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Reconstructing the Fair Use Doctrine
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Part V: Utopian Analysis

This Part considers how the fair use doctrine might be rebuilt if one's ambition were not merely to reduce inefficiency in the use of resources, but to advance a substantive conception of a just and attractive intellectual culture. Section A sets the premises of the analysis by adumbrating a vision of the good life and the sort of society that would facilitate its widespread realization. Section B confronts and rejects the argument that using legal doctrine to nudge the United States in the direction of that vision would be unacceptably [*1745] "paternalistic." Section C considers how a well-informed court or legislature might advance the utopian agenda by differentiating between fair and unfair uses of copyrighted materials. Section D distills from that analysis a set of considerations that could be incorporated reasonably easily into the current fair use doctrine. ***

A. Premises

What sort of social order should we strive to achieve? Most of the writers who in recent years have addressed this age-old question fall into one of two camps. Utilitarian theorists argue that our goal should be to identify and institute the system that would maximize "general happiness," measured by the sum of the pleasures minus the sum of the pains experienced by the members of the society, taking due account of the intensity -- but no account of the character -- of the desires whose satisfaction or frustration gives rise to those pleasures and pains. n361 The members of the other group -- perhaps best described as "Kantian liberals" n362 -- reject the utilitarians' aggregative criterion for resolving conflicts between individuals' preferences on the ground that it often counsels subordinating the interests of some persons to the interests of others, a result offensive to our conceptions of justice. n363 The ambition of the Kantian philosophers is to formulate guidelines for the design of the social and political system that do not entail judgments regarding alternative aspirations or ways of living [*1746] but instead accord all persons the respect they are due as autonomous moral agents. n364

The theory summarized below, though it incorporates many arguments developed by the utilitarians or their opponents, takes a different tack. It proceeds from the propositions, sometimes associated with the Aristotelian tradition of moral philosophy, that there exists such a thing as human nature, which is mysterious and complex but nevertheless stable and discoverable, that people's nature causes them to flourish more under some conditions than others, n365 and that social and political institutions should be organized to facilitate that flourishing. n366

Adequate development of such an argument is clearly beyond the scope of an article on copyright law. This section does no more than set forth, in the form of postulates, those aspects of the vision that bear on the shape of intellectual property law and direct readers to more thorough defenses and criticisms of each tenet. Readers who find either the methodology or the proffered theory uncongenial may nevertheless find the ensuing analysis helpful in suggesting how some other substantive conception of the public interest might be used to restructure the fair use doctrine.

I. *The Good Life*. -- The good life is a life of self-determination, commitment, moderate risk, and meaningful work. n367 The activities, [*1747] bonds, and communities through which a person defines himself are freely chosen; the person is engaged in projects and relationships that carry with them a chance of failure; work is important and, for the most part, creative. Brief explications of the components of this conception and an explanation why they do not conflict with one another follow.

(a) *Work*. -- Marx's most durable insight is that productive activity is "the life of the species" -- that work is natural, not something to be endured or escaped, and that the quality of a person's existence is closely related to the quality of his work. What is good work? The adjective that best captures Marx's answer is "meaningful." Meaningful work requires skill and concentration, presents the laborer with challenges and problems he can overcome only through the exercise of initiative and creativity, and is part of a larger project he considers socially valuable and must take into account in making his decisions. n368

Persons whose labor consists primarily of thinking and writing have long known the rewards of work of this sort. Prior to the onset of industrialization, many artisans also cherished a version of this ideal and to some degree realized it. The spread of industrial capitalism during the nineteenth century deprived an ever larger proportion of the population access to meaningful work. n369 The resulting changes in the consciousness and life-style of the typical laborer -- the sense of being separated from the goods and institutions one has created, from other people, and from one's own ego; the passivity; the search for solace in the ephemeral pleasures of consumption -- are what most horrified Marx. n370 Movement in the direction of utopia would require, to the extent practicable, reversal of those trends.

[*1748] (b) *Risk and Vulnerability*. -- Excessive security makes for a flat life. Excessive desire for security -- for certainty that one's projects will succeed, that one's relationships will not deteriorate, and that one will not be hurt physically or emotionally -- leads to unambitious and unrewarding projects, shallow relationships, and dull play. The good life is an intense life, and intensity depends in part on adventurousness. n371 To be vulnerable, to be not fully in control of one's life, is a good thing, a condition to be sought, not shunned. To avoid friendship and love, to eschew all attachment to possessions, to refuse to nourish or gratify one's passions because all of those things expose one to the risk of loss, to the vagaries of fortune, and to the wills of others, is to be not fully human. n372

The notion that some degree of risk and vulnerability is desirable coheres in two ways with the value of meaningful work. First, engagement in meaningful work fosters confidence, innovativeness, and sense of worth, which in turn support a willingness to take chances. Second, the possibility that a project on which one is working will not realize one's hopes helps prevent creative work from "degenerat[ing] into narcissism or self-indulgence"; the worker's desire to succeed, and knowledge that he may not, keeps his mind off "self-realization" and increases the likelihood that he will attain it. n373

(c) *Self-Determination*. -- To live well means, among other things, to take responsibility for one's self. "One's dignity resides in being, to some important degree, a person of one's own creating, making, choosing, rather than being merely a creature or a socially manufactured, conditioned, manipulated, thing: half-animal and half mechanical and therefore wholly socialized." n374

To emphasize self-determination is not to deny that our identities are substantially socially determined -- that both our initial senses of [*1749] self and our capacity to reflect upon the selves we wish to become derive to a large extent from the communities in which we are reared, and that those communities inevitably exert powerful influences over our subsequent lives. n375 But the person who depends too much for his identity and life-plan on inherited outlooks and habits -- who does not achieve sufficient distance from his original community either deliberately to make the tradition his own or to transcend it -- is not fully alive. n376 Mill put the point powerfully:

The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice. He who does anything because it is the custom, makes no choice. He gains no practice either in discerning or in desiring what is best. The mental and moral, like the muscular powers, are improved only by being used. n377

Nor is it to deny the importance of attachment to groups. Participation in families, n378 friendships, n379 teams of workers, local political bodies, n380 communities of faith, n381 and other cooperative ventures n382 is more than a strategy for achieving our individual ambitions and [*1750] desires; it is a crucial way in which we define ourselves. n383 To be most meaningful, however, such engagements should derive from choice and commitment, not drift or ascription. n384

(d) *The Coherence of the Ideal.* -- Why does the value of self-determination not conflict with the values of meaningful work and moderate risk? Left to their own devices, would not many people opt for risk-free, monotonous jobs that provide them sufficient income to enjoy the bounty of consumer goods in their leisure time? n385 A premise n386 of the argument advanced here is that the vast majority of persons would not react in that way. The theory supposes that the reasons relatively few Americans are now clamoring for more creative work n387 are that they have not experienced the rewards of the life described above, that they are enmeshed in a culture that places a premium on "disposable income," and that their preferences have adapted to afford them a modicum of pleasure and satisfaction in the [*1751] world as it stands. n388 If released from the spell of consumerism and allowed to taste the kind of self-realization achievable through meaningful labor, they would with few exceptions opt to continue to live adventurous, creative lives. n389

2. The Good Society. -- In the utopian society, resources would be deployed and divided in the fashion that enabled and encouraged its members n390 to realize as fully as possible lives of the sort sketched above. Does that entail affording all persons *equal* access to the good life? The present subsection assumes the answer is yes and outlines the allocation of resources that would advance that end. The following subsection considers possible reasons for departing from the goal of strict equality of access. n391

(a) Engagement in most of the activities central to the good life is impossible unless one is fed, housed, clothed, and tolerably healthy. People vary in their metabolisms, the climates in which they live, and their susceptibility to disease. Thus, affording all persons equal access to the good life would require that, up to a certain level, food, housing, clothing, and medical care be provided on the basis of need. n392

(b) Both self-determination and creativity are facilitated by conditions that increase and make more apparent people's opportunities for self-expression and communication. Perhaps the most important such condition is cultural diversity. The enduring power of Mill's essay, *On Liberty*, despite gaps in the utilitarian rationale upon which [*1752] it ostensibly rests, n393 is attribut-

able in large part to its evocative depiction of the cumulative benefits of variety in social and intellectual life: the more multifarious the life-styles and ideas on public display in a society, the more each of its members must decide for herself what to think and how to act, thereby developing her own "mental and moral faculties" and rendering the culture as a whole even more "rich, diversified, and animating." n394 Mill is usually remembered and invoked for his contention that the "expressive" activity crucial to the preservation of diversity ought not be penalized by the state. n395 But Mill understood that "individuality" and diversity are endangered as much by hostile public opinion and informal social sanctions as by "blue laws." n396 The more trenchant critics of American culture have confirmed the point. n397 In the utopian society, therefore, intellectual and cultural innovativeness -- the key to diversity -- would be not merely tolerated by government but nourished and rewarded.

