for literature, education, and the

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198. *See* Opderbeck, *supra* note 174.

199. Pope Benedict, *Caritas in Veritate*, supra note 78, at ¶ 36.

200. *Id.* (emphasis in original).

201. *Id.* at ¶ 38.

202. *Id.* at ¶¶ 68–75.

arts.[203] Most of these models take advantage of existing flexibilities in intellectual property law, such as the ability to license derivative works (Creative Commons), fair use, and certification marks. In some ways these flexibilities may represent the inherent seeds of intellectual property law's redemption.

VII. CONCLUSION

"Reality, most basically considered, is an order of *love*."[204] The metaphysical basis for a theory of intellectual property as social relations is the love of God poured out in the gift of creation, including the creation of human beings in God's image who are uniquely endowed with the capacity of co-creation after God's image. Human creativity and invention find their basis in God's creativity and invention. As God made the "very good" of the created order, human creative activity should be oriented toward the flourishing of all of creation.[205] Indeed, this is the meaning of the "cultural mandate" God first gave to humanity.[206] This realization should prompt fresh reflection on the nature and scope of claims to ownership of human cultural products.

These suggestions, of course, are not in themselves novel. What I have endeavored to do is show how themes such as these can be rooted in a richer social imagination that gives them meaning and weight. When we skip over reasons and merely offer prescriptions—or perhaps worse, when our reasons are anemic, or worse yet, when our reasons reflect a distorted ontology of selfishness—the goods we are able to achieve will suffer accordingly. Christian and other religious scholars can therefore offer the world great gifts: the gifts of reason, purpose, and love.

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203. *See New Economies, Innovative Markets*, RESPUBLICA, http://www.respublica.org.uk/units-new-economies—innovative-markets (last visited Jan. 14, 2014).

204. David L. Schindler, *Preface*, *in* ORDERING LOVE, *supra* note 98, at ix (emphasis added).

205. *See Genesis* 1:31.

206. *See Genesis* 1:28. At times both religious interpreters and secular critics have read *Genesis* 1:28 as a license to despoil the planet. Nothing could be further from the sense of the text. In fact, the text suggests that human beings are appointed to love and care for the Earth as God's representatives. *See*, *e.g.*, FRED BAHNSON & NORMAN WIRZBA, MAKING PEACE WITH THE LAND: GOD'S CALL TO RECONCILE WITH CREATION (2012).