(c) A second, related condition conducive to self-expression and self-realization is a rich artistic tradition. This point has been made most ably by Ronald Dworkin in his recent defense of public subsidies for the arts. n398 Dworkin persuasively argues that the more complex and "resonant" the "shared language" of a culture -- the richer it is in the raw materials of representation, metaphor, and allusion -- the more opportunities for creativity and subtlety in communication and [*1753] thought it affords the members of the culture. n399 The complexity and resonance of the culture's language in large part depends, he contends, upon the quality of its "vocabulary of art." n400 One might extend Dworkin's argument by observing that a resonant "shared language" also invites and helps persons to take a hand in shaping their culture, thereby facilitating their achievement of a rewarding collective life. n401 For several reasons, therefore, a legitimate and important objective of a government that wishes to increase the "complexity and depth [of] the forms of life open to" its subjects is to protect the culture's language as a whole and its artistic vocabulary in particular "from structural debasement or decay" -- both by preserving and making accessible to the public "a rich stock of illustrative and comparative collections" of art and by fostering "a tradition of [artistic] innovation." n402

(d) Simply multiplying the "choices" and the opportunities for communication available to individuals, however, does not sufficiently foster self-determination and self-realization. To be willing and able to avail oneself of such options, one must have a secure sense of self and a capacity for reflection -- attributes most likely to be found in persons with a grounding in a "community of memory." n403 And persons' capacities to construct rewarding lives will be improved if a variety of potentially "constitutive" group affiliations are accessible to them. n404 In the good society, therefore, communities of both sorts would be encouraged and protected. n405

[*1754] (e) Expansion and levelling of access to the good life would necessitate reform of the economic system designed to increase and equalize the proportions of persons' labor that consisted of meaningful work. n406 At least three complementary initiatives would be essential to the program: decentralization of responsibility for deciding how tasks are performed and goods are produced, enabling workers to reap more of the rewards of problem-solving; equalization of the shares of irremediably dull labor performed by the members of the society; n407 and equalization of access to each of the resultant packages of good and bad work.

(f) A rich linguistic and artistic tradition is of little value if the public is not in a position to appreciate it. nor will ready access to a potpourri of creative work facilitate widespread achievement of the good life if few people are capable of doing those jobs. An essential feature of the good society would therefore be extensive, public, n408 and (up to a point) compulsory education. The sort

of education that would maximize access to the good life would encompass more than that received by most Americans today. It would expose a young person to a wide variety of (creative) occupations, assist her in choosing one, and prepare her to perform it. It would explore and celebrate, rather than ignore or denigrate, the distinctive traditions of established communities. And, to widen people's horizons, it would incorporate more than schooling -- extending to such things as publicly financed concerts, art exhibitions, and dramatic performances. n409

(g) The public projects described in the preceding six paragraphs would absorb a good deal of the society's resources, but, at least if [*1755] the society in question were moderately modernized, there would be some left over. How should the surplus be divided? If, as we have assumed thus far, the objective is simultaneously to maximize and to equalize persons' access to the good life, the most plausible answer would seem to be: equally.

But perhaps that response is premature. Consider the following problem. If *X* decides to spend a significant portion of her leisure time playing chess while *Y* decides to perfect and exercise his skill in sailboat racing, the amounts of satisfaction they are able to obtain per unit of resource will diverge. Does not affording them equal access to the good life require giving *Y* many times the resources given *X*? n410 The question is difficult, but a combination of three concerns suggests no. First, the goal of maximizing all persons' access to the good life would be advanced by creating a disincentive to cultivate tastes for costly leisure activities, and an effective way of establishing such a disincentive would be to refuse to increase a person's allowance when he acquires an unusually expensive taste. Second, monitoring each person's relative capacity to make efficient use of resources -- especially in view of the advantage of pretending to hold expensive tastes -- would be prohibitively costly. Finally, in the opinions of at least some of the theorists to have addressed the issue, there is something "counterintuitive" about the notion that wine-lovers should get more of the medium of exchange than beer-lovers. n411 These arguments are not without their difficulties, n412 but in concert they seem sufficient to sustain the proposition that maximization and equalization of access to the good life requires that surplus goods and services be distributed equally. n413

[*1756] We now turn to the question how, if at all, the premise on which we have thus far proceeded should be altered. In other words, what considerations, if any, justify affording people unequal access to the good life and how much inequality (or what sort of inequality) do they legitimate?

3. *Distributive Justice.* -- Over the centuries, moral philosophers have debated the merits of many different criteria for distributing shares of the social pie. n414 This section posits that only two of those theories are defensible: a variant of the "difference principle" popularized by John Rawls; n415 and the proposition that unequal effort warrants unequal reward. The principal arguments on which that sweeping judgment is based are presented below in highly abbreviated form. For their fuller elaboration, the reader should consult the sources cited in the margin.

To make the discussion concrete, consider the following case. Nan, using only a typewriter and a few reams of paper, manages, by dint of a year of hard work, to produce a novel whose brilliance is appreciated immediately by both critics and the reading public. Nan enjoys being a writer and is relatively nonmaterialistic, but is not entirely immune to the temptations of wealth. On what grounds might she argue that she should be accorded a better than average lot in life?

(a) *Labor-Desert/Entitlement Theory.* -- First, Nan might assert that she has a natural right (which the law should recognize) to the fruits of her labor. n416 More precisely, she might claim

that, because she created the text by herself and did not thereby diminish the resources or opportunities available to her fellow citizens, she should be entitled to set the terms upon which other people can gain access to her creation. n417 If, through voluntary transactions with those consumers, she can secure a larger than average share of society's resources, she deserves it. n418 The most compelling of the objections [*1757] that may be made to this theory is that it fails to take account of the fact that "the accumulated results of many separate and ostensibly fair agreements [of the sort described above] . . . are likely in the course of time to alter citizens' relationships so that the conditions for free and fair agreements no longer hold" n419 and thus to impose "intolerable limitations on individuals' opportunities for autonomous living." n420

(b) *Equity Theory.* n421 -- Second, Nan might argue that she has done more than most of her neighbors to enhance the quality of their collective life, and that she deserves a reward commensurate with the magnitude of her contribution. n422 Enormous practical difficulties would accompany systematic implementation of this principle. n423 But, assuming those impediments could be overcome, the theory should be rejected on the ground that it would make persons' lots in life depend to an excessive extent upon their natural abilities, the distribution of which is "arbitrary from a moral point of view." n424 To the (large) [*1758] extent that Nan's contribution to her fellow citizens' welfare is traceable to her better-than-average talents, she can no more convincingly assert a claim to a reward than she can by pointing to the talents themselves. n425

(c) *Utilitarianism.* -- Third, Nan might argue that justice requires, not that she and her neighbors receive equal lots in life, but that their shares be set by determining which deployment of resources would produce "the greatest good of the greatest number." n426 It is far from clear that Nan would be happy with the outcome of such a calculus. Her love of her work might prompt Nan to continue writing equally fine novels (thereby giving pleasure to her readers) even if paid little, and her relative disinterest in consumer goods might mean that more total happiness would result from giving surplus resources to her neighbors than to her. n427 Assume, however, that (as is likely) most of Nan's fellow citizens subscribe to the "equity theory" just discussed n428 and thus would suffer disappointment or anxiety if she were denied the share that they believe she is due. Under those circumstances, net social utility would most likely be maximized by affording Nan a larger than average portion of society's surplus. n429 The theory she invokes nevertheless should be rejected primarily n430 on the ground that, to the extent it concentrates on "the total aggregate of pleasure or happiness" and counsels depriving a person of resources whenever so doing would secure the greater happiness of others, it fails to "take seriously the distinction between persons." n431

[*1759] (d) *Inequality that "Pays for Itself."* n432 -- Frustrated, Nan might respond: at least we can agree upon the legitimacy of inequality that leaves no person worse off than a situation of perfect equality. Here she is on solid ground. A policy that increases the ability of some persons to realize the good life without decreasing the ability of others is unobjectionable. n433 Full elaboration of this deceptively simple criterion n434 would be exceedingly difficult, n435 but a few implications are clear and germane. Some degree of inequality in income, decisionmaking responsibility, and access to meaningful work surely is justifiable when, through a system of incentives, it increases economic productivity and coordination enough to enhance the quality of life of the least advantaged individual. n436 Thus, the creators of art should [*1760] be afforded better than average incomes (or greater freedom from drudgery) whenever, but only whenever, such a policy would increase their output enough to yield a net improvement in the lives of non-artists. n437

(e) *Unequal Effort*. -- Finally, Nan might seek to salvage something of the "equity theory" criticized above. n438 Conceding that she is not entitled to a reward for that part of her achievement attributable to her innate talent, she might claim that her decision to devote unusual amounts of time and effort to the development and application of her ability deserves recognition. This argument also has merit. Rawls would have us reject Nan's plea on the same grounds we rejected the argument based on a differential contribution: a person's "character" -- which, presumably, is what inclines and equips her to work hard -- "depends in large part upon fortunate family and social circumstances for which [she] can claim no credit." n439 But this concedes too much to the determinist camp. Our intuitions and experience point toward -- indeed, our capacity to make moral judgments of any sort depends upon -- the proposition that persons are to *some* extent the architects of their characters and the agents of their actions. n440 Once Rawls' position on this point is rejected, Nan's claim is strong. She does not deserve extra credit for every hour she spent in front of her typewriter; she has a duty to devote to the community a portion of her time and energy that, when combined with the equal contributions of her fellow citizens, will sustain the conditions that make it possible for everyone to realize the good life. n441 But the objective of providing all members of the society room for self-determination counsels permitting her to decide for herself if and how much to exceed that level of contribution. If she decides to devote [*1761] more time than her neighbors to activities from which they all benefit, she deserves more than an average share of society's surplus. n442

4. *The Contours of the System*. -- The comments made in the preceding fifteen pages leave many difficult questions unresolved. Among the more important are: Would socialism, capitalism, or some mixture of them best facilitate the requisite reforms of the economic system? n443 What kind of governmental regulation would be necessary to allocate income and tasks in accordance with the modified "difference principle" and the unequal-effort principle? n444 And how, in practice, would legitimate inequalities derived from those two criteria be reconciled? n445

Nevertheless, the rough outlines of the utopian society are clear enough: compared to the United States today, the creativity and challenge of persons' jobs would be greater and more equal; the material resources at each person's disposal would be somewhat less (on average) and much more equal; and the state would be more extensively involved in fostering artistic innovation and providing people decent food, clothing, housing, and medical care and more-than-decent educations. A society organized along such lines would make accessible to all of its members the sort of life sketched at the outset of the analysis. More fundamentally, by celebrating such a life and by inculcating [*1762] the habits, moods, and motivations crucial to it, n446 the society would induce persons to seek and share it.

B. *Paternalism*

Although substantial movement in the direction of the society outlined above would require social and economic reform of many sorts, most of which are beyond the reach of the law of intellectual property, judicious reconstruction of the fair use doctrine could contribute in more than trivial respects to the overall program. n447 Sections C, D, and E of this Part attempt to substantiate that assertion. Before commencing the analysis, however, we must confront a general objection to this way of approaching and justifying doctrinal reform. A goal of several of the specific proposals advanced in the following pages is to alter, through adjustments in the price or availability of different sorts of intellectual products, consumers' habits and desires so that they conform more closely

to the predilections endorsed in Section A. To the extent such proposals are motivated by a judgment that many Americans do not now know what is in their best interest, are they not impermissibly "paternalistic" in character? In other words, do they not amount, at bottom, to efforts to limit persons' freedom "for their own good" -- an activity in which government n448 should not be engaged?

The challenge might be deflected to some degree by three observations. First, none of the reforms advocated below would force consumers to do or not do anything. True paternalism, it could be argued, involves coercion; n449 the use of incentives or disincentives to [*1763] alter persons' outlooks and conduct should not cause us the same alarm. n450 Second, the American legal system is rife with rules whose most plausible justification is that they limit persons' freedom for their own good, and many of those rules are the inventions of judges. n451 The suggestion that, in modifying copyright law, we might profitably attend to concerns that already undergird much of the law of contracts, torts, and consumer protection arguably should not be troubling. Third, the program outlined below is as much designed to foster in future generations tastes and capacities that will enable and urge them to realize the good life as it is to change the preferences of current consumers. To that extent, it is not paternalistic at all, but falls well within the category of "redistributive" rules -- limitations on the freedom of some persons to advance the interests of others. n452

Unfortunately, none of these responses, reassuring as they may be, reaches the heart of the matter. As to the first, several philosophers have recently argued persuasively that noncoercive interference with persons' freedom in order to promote their own welfare implicates, at least in muted form, the same moral difficulties raised by coercive interference. n453 The second argument in truth only expands the set [*1764] of rules that must be justified, and the third answer fails to justify the proposals insofar as they are aimed at current consumers.

We turn then to the question: to what extent, if at all, is it legitimate to use the law of copyright to change persons' minds and habits for their own good? We may profitably begin by isolating the grounds on which philosophers have either criticized legal paternalism or tried to delimit its acceptable scope. Four themes (in various combinations) dominate the literature. (a) Drawing on the central argument of most modern forms of liberalism, n454 many analysts contend that government ought to remain neutral as to alternative theories of the good and therefore that paternalistic intervention in a person's affairs can be justified, if at all, only when it enables him to realize his own conception of his well-being n455 more effectually than would leaving him to his own devices. n456 (b) Building on an argument first advanced by Mill, n457 some commentators insist that, although a person does not always know which course of action would be in his best interest, he is usually a better judge of his welfare than an officious government official (at least given extant systems for selecting government officials), that the rare cases in which the official's judgment would be superior cannot be isolated, and that therefore a general (or nearly general) rule against legal paternalism would do more good than harm. n458 (c) Other writers eschew such a consequentialist approach as too unreliable a bulwark of individual liberty and contend, usually on Kantian grounds, n459 that a person's freedom to choose his own course of action is the supreme value and should always prevail over others' desires to protect him from harm. n460 (d) Finally, some [*1765] writers argue that individuality (in the sense of full development of one's faculties), while perhaps not the supreme value, is surely an important one, and that leaving persons free to make choices (and mistakes) is the best way to enable them to develop the moral muscles upon which individuality depends. n461

When these four arguments are exposed to the utopian vision set forth in section A, the first and third quickly fall away. As to the first, a premise of the analysis of this Part is that government should *not* remain neutral as to alternative conceptions of the good; the fact that a paternalistic rule presupposes "some idea of what is a fitting life for a person," consequently, is no objection to it. n462 As to the third, the particular conception of the good life ventured in section A.I. does not hold up autarchy as the supreme value.

But the game is far from up for the antipaternalist. One of the components of the proffered vision of the good life is a particular conception of self-determination. n463 Insofar as a paternalistic law enhances persons' capacity and tendency to choose and shape their roles, relationships, jobs, and communities (for example, by freeing them of habits and outlooks endemic to electronic consumer culture that stunt or distort their imaginations), n464 it is commended by, rather [*1766] than repugnant to, that conception. n465 But too many such laws would diminish the set of choices available to persons more than could be justified by the augmentation of their "positive freedom" n466 to avail themselves of the remaining options. That a particular rule would limit persons' opportunities for self-determination is not necessarily a fatal objection to it; for example, the rule might sufficiently enlarge persons' access to creative work to be nevertheless justifiable. But, from the standpoint of the theory advanced here, the fact that a rule would have a net adverse impact on persons' choices does count against it. In addition, when considering the wisdom of particular paternalistic incentives or constraints, the educational value of mistakes must constantly be borne in mind. Finally, the dangers identified by the consequentialist argument -- that government officials either will abuse their authority or will make good-faith errors when adopting laws for persons' own good -- remain salient.

Where does this leave us? Not inveterately opposed to paternalism, certainly, but not cavalier in our acceptance of it either. In general terms, the argument suggests that when and only when it can be predicted -- with sufficient confidence to warrant running the risks just canvassed -- that a particular policy designed to alter persons' tastes for different types of intellectual products would, on balance, increase their access to the good life (taking due account of the need to preserve opportunities for self-determination), it should be adopted. A rough principle, to be sure, but it enables us to proceed and will help guide the more contextual judgments made in the course of the ensuing analysis.

C. Reconstructing the Fair Use Doctrine

This section considers how a judge who had time on his hands and extensive access to information, who knew that other courts would adhere to his rulings, and who fully shared the utopian vision advanced in this Part might rebuild the fair use doctrine. The following [*1767] section extracts from that discussion a set of proposals a real federal court might practicably and comfortably adopt.

A quick review is in order. Artists make money by extracting fees from persons who desire access to their works. Part IV showed why, in many circumstances, it would be inefficient to empower an artist to demand payment from every person who wished to put her works to one of the uses listed in section 106 of the Copyright Act. Part IV also showed that it matters *which* activities consumers are permitted to engage in for free and which are deemed to require the consent of the artist. The rights prescribed by section 106 vary in the amount of benefit they provide copyright

owners per unit of cost to the rest of us. Generally speaking, the economist would like to avoid two situations: one in which artists are accorded entitlements from which they gain little but which cost the public a good deal, and one in which they are denied entitlements from which they could gain much at modest cost to the public. Somewhat more precisely, maximization of allocative efficiency can be achieved by arranging the set of activities putatively reserved to copyright owners by section 106 in order of their incentive/loss ratios, n467 identifying the point in the series at which the benefits secured by holding out monetary incentives to talented persons exceed by the maximum amount the attendant monopoly losses, and declaring all uses above that point fair and all uses below it unfair. n468

A modified version of this technique could be put to good use by our hypothetical judge. If full exploitation of the rights prescribed by section 106 would afford creators of a particular type of intellectual product more income than they deserve, the judge would be able to promote his goals by declaring fair (and thus encouraging) activities that would contribute to the attainment of the good society and by declaring unfair activities that would not. How, then, should he decide which uses fall into which category? That question reduces to two problems. The first, addressed in subsection 1, is how might the judge go about ranking the putatively infringing uses of a particular sort of copyrighted material in terms of their relative importance to his agenda. The second, addressed in subsection 2, is where in that series he should draw the line between fair and unfair activities.

1. Ranking Entitlements. -- Because, other things being equal, the judge would rather that people be better rather than worse off by their own lights, he would have to take into account all of the considerations identified by the portion of the economic analysis directed toward arranging uses in the right order. But sections A and B of [*1768] this Part have identified a number of goals other than maximizing the satisfaction of current consumers' tastes that the judge would seek to advance. Specifically, sensitivity to the five concerns itemized below could and should affect his determination of the optimal order of entitlements.

(a) Transformative Uses. -- Active interaction with one's cultural environment is good for the soul. A person living the good life would be a creator, not just a consumer, of works of the intellect. This is not to say that all passive uses of cultural artifacts are bad; even in utopia, people can be expected to listen to symphonies without playing along, to attend dramatic performances without mounting the stage, even to watch some television. n469 But the proportion of active to passive activities in the lives of most Americans today is too low. Whitman's contention that, to realize the promise of democracy, to create and sustain a society in which people flourish, we must cultivate a new kind of "character" -- one not only more "attentive," more capable of appreciating the texture of the surface of life, but also more energetic, more actively engaged in the production and transformation of "Culture" n470 -- is even more applicable to the United States of the 1980's than it was to the United States of the 1860's. n471

What does that have to do with the fair use doctrine? It suggests that uses of copyrighted material that either constitute or facilitate creative engagement with intellectual products should be preferred to uses that neither constitute nor foster such engagement. Our hypothetical judge should thus modify the sequence of uses generated by economic analysis, which takes as given Americans' present tastes, either by shifting transformative uses upward or by shifting passive uses downward. Assume, for example, that he has succeeded in ranking according to their incentive/loss ratios the various ways in which copyrights in feature movies could be violated. Included in the list are home videotaping of the sort at issue in *Sony* and the production of "sequel" movies.

n472 Because the latter is more creative than [*1769] the former, n473 the latter should be moved up in the series, or the former should be moved down. n474

For two related reasons, systematic application of this procedure would advance the utopian agenda. First, it would create more opportunities for Americans to become actively involved in shaping their culture, thereby increasing access to the good life. Second, by altering the relative ease with which Americans can engage in different sorts of activities -- that is by making creative activities less expensive or more convenient and making noncreative activities more expensive or less convenient -- the procedure would modify consumers' habits and eventually their desires, thereby enhancing not just their access to but also their appreciation of the good life. n475

(b) Education. -- During the prolonged debate that resulted in the 1976 comprehensive reform of the Copyright Act, it was often suggested that some sort of special exemption for "educational" uses of copyrighted materials be incorporated into the statute. n476 Only a few of these various proposals found expression in the language of the statute that Congress ultimately adopted. n477 Despite this meager [*1770] congressional acknowledgment of the special character of education and despite the fact that, in recent litigation, "nonprofit educational users have been singularly unsuccessful in asserting fair use," n478 a suspicion persists among many students of the doctrine that educational activities should stand on a somewhat different footing from other kinds of uses. n479

The utopian vision advanced in this Part provides a way of giving shape to and justifying that intuition. Recall that one of the important features of the good society would be an extensive system of public education, which would include not just "schooling," but also a variety of institutions designed to enhance people's knowledge of public affairs and appreciation of different kinds of art. Realization of that objective plainly would require a good deal more than reform of copyright law. But until such time as the federal or state governments can be induced to provide an educational regime of the sort envisioned, the fair use doctrine can and should be crafted to implement parts of it. n480 A good way of doing so would be to accord preferential treatment in the fair use calculus to activities that facilitate education -- either by enhancing access to information and argument on matters of public importance n481 or by increasing the ability of teachers to design and deliver to students the packages of materials they deem most effective. The [*1771] more a particular use would advance that end, the more of a boost it should get.

Examples, drawn from the case law, of uses that would qualify on this basis for special protection include: n482 taking from a book defending a woman's right to an abortion portions of interviews of women who had had abortions and publishing them in a book arguing against such a right; n483 reprinting excerpts from an author's copyrighted letters in a critical biography of him; n484 reproducing in a biography of a composer passages from a previously published biography for the purpose of substantiating criticisms of the first biographer's conclusions or use of evidence; n485 and copying, for classroom use, portions of copyrighted materials unavailable in the form deemed most educational by a teacher. n486

To apply this procedure sensitively, a judge would have to bear in mind that the degree of preferential treatment to which a particular activity is entitled depends on how important use of the copyrighted [*1772] material is to the activity's educational value. If, for example, much of the credibility and force of a "pro-life" argument derives from the author's ability to quote interviews conducted by an advocate of the right to an abortion, n487 the place of the activity in the sequence of uses should be changed significantly. By contrast, if the reader's capacity to assess one historian's criticism of another is enhanced only marginally by the former's quotation of passages

from the latter's work, then sensitivity to the educational value of such criticism does not require adjustment of the sequence of putatively infringing uses.

(c) *Diversity*. -- Closely related to the goal of facilitating education is that of fostering cultural diversity. The objective of producing a society in which people exercise (and thereby develop) their faculties of choice and discrimination will be served by providing the populace as wide a range of cultural artifacts as possible. n488 One way to advance that end is to give special consideration, when deciding which uses of a type of copyrighted material should be deemed fair, to those likely to produce "derivative works" n489 that will add to the variety of intellectual products available to the public.

In most circumstances, this consideration will reinforce the two guidelines just considered. So, for example, parody deserves a boost in the fair use calculus, partly because it is a transformative use, n490 partly because it improves the ability of consumers to assess the merits of the parodied work, n491 and partly because it increases the variegation of the artistic environment. n492

[*1773] (d) *Protecting the Creative Process*. -- In his efforts to afford the public opportunities to transform and learn from intellectual products, the judge should be careful not to lose sight of the concerns of producers. n493 In particular, both to ensure that artists (as well as consumers) have maximum opportunities for engaging in meaningful work and to increase the maturity and diversity of the artifacts they generate, he should be loath to privilege activities that threaten the creative process. n494 So, for example, he should disfavor conduct that results in disclosure of works of art before their creators deem them finished, insofar as both premature divulgence itself and fear of such disclosure undercut artists' willingness and ability to take the time [*1774] they need to refine their works to their satisfaction. n495 The courts' current reluctance to recognize as fair any copying of "unpublished" materials n496 goes a considerable distance toward accommodating this concern. More precise would be a guideline that simply incorporated the concern itself -- namely, that disfavored unauthorized uses of materials the creators of which were still considering revising. n497

(e) *Equalizing Public Access*. -- One of the major conclusions of the argument summarized in section A.3 was that, in the good society, people's lots in life would be much less unequal than they are in the United States today. The bearing of that proposition on the ways in which we compensate artists is considered in the next subsection. A less apparent but equally important implication of the conclusion is that the law should be adjusted to equalize consumers' access to works of the intellect.

Clearly, the most direct route to the latter goal would be to redistribute wealth and income in American society, thereby providing persons more equal means to purchase access to copyrighted materials. Unfortunately, fundamental reform along those lines does not appear imminent. Until it happens, our hypothetical judge can and should make adjustments in the fair use doctrine to effect, in some small measure, the sort of levelling commended by the utopian vision; other things being equal, activities that would tend to equalize public access to intellectual products should be given priority over activities that would not. So, for example, the fact that the behavior of Best-seller Book Club described in Part IV n498 impedes Plaintiff's ability to engage in price discrimination in the marketing of her work should count against it. Conversely, an activity that facilitates price discrimination should be favored.

2. *Compensating Creators.* -- Like the economic analysis of Part IV, the utopian analysis deployed in this Part is notably less helpful in determining where the line should be drawn between fair and unfair activities than it is in ranking entitlements. nevertheless, this subsection argues, a few guidelines may be derived from the approach.

Recall that section A.3 isolated two grounds on which the creators of intellectual products might legitimately be accorded lots in life better or worse than average: the proposition that unequal effort warrants unequal rewards; and a modified version of Rawls' difference [*1775] principle. Unfortunately, the impediments to using the fair use doctrine to implement those ideals are substantial.

As to the unequal-effort criterion, two obstacles seem insurmountable. First, courts cannot obtain the information necessary to apply the principle to particular cases. It may be true that *M*, who by dint of concentration and effort produces a respectable symphony despite his modest talent, deserves more income than *N*, who dissipates her enormous talent and produces only a respectable symphony, but accumulation of the data necessary to determine which artists are more like *M* and which are more like *N* plainly would be infeasible. n499 Second, even if courts had the requisite information, the importance of enabling both the creators and the users of intellectual products to predict in advance what activities will and will not give rise to liability n500 would counsel against the sort of case-by-case adjudication that tying rewards to effort and not talent would require.

The barriers to accommodation of the modified difference principle at first blush seem nearly as formidable. Remember the difficulties we encountered in giving effect to the formula for the maximization of allocative efficiency that emerged from Part IV. n501 Applied to copyright law, the variant of the difference principle elaborated in section A.3 differs from the economist's formula in two respects, both of which seem to exacerbate rather than reduce those difficulties. First, because it permits increasing the incomes of categories of artists only up to the point beyond which additional rewards would cease to yield net improvement in the life of the least advantaged member of the society, the levels of compensation commended by the difference principle would be both lower n502 and even harder to ascertain than the economist's test. Second, the contribution to each citizen's powers of imagination and communication made by seminal works of literature and art n503 -- which the modified difference principle, unlike the economist's test, takes into account n504 -- would be extremely difficult [*1776] to measure and might well more than offset the constraint just mentioned. n505 In short, if drawing the line between fair and unfair uses using economic analysis was difficult, drawing it using the difference principle often would be nearly impossible.

Upon reflection, however, it appears that the proffered theory of distributive justice may not be altogether toothless. In three contexts, itemized below, it could provide our hypothetical judge some assistance.

(a) *Superfluous Income.* -- The most obvious but perhaps most important implication of the theory is that, if the diminution in the incomes available to the creators of a particular type of work caused by shifting the line between fair and unfair uses from point X to point Y would not cause any significant reduction in the quality or quantity of works produced, the judge ought to make the move. In this respect, the utopian analysis leads to precisely the same conclusion as the economic analysis -- and both repudiate the labor-desert/entitlement theory advocated by some commentators. n506 For the reasons suggested in Part IV, this guideline may have more real-world applications than one might suspect. Thus, if further empirical research confirmed Judge Breyer's predictions

regarding the insignificant impact of a reduction in copyright protection for tradebooks upon their production, n507 a substantial expansion of the set of fair uses of such books would be warranted.

(b) *Diversity*. -- If the choice between point X and point Y *would* make some difference in the future output of works, the judge should be less willing to pick the lower of the two points if consumer demand for intellectual products of the type in question is currently low than if the demand is high. The reason is that the modified difference principle urges us to adopt the system of incentives that (as compared to a regime of strict equality) would yield the greatest net improvement in the quality of life of the least advantaged member of the society, and one important source of her quality of life is diversity in the cultural artifacts to which she is exposed. n508 So, for example, a judge who could simultaneously adjust the fair use doctrine as applied to poetry, sculpture, detective novels, and Broadway musicals should set the lines higher for the first two than for the third and fourth.

[*1777] (c) *Minimal Compensation*. -- One of the major implications of the arguments summarized in section A.3 is that a just society would be a relatively egalitarian society. It may be impossible to predict the schedule of incomes for different types of artists and other workers that the application of the unequal effort and modified difference principles would yield, but it can be said with some confidence that no one's share of resources would fall dramatically below the mean. n509 In this respect, the utopian analysis points in a very different direction from economic analysis. To illustrate, imagine that the producers of a particular type of intellectual product -- say, the designers of video games -- are passionate about their work and would continue doing it even if paid poorly. n510 Moreover, only those who love the job do it well. Consistent application of the argument developed in Part IV would require expansion of the set of fair uses of video games to the point where their creators were left only enough income to live on. Fidelity to the conceptions of just compensation advanced in this Part, by contrast, would require that the expansion be halted when further movement would leave designers of average talent and diligence incomes substantially below the national average. n511

Can we offer the judge any further guidance? Two additional potential applications of the utopian analysis to the task of setting artists' incomes do suggest themselves. On balance, however, both seem inadvisable. They -- and the reasons for rejecting them -- are reviewed briefly below for the purpose of showing the limits of the theory.

(d) *Detoxification*. -- It might be contended that the "diversity" guideline proposed above is too mild. If Americans currently indulge to excess their tastes for certain sorts of intellectual products, should we not undertake more vigorous initiatives to change their behavior? For example, if the amount of time people devote to noncreative, passive pursuits -- like watching television n512 -- is too great, why not use more drastic measures to help free them from their addiction? One such measure seems at hand: if we expanded radically the set of [*1778] uses of copyrighted television programs deemed fair, fewer such programs (or poorer quality programs) would be produced. The less attractive the menu of material "on the air," the more time people would probably spend in more active leisure activities.

Unfortunately, to be effective, the reduction in the quantity or quality of television programs would have to be very substantial, which would render the tactic objectionable on two grounds. First, it would entail a functionally "coercive" limitation on consumers' freedom to choose how to spend their free time in a context in which misguided decisions do not do them irreparable harm and in which, arguably, people become thoughtful regulators of their behavior only by making and

learning from mistakes. As such, it is vulnerable to especially strong versions of the argument against certain forms of paternalism. n513 Second, it would likely require that the incomes of many of the persons who assist in the production of television programs be reduced to levels well below the national average. As such, the proposal would entail deliberately doing injustice in order to advance the utopian agenda. Even assuming such a tactic is in some contexts justifiable, n514 it is sufficiently troubling to counsel against adoption of the plan.

(e) Rewarding Quality. -- Individual works of art surely differ in the degree to which they contribute to our common stock of allusions and insights. Should we not try to stimulate the production of intellectual products that would do so most? Specifically, should we not narrow the scope of the fair use doctrine as applied to those individual copyrighted works that enhance especially noticeably the complexity and resonance of our language? In support of such a proposal, it might be argued that judges construing the current fair use doctrine already frequently protect covertly works they consider of "high quality" and disfavor original or derivative works they regard as "trash," n515 that they cannot be prevented from making such aesthetic judgments, and that empowering the parties to contest -- and requiring judges to defend -- those evaluations would improve them. Moreover, the [*1779] proposed modification of the fair use doctrine would enable us to reduce (at least marginally) the incidence of the phenomenon -- all too common in American literary history -- of an unusually talented writer, financially strapped or simply discouraged by a meager income, producing less or poorer quality work than he is capable of. n516

Unfortunately, three considerations require rejecting the proposal. First, although it is possible in retrospect to identify works of art that have made especially large contributions to American culture, determining in advance which works will have such an impact would be extremely difficult. n517 Second, for such a system of incentives to work effectively, it would be essential that persons contemplating either creating or using works of art be able to predict reasonably accurately how federal judges would assess their quality -- the chances of which seem slim. Third, though the proposal would not empower judges to engage in censorship, it would entail some degree of governmental control over the definition of good and bad art, and the history of experiments in regulation of that sort should give one pause. n518

In sum, for the time being, it seems wisest to limit judges' involvement in the compensation of artists to: (i) the avoidance of superfluous income; (ii) the promotion of cultural diversity by favoring types of art for which popular demand currently is low; and (iii) providing artists (to the extent practicable) minimal levels of income.

[*1780] *D. A Modest Proposal*

The preceding section outlined an approach to comprehensive reform of the fair use doctrine -- an approach that might be put to good use by the Supreme Court or, better yet, by Congress. Unfortunately, an amendment of the copyright statute is not likely in the near future, and, in its absence, the Supreme Court would probably be reluctant to undertake as thorough a reconstruction of the field as the discussion contemplated. That circumstance does not deprive the analysis of all practical significance, however. We may be stuck for the foreseeable future with the traditional case-by-case approach to the resolution of fair use controversies, but we can at least modify the factors to which the courts attend when making their determinations. Such a reform would surely not alleviate all of the problems that plague the field, but would be a good deal better than nothing.

This section takes on that task. Drawing on the arguments of sections II.B (the criticism of the litany of factors currently employed by the courts) and IV.E (the lessons of the economic approach) in addition to the analysis just completed, it proposes a practicable, four-step procedure for deciding fair use cases. The next (and final) section will suggest how that procedure might have been applied to the facts of the *Sony* and *Harper & Row* cases.

When the defendant in a copyright infringement action seeks to escape liability on the ground that his conduct constituted a fair use, the district court judge should proceed as follows:

(1) He should first determine whether, at the time the putative infringement occurred, the creator considered her work finished. A finding that she was still considering making changes in the work should be sufficient by itself to deprive the defendant of the fair use defense -- on the theory that the threat to the creative process posed by premature divulgence of incomplete works is so serious n519 and the circumstances in which the benefits of early release offset that threat are so rare that adoption of a per se rule is warranted. A finding that the creator considered the work complete would not favor the defendant, but would simply require the judge to proceed to step 2. n520

[*1781] (2) The judge next should estimate the harm to producers of the type of copyrighted material at issue that would be caused by legitimating conduct of the sort engaged in by the defendant. For the reasons summarized in sections II.B.1 and IV.E.1, "harm" should be defined expansively; any predictable adverse impact on the welfare of the producers caused by depriving them of the right either to forbid the activity in question or to charge persons who wish to engage in it should be included. In defining the "type of copyrighted use at issue" and "conduct of the sort engaged in by the defendant," the judge should employ categories as narrow as is consistent with preservation of the ability of artists and users to ascertain with some confidence the camps into which they will fall. n521 In making his estimate, the judge may consider whether the activity in question is "commercial" in character and how much of the copyrighted material is used. n522 He should bear in mind, however, that these considerations are mere adjuncts to the central question of the magnitude of the injury and do not constitute separate factors. n523

(3) If either of the following two conditions obtain, the judge without further ado should declare the use fair:

(a) harm of the sort just described would be insubstantial; n524

[*1782] (b) the harm would be substantial, but it would not materially reduce either the quantity or quality of the producers' output. n525

(4) If the tests set forth in paragraphs 1-3 fail to resolve the controversy, the judge should decide the case by assessing the relative strength of the following factors:

(a) *Magnitude of the injury*. The more serious the harm caused to producers of the type of work at issue by privileging the conduct in question, the less willing the judge should be to deem the conduct fair.

(b) *Creativity*. The more the activity in question constitutes or makes possible creative, transformative use of copyrighted material, the more willing the judge should be to declare it fair n526 -- on the theory that (i) derivative works both are "public goods" in their own right n527 and add to the diversity of artifacts available to the public, n528 and (ii) such a policy will enable more persons to participate in shaping their cultural environments. n529

(c) *Education*. The more that privileging the activity in question would either (i) improve the public's access to information and debate on matters of public importance or (ii) facilitate the efforts of teachers to assemble and make available to students the materials they consider best suited to their courses, the stronger the argument for fair use. n530

(d) *Price Discrimination*. The more that privileging the activity would undermine the ability of copyright owners to engage in price discrimination, the weaker the case for fair use, because price discrimination both increases the rewards available to creators (without increasing monopoly losses) n531 and equalizes consumers' access to works of the intellect. n532

Admittedly, the proposed procedure is far from ideal. Its principal weakness is that, like all case-by-case approaches, it prevents comparative [*1783] evaluation of the various ways in which a particular type of copyrighted material may be put to putatively infringing use and thus would generate a less-than-optimal pattern of entitlements. In several other respects as well, it trades precision for practicability in the advancement of the good society.

Nevertheless, the proposal is markedly superior to the approach now employed by most courts. It jettisons those aspects of the current doctrine that seem altogether ill-advised n533 and remedies the principal defects of the remaining factors. n534 Most importantly, the proposal provides what the current regime lacks: an integrated vision of the objectives of the doctrine as a whole. n535 The benefits for the administration of the doctrine of reorganizing it around such a vision would be cumulative. At the outset, the goal of advancing the good society outlined above would assist courts in interpreting and applying the individual factors. And, over time, the accretion of judicial opinions construing the factors would modify and refine the vision, increasing its power to guide the resolution of future controversies. n536 That ongoing process of modification and refinement, moreover, would have an important incidental advantage: by engaging lawyers and judges in the project of applying and improving a vision of the good life and the good society, n537 it would enlist them in the campaign to reinfuse American legal argument and political discourse with substantive conceptions of the public interest. n538

FOOTNOTES

n361 *See generally* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 160; J. BENTHAM, FRAGMENT ON GOVERNMENT, *supra* note 160; H. SIDGWICK, *supra* note 160. Utilitarians' disagreement regarding the most appropriate ways of defining and measuring "pleasure" and "pain" need not detain us. For two contemporary efforts to determine what a society organized on the basis of the "general happiness" principle would look like, see R. BRANDT, A THEORY OF THE GOOD AND THE RIGHT 306-26 (1979), and R. HARE, MORAL THINKING 164-67 (1981).

n362 The label and some of the argument in this paragraph are derived from M. SANDEL, LIBERALISM AND ITS CRITICS 1-7 (1984). The marked differences in the views of the members of this group preclude referring to them as a "school," but their common commitment to the propositions set forth in the text warrants lumping them together for present purposes. Their major works include B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); R. DWORKIN, *supra* note 139; Dworkin, *What Is Equality?*, 10 PHIL. & PUB. AFF. 185, 283 (1981); C. FRIED, RIGHT AND WRONG (1978); J. RAWLS, *supra* note 192; D. RICHARDS, THE MORAL CRITICISM OF LAW (1977); and E. Rakowski, Equal Justice (forthcoming 1989) (draft of August 7, 1987 on file with Harvard Law School library). For helpful discussions and criticisms of the themes common to their arguments, see Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828 (1979); and Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1119-74 (1983).

n363 *See, e.g.*, R. DWORKIN, *supra* note 139, at vii; D. RICHARDS, A THEORY OF REASONS 87 (1971).

n364 *See, e.g.*, B. ACKERMAN, *supra* note 362, at 11, 57-58, 327-78; C. FRIED, *supra* note 362, at 9, 20, 24, 28-29; J. RAWLS, *supra* note 192, at 395-452 (insisting that persons in the original position be ignorant of their own conceptions of the good); *id.* at 325-32, 442 (arguing that government, once established, should remain neutral as to alternative ways of life).

n365 The question naturally arises: Exactly how does one pierce the veil of cultural conventions and induced tastes, discover people's true nature, and determine what allows it to flower? There is no infallible method, but three sorts of inquiries, in combination, seem to yield the greatest insight: (i) the study of history and anthropology, to see how different people have behaved under different circumstances in different cultures; (ii) introspection, to determine which of those ways of living seem most attractive, most rewarding and decent, most "congruen[t] with our deeper understanding of ourselves and our aspirations," *cf.* Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 519 (1980) (using the phrase to describe one of the appropriate sources of a theory of justice, rather than a conception of the good life); and (iii) critical reading of the work of those philosophers and social critics who have thought seriously about such matters. In any event, a mixture of these three approaches has shaped the vision summarized in this section.

n366 For discussion of the degree to which Marx relied on similar propositions, see J. ELSTER, MAKING SENSE OF MARX 53-55, 61-92 (1985). For four quite different contemporary arguments employing similar approaches, see J. FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); W. GALSTON, JUSTICE AND THE HUMAN GOOD (1980); A. MACINTYRE, cited above in note 175; and R. UNGER, PASSION (1984). For a criticism of the method in general and Finnis' use of it in particular, see L. WEINREB, NATURAL LAW AND JUSTICE 108-15 (1987). For a criticism from a different perspective of the arguments of MacIntyre and Unger, see Cornell, cited above in note 176, at 314-59.

n367 *Cf. Port Huron Statement* (an early iteration of the platform of the Students for a Democratic Society), reprinted in THE NEW LEFT: A DOCUMENTARY HISTORY 166-67 (M. Teodori ed. 1969) ("Men have unrealized potential for self-cultivation, self-direction, self-understanding, and creativity.").

n368 Though most evident in his early writings, *see, e.g.*, K. MARX, ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844, at 110-11, 137 (D. Struik ed. 1964) [hereinafter 1844 MANUSCRIPTS]; K MARX, GRUNDRISSE 124 (D. McLellan ed. 1971), these themes run throughout his works. *See* J. ELSTER, *supra* note 366, at 521; S. MOORE, MARX ON THE CHOICE BETWEEN SOCIALISM AND COMMUNISM 42 (1980); B. OLLMAN, ALIENATION: MARX'S CONCEPTION OF MAN IN CAPITALIST SOCIETY 98-100 (1971). A definition reasonably true to Marx's vision may be found in R. NOZICK, ANARCHY, STATE, AND UTOPIA 247 (1974). A version of the ideal less schematic and more evocative than Nozick's may be found in the *Port Huron Statement*, cited above in note 367, at 168.

n369 For detailed studies of this development in the United States, *see, for example*, A. DAWLEY, CLASS AND COMMUNITY: THE INDUSTRIAL REVOLUTION IN LYNN (1976); S. ROSS, WORKERS ON THE EDGE: WORK, LEISURE, AND POLITICS IN INDUSTRIALIZING CINCINNATI, 1788-1890 (1985); S. WILENTZ, CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850 (1984); and Montgomery, *The Working Classes of the Pre-Industrial American City, 1780-1830*, 9 LAB. HIST. 3 (1968).

n370 *See* 1844 MANUSCRIPTS, *supra* note 368, at 133-41, 150. For insightful secondary studies of this aspect of Marx's thought, *see* J. ELSTER, cited above in note 366, at 74-82, 521; B. OLLMAN, cited above in note 368, at 131-233; and A. SCHAFF, ALIENATION AS A SOCIAL PHENOMENON 57-62 (1980). Marx's prediction that consumerism would replace creative labor was fulfilled in the United States to a degree even he might have found surprising. *See* D. RODGERS, THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850-1920, at 94-124 (1978); Goldman, "*We Make Weekends*": *Leisure and the Commodity Form*, 8 SOC. TEXT 84 (1983-84).

n371 *See* Kateb, *Democratic Individuality and the Claims of Politics*, 12 POL. THEORY 331, 334, 337, 343 (1984) (examining the common themes in Emerson's, Thoreau's, and Whitman's conceptions of the good life and arguing that they could provide the basic for a conception of individuality that might facilitate the "renovation of liberalism").

n372 For an insightful study of the interplay in the writings of selected Greek philosophers, poets, and historians between the propositions set forth in the text and the opposed "Platonic conception of a self-sufficient and purely rational being," *see* M. NUSSBAUM, THE FRAGILITY OF GOODNESS (1986). For exploration of the benefits (as well as the dangers) of a moderate degree of attachment to possessions, *see* M. WALZER, SPHERES OF JUSTICE 7-10 (1983); Radin, *Market-Inalienability*, cited above in note 182, at 1871-72, 1903-09; and Radin, *Property and Personhood*, cited above in note 162. For reflections on the merits of vulnerability in general, *see* R. UNGER, cited above in note 366, at 107-15.

n373 J. ELSTER, *supra* note 366, at 523.

n374 Kateb, *supra* note 371, at 343 (emphasis removed). Some of the characteristics and virtues of self-determination in the sense used here are explored in J. FEINBERG, HARM TO SELF 31-47 (1986).

n375 *See* A. MACINTYRE, *supra* note 175, at 220-21; M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 152-53 (1982); Dworkin, *Moral Autonomy*, in MORALS, SCIENCE, AND SOCIALITY 156-61 (H. Engelhardt, Jr. & D. Callahan eds. 1978); *cf.* R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART 152-54 (1985) [hereinafter R. BELLAH] (describing the rich sense of self that results from growing up in a "community of memory" -- a community whose awareness of its past is sustained by "stories of collective history and exemplary individuals" -- and the shallower sense that results from growing up in a community lacking such memories and bonds).

n376 *See* A. MACINTYRE, *supra* note 175, at 211.

n377 J. MILL, ON LIBERTY, *reprinted in* THE PHILOSOPHY OF JOHN STUART MILL 252 (M. Cohen ed. 1961). For other depictions of the connection between self-determination and the development of human faculties, see I. KANT, CRITIQUE OF PRACTICAL REASON 51-84 (T. Abbott trans. 1873) (6th ed. 1909), and the *Port Huron Statement*, cited above in note 367, at 167. For a contemporary defense of the "goodness" of the full development of human faculties, see W. GALSTON, cited above in note 366, at 61-66.

n378 See R. BELLAH, *supra* note 375, at 85-112.

n379 See M. SANDEL, *supra* note 375, at 179-83 (offering an admittedly only suggestive view of the proper relationship between "character, self-knowledge, and friendship").

n380 The linked propositions that participation in politics is not only good for the community but good for the soul and that a polity should be small enough to make widespread participation practicable and meaningful have a long pedigree. See, e.g., ARISTOTLE, POLITICS, in THE BASIC WORKS OF ARISTOTLE 1127-316 (R. McKeon ed. 1941) [hereinafter BASIC WORKS]; MONTESQUIEU, L'ESPRIT DES LOIS Bk. VIII, ch. 16 (1748); A. TOCQUEVILLE, DEMOCRACY IN AMERICA (P. Bradley ed. 1945); H. ARENDT, ON REVOLUTION (1963). In recent years, these ideas, as components of the ideology of classical republicanism, have captured the attention of a growing number of legal scholars. See, e.g., Michelman, *The Supreme Court, 1985 Term --Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

n381 See R. BELLAH, *supra* note 375, at 219-49.

n382 See *id.* at 167-95 (describing modern voluntary associations); Benn, *Individuality, Autonomy and Community*, in COMMUNITY AS A SOCIAL IDEAL 43, 47-51 (E. Kamenka ed. 1982) (exploring the "*transcendent collective enterprise*, which arises from a common concern for some valued endeavor or a worthwhile activity, which must be pursued collectively").

n383 See M. SANDEL, *supra* note 375, at 147-50 (contrasting three conceptions of community: an "instrumental conception," in which the group is merely a vehicle for the satisfaction of its members' "egoistic ends"; a "sentimental conception" (associated with Rawls), in which the advantages of cooperation include "the quality of motivations and ties of sentiment that may attend" it; and a "constitutive conception," in which "community would describe not just a *feeling* but a mode of self-understanding partly constitutive of the agent's identity").

n384 Two conclusions follow from the emphasis on choice in this context. First, many different sorts of groups afford opportunities for self-fulfillment; the good life does not entail engagement in all kinds or in any one kind of community. Thus, the premium placed in recent years by writers mining the vein of republicanism, see *supra* note 380, on participation in political bodies is excessive -- at least insofar as their arguments turn on the good of the participants rather than the quality of the outcomes of the political process. Cf. M. WALZER, RADICAL PRINCIPLES 128-38 (1980) (criticizing the conception of the socialist citizen proffered by Marx and Engels in *The German Ideology*). Second, the good life would afford opportunities for engagement in several nonoverlapping (or only partially overlapping) communities. Thus, the quest by a smaller group of theorists for "organic" communities, see, e.g., R. UNGER, *supra* note 105, at 262-63 (1975), is also misguided. Both topics are crucial to a full utopian vision, but neither bears sufficiently on the production of works of the intellect to merit further exploration here.

n385 Cf. J. ELSTER, *supra* note 366, at 522 (worrying that many people would indeed react this way).

n386 This proposition is described as a premise because, at present, it is grounded primarily in unverified intuition. However, an accumulating body of empirical research does lend support to the prediction. See, e.g., H. JAIN, WORKER PARTICIPATION: SUCCESS AND PROBLEMS (1980); R. KATZELL & D. YANKELOVICH, WORK, PRODUCTIVITY AND JOB SATISFACTION: AN EVALUATION OF POLICY-RELATED RESEARCH (1975); H.

THOMAS & C. LOGAN, MONDRAGON: AN ECONOMIC ANALYSIS 191 (1982); M. WALZER, *supra* note 372, at 177-80 (discussing the cooperative Sunset Scavenger Company of San Francisco as an example of an enterprise in which self-management enhances self-respect, job satisfaction, and productivity); Conte, *Participation and Performance in U.S. Labor-Managed Firms*, in PARTICIPATORY AND SELF-MANAGED FIRMS 213 (D. Jones & J. Svejnjar eds. 1982); Markovic, *Alienated Labour and Self-Determination*, in ALIENATION: PROBLEMS OF MEANING, THEORY AND METHOD 130 (R. Geyer & D. Schweitzer eds. 1981).

n387 See 1 J. GOLDTHORPE, D. LOCKWOOD, F. BECHHOFFER & J. PLATT, THE AFFLUENT WORKER (1968); Jensen & Meckling, *Rights and Production Functions: An Application to Labor-Managed Firms and Codetermination*, 5 J. BUS. FIN. & ACCT. 469, 472-75 (1978).

n388 For discussion of the phenomenon of adaptive preferences, see section IV.D.7 above.

n389 In other words, the good life described in this section is asserted to be "stable" in the same sense that Rawls contends his just society is stable: people living it will not wish to opt out of it. See J. RAWLS, *supra* note 192, at 453-504. It is not essential to the argument (nor is it likely) that the good life sketched here be the *sole* stable life-style -- only that it be among the set of stable ways of life.

n390 The vexing question of how much of the resources of one "society," however defined, should be distributed to the members of others will not be considered here. Cf. *supra* note 195 (acknowledging that the economic analysis of Part IV likewise is confined to American society).

n391 This way of proceeding treats equality (of a particular sort) as the default position, departures from which must be justified. It is grounded in the notion that individual human beings are sufficiently deserving of respect or share sufficiently important capacities and needs that they should be treated equally unless a persuasive reason can be advanced for not doing so. For different versions of that proposition, see, for example, R. DWORKIN, *supra* note 139, at 182; K. NIELSEN, EQUALITY AND LIBERTY 283 (1985); and Lukes, *Socialism and Equality*, in THE SOCIALIST IDEA 74, 76-77 (L. Kolakowski & S. Hampshire eds. 1974). But see F. HAYEK, THE CONSTITUTION OF LIBERTY 85-88 (1960) (criticizing the approach); Letwin, *The Case Against Equality*, in AGAINST EQUALITY 1-70 (W. Letwin ed. 1983) (rejecting the arguments usually advanced to make the prima facie case for equality).

n392 See D. MILLER, SOCIAL JUSTICE 149 (1976); Lukes, *supra* note 391, at 77. For more conceptual arguments that medical care in particular should be distributed on the basis of need, see M. WALZER, cited above in note 372, at 86-90, and Williams, *The Idea of Equality*, in PHILOSOPHY, POLITICS AND SOCIETY (2d ser.) 110 (P. Laslett & W. Runciman eds. 1962).

n393 See R. WOLFF, THE POVERTY OF LIBERALISM 3-50 (1968).

n394 See J. MILL, *supra* note 377, at 252-57. Mill's argument on this score was criticized by Stephen on the ground that it "confound[ed] the proposition that variety is good with the proposition that goodness is various." J. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 83 (R. White ed. 1967) (1st ed. 1873). "Originality," insisted Stephen, "consists in thinking for yourself, not in thinking differently from other people." *Id.* at 84. What Stephen failed to appreciate are the fragility of the inclination to think for oneself and the importance of fostering that inclination by exposing persons to a wide variety of cultural forms. For analyses and defenses of diversity consistent with Mill's, see W. VON HUMBOLDT, THE SPHERE AND DUTIES OF GOVERNMENT 11-13 (J. Coulthard trans. 1854), and A. O. LOVEJOY, THE GREAT CHAIN OF BEING 293-314 (1936).

n395 See, e.g., M. SANDEL, *supra* note 362, at 2.

n396 See J. MILL, *Supra* note 377, at 191.

n397 The seminal work is *Democracy in America*. See A. TOCQUEVILLE, *supra* note 380, at 273-74. For exaggerated but nevertheless powerful accounts of the nature and effects of pressures in American culture to "[c]onform, conform, in your heart of hearts and obey," see Editorial, *Berkeley Barb*, Oct. 26, 1967, reprinted in *THE NEW LEFT: A DOCUMENTARY HISTORY*, *supra* note 367, at 362-63, and *Port Huron Statement*, *supra* note 367, at 164-65.

n398 See Dworkin, *Art as a Public Good*, *supra* note 321, at 143-57. Dworkin appears to have arrived at this position only after considerable reflection. For the development of his thought, see Dworkin, *Liberalism*, cited above in note 337, at 131-32; Dworkin, *Philosophy and Politics*, in *MEN OF IDEAS* 260 (B. Magee ed. 1978); Dworkin, *Why Liberals Should Believe in Equality*, cited above in note 187, at 32-33; Dworkin, *Is There a Right to Pornography?*, 1 *OXFORD J. LEGAL STUD.* 177, 194-96 (1981). For insightful speculations regarding the reasons for his gradual change of heart, see Shiffren, cited above in note 362, at 1131 n. 105.

n399 See Dworkin, *Art as a Public Good*, *supra* note 321, at 153-57.

n400 Cf. Bator, *An Essay on the International Trade in Art*, 34 *STAN. L. REV.* 275, 305-06 (1982) ("[T]he study and appreciation of art elevates and civilizes," helps "make possible a life that is morally serious and aesthetically delightful," and "is a necessary constituent of a rich and intense intellectual life.").

n401 Cf. R. BELLAH, *supra* note 375, at vii-viii (discussing how the reappropriation of a common heritage might assist Americans to cure the "cancer" of individualism and to reconstruct a "morally coherent" common life).

n402 See Dworkin, *Art as a Public Good*, *supra* note 321, at 153-56 (emphasis omitted). Dworkin strives valiantly but, in my view, unsuccessfully to demonstrate that the pursuit of such policies does not entail lending governmental support to a particular conception of the good life. Unhampered by Dworkin's compunctions on that score, I do not hesitate to appropriate his insightful depiction of the relationship between the character of a culture's artistic tradition and opportunities for self-realization available to its members. A very different route to the proposition that society should be organized to advance the pursuit of knowledge and the cultivation of art is described and criticized by Rawls in *A THEORY OF JUSTICE*, cited above in note 192, at 325-32.

n403 See *supra* note 375 and accompanying text.

n404 See *supra* pp. 1749-50; cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984) (describing the importance to persons' "emotional enrichment" of certain kinds of voluntary associations and explaining the need to protect such groups from governmental interference).

n405 For some suggestions regarding how legal doctrine should be employed to protect these communities, see Michelman, *Property as a Constitutional Right*, 38 *WASH. & LEE L. REV.* 1097 (1981), and Note, *A Communitarian Defense of Group Libel Laws*, 101 *HARV. L. REV.* 682 (1988).

n406 Cf. K. NIELSEN, *supra* note 391, at 48 (arguing, from somewhat different premises, for expansion and equalization of "opportunities for meaningful work").

n407 A provocative analysis of the desirability and feasibility of redistributing "hard work" may be found in M. WALZER, cited above in note 372, at 165-83. Not all of the activities Walzer considers "hard" are irremediably non-meaningful; indeed, some of the jobs he includes in the subcategory of "dangerous work" (e.g., labor on oil rigs) are already organized in ways that afford workers more decisionmaking responsibility than, for example, factory or sales

work. Cf. A. CLAYRE, *WORK AND PLAY* 84-86 (1974) (rejecting the notion that manual labor is necessarily degrading).

n408 The reason schooling would have to be public is to minimize the capacity of parents who have legitimately acquired larger than average shares of wealth (see section V.A.3 below for a discussion of the sources of such legitimate inequality) to provide their children better than average educations. Cf. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 71, 111-30 (1973) (Marshall, J., dissenting); M. WALZER, *supra* note 372, at 206 (making similar arguments).

n409 Cf. M. WALZER, *supra* note 372, at 70 (describing a system of publicly funded drama festivals in Athens in the fifth and fourth centuries B.C. and speculating that it was "a central feature of the religious and political education of the Athenian people"); ARISTOTLE, *POLITICS* bk. VIII, in *BASIC WORKS*, *supra* note 380, at 1305-16 (sketching a system of public education that bears some resemblance to the one advocated here).

n410 Cf. Arrow, *Some Ordinalist-Utilitarian Notes on Rawls' Theory of Justice*, 70 *J. PHIL.* 245, 254 (1973) (identifying the difficulty).

n411 See Dick, *How to Justify a Distribution of Earnings*, 4 *PHIL. & PUB. AFF.* 248, 251-52 (1975); Dworkin, *What is Equality?*, *supra* note 362, at 228-40; E. Rakowski, *supra* note 362, ch. 6, at 6.

n412 The first, in particular, is vulnerable to the retort that, although discouraging the acquisition of expensive preferences may be necessary to prevent a spiral of competition in the cultivation of tastes that results in a society of equally unhappy gourmets, to some extent it limits opportunities for self-determination and ignores the fact that preferences for many kinds of leisure activity (for example, chess and sailboat racing) consist of a combination of cultivated taste (which can be altered) and aptitude (which cannot). Also troublesome is the risk that this system of incentives would result in a "dull, conformist, unimaginative, and otherwise unattractive community." See Dworkin, *What Is Equality?*, *supra* note 362, at 236.

n413 Further support for that conclusion may be found in J. ELSTER, cited above in note 366, at 524, 527; R. TAWNEY, *THE ACQUISITIVE SOCIETY* 260 (1920); and Lukes, cited above in note 391, at 79. *But cf.* D. MILLER, *supra* note 392, at 144-46 (arguing that "the principle of equal well-being" is superior to the principle of equality of resources). A nicely complex question (that does not implicate sufficiently the design of a system of intellectual property law to merit exploration here) is what mechanism for distributing resources would best approximate equality of the sort advocated in the text. For some speculations on the matter, see Dworkin, *What Is Equality?*, cited above in note 362, at 283-90; Varian, *Distributive Justice, Welfare Economics, and the Theory of Fairness*, 4 *PHIL. & PUB. AFF.* 223, 240-42 (1975); and E. Rakowski, cited above in note 362, at 42-46.

n414 This way of framing the issue (indeed, even the use of the phrase "distributive justice") assumes that a "social pie" exists to be "divided." For the origins of this attitude, see ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, ch. 2, in *BASIC WORKS*, cited above in note 380, at 1005-06. For contemporary objections to it, see R. NOZICK, cited above in note 368, at 149-50, and Flew, *Justice: Real or Social?*, 1 *SOC. PHIL. & POL.* 151, 152-53 (1983).

n415 See J. RAWLS, *supra* note 192, at 60-83.

n416 The Lockean theory from which this line of argument derives is reviewed above in note 161 and the accompanying text.

n417 See R. NOZICK, *supra* note 368, at 181-82; A. RAND, *CAPITALISM: THE UNKNOWN IDEAL* 125-29 (1966).

n418 See R. NOZICK, *supra* note 368, at 150-53; *cf.* Fried, *Distributive Justice*, 1 SOC. PHIL. & POL'Y 45, 49-50 (1983) (outlining a similar argument -- albeit tempered by a "duty of benevolence" unacknowledged by Nozick).

n419 Rawls, *The Basic Structure as Subject*, in VALUES AND MORALS 47, 52-53 (A. Goldman & J. Kim eds. 1978); *see also* Ackerman, *On Getting What We Don't Deserve*, 1 SOC. PHIL. & POL'Y 60, 65-66 (1983) (arguing that "[i]n a real-world market system, each of us finds himself burdened by a whole series of market imperfections, informational disadvantages, [and] transactional rigidities" and that, "[w]hile all of us have to deal with these inconveniences, some are crushed by [them]").

n420 A. BUCHANAN, MARX AND JUSTICE 161 (1982). The theory is also somewhat vulnerable to the point that, stripped of the divine imperative upon which Locke relied when first advancing the argument, *see* J. LOCKE, *supra* note 161, at 309, it lacks an explanation why labor should give rise to ownership of the thing labored upon. *See* Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1227 (1979); O'Neil, *Nozick's Entitlements*, in READING NOZICK 308-10 (J. Paul ed. 1981). Admittedly, however, this traditional objection loses some of its force when applied to works of the intellect.

n421 The phrase is derived from the literature of social psychology, where it is used to describe the belief that justice entails giving each participant in a collective enterprise (whether it be a discrete project or a society) a share of its products proportional to his "contribution" to the venture. *See* M. DEUTCH, DISTRIBUTIVE JUSTICE: A SOCIAL PSYCHOLOGICAL PERSPECTIVE 9 (1985).

n422 For a sympathetic presentation of this argument, *see* J. FEINBERG, SOCIAL PHILOSOPHY 114-15 (1973). Although it resembles the labor-desert theory just considered, the equity theory differs from it in three respects: (i) in imperfect markets (and all markets are, after all, imperfect), the rewards that Nan could claim under the two approaches would differ; (ii) the equity theory could accommodate measures of Nan's contribution to "the quality of [her neighbors'] collective life" more refined than the amount of money those neighbors would pay for access to her creations; and (iii) the equity theory is more comprehensive, insofar as it provides a guide to the entitlements of workers (e.g., doctors, teachers, cashiers) whose activities cannot be characterized plausibly in terms of the creation of useful objects.

n423 *See id.* at 115-16.

n424 J. RAWLS, *supra* note 192, at 72; *see also* I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 9 (L. Beck trans. 1959); N. RESCHER, DISTRIBUTIVE JUSTICE 77 (1966) J. Rawls, *supra* note 192, at 104. For a sensitive summary of Rawls' views on these matters, *see* SANDEL, cited above in note 375, at 67-71. The gap in Rawls' argument identified by Sandel -- the absence of any affirmative justification for the proposition that talents should be treated as "common assets" -- can be filled by the proposition, central to the argument advanced here, that enabling all persons most fully to realize the good life is itself good.

n425 *See* J. RAWLS, *supra* note 192, at 72-73; J. RYAN, DISTRIBUTIVE JUSTICE 183-84 (1916). *But cf.* Fried, *supra* note 418, at 49-50 (arguing that, although a person does not "deserve" her talents, she is "entitled" to them and to "what [she] acquire[s] by those talents").

n426 For the argument that this classic statement of the utilitarian criterion is so ambiguous as to be useless unless supplemented by "a further and at least equally fundamental principle," *see* N. RESCHER, cited above in note 424, at 25-41. For present purposes, I pass by this objection and assume the criterion could be coherently construed and applied.

n427 That individuals' utility functions are simply not comparable in the manner presumed by this prediction is a traditional objection to utilitarianism, but a less fundamental criticism than those summarized below.

n428 Recent empirical work suggests that the majority of contemporary Americans and Western Europeans adhere to some version of the view that rewards should vary with "contribution." *See, e.g., Adams & Freedman, Equity Theory Revisited: Comments and Annotated Bibliography*, in 9 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOLOGY* 43, 47-49 (L. Berkowitz & E. Walster eds. 1976). In other cultures and in others eras, however, this view has been less popular. *See, e.g., M. DEUTCH, supra* note 421, at 29, 164-79, 202-03.

n429 Contemporary utilitarians are disturbed by the degree to which the distribution of income would seem to depend upon "external preferences" of the sort described in the text, *see, e.g., R. HARE, supra* note 361, at 104, but none has devised a coherent method for excluding such attitudes from the distributive calculus. *See E. Rakowski, supra* note 362, ch. 5.

n430 Another powerful objection to the theory is that it is insensitive to considerations of merit or desert. *See N. RESCHER, supra* note 424, at 48. Those considerations are taken up in section V.A.3.e below.

n431 J. RAWLS, *supra* note 192, at 27; *see also* N. RESCHER, *supra* note 424, at 25-44; M. SANDEL, *supra* note 362, at 3; Hart, *supra* note 362, at 829-30.

n432 *See* N. RESCHER, *supra* note 424, at 93.

n433 *See* J. RAWLS, *supra* note 192, at 530-41 (arguing that, under these circumstances, only envy could motivate the least advantaged to object, and that sentiment is unworthy of our deference); N. RESCHER, *supra* note 424, at 89-93, 101-04. As Nozick observes, the legitimacy of inequality up to this point is comparatively uncontroversial -- and does not depend on the defensibility of Rawls' contractarian theory. *See* R. NOZICK, *supra* note 368, at 195-96. *But cf.* K. NIELSEN, *supra* note 391, at 49-53 (arguing that Rawls' "difference principle" would undermine the self-respect of persons on the bottom and "reflects both elitism and paternalism").

n434 It should be noted that the statement of the principle set forth in the text differs from Rawls' difference principle in two respects: it requires that inequality not undermine the position of the least advantaged person, rather than the least well-off class, and it measures "advantage" in terms of access to the good life, rather than in terms of holdings of "primary goods." *Cf.* J. RAWLS, *supra* note 192, at 95-100. Some of the reasons for making these adjustments are reviewed in Barber, *Justifying Justice: Problems of Psychology, Politics and Measurement in Rawls*, in *READING RAWLS* 292, 301-03 (N. Daniels ed. 1974); and Scanlon, *Rawls' Theory of Justice*, 121 *U. PA. L. REV.* 1020, 1057-61 (1973).

n435 One question that would have to be addressed is when does the strategy of differentiating lots in life and allocating positions for which demand exceeds supply on the basis of criteria not entirely within persons' control (e.g., a mixture of aptitude and commitment) so impair persons' capacity to shape their own lives (by limiting the sets of occupation from which they are able to choose their careers) that it is not justified by the enhancement of the society's material or cultural resources?

n436 *See, e.g., J. RYAN, supra* note 425, at 181. Determining how much inequality could be justified by this guideline would be very hard, but two lines of recent research suggest that it would be less than is commonly assumed. The first consists of a growing set of studies concluding that substantial decentralization of decisionmaking responsibility need not impair either the total output of a firm or economy or the match between the amounts and kinds of goods and services produced and consumers' desires for them. *See* B. HORVAT, *THE POLITICAL ECONOMY OF SOCIALISM* 202-09 (1982); Jones, *British Producer Cooperatives, 1948-1968: Productivity and Organizational Structure*, in *PARTICIPATORY AND SELF-MANAGED FIRMS, supra* note 386, at 175-98; Jones & Svejnar, *Participation, Profit Sharing, Worker Ownership and Efficiency in Italian Producer Cooperatives*, 52 *ECONOMICA* 449, 460 (1985); Levin, *Issues in Assessing the Comparative Productivity of Worker-Managed and Participatory Firms in Capitalist Societies*, in *PARTICIPATORY AND SELF-MANAGED FIRMS, supra* note 386, at 45-47; M. Quarry, *Employee Ownership: Examining an Idea at Work* (Master's thesis, Dartmouth, 1986). The second consists of empirical research

in social psychology that casts doubt on the conventional wisdom that laborers rewarded in proportion to their performance will do more and better work than laborers who receive equal rewards. See M. DEUTCH, *supra* note 421, at 198-99 (1985) (reviewing the literature); M. LEPPER & D. GREENE, *THE HIDDEN COSTS OF REWARD* (1978).

n437 This statement of the principle is intended to incorporate Rawls' persuasive argument that the legitimacy of inequalities must be assessed at the level of generality of policies according special benefits to types of workers, not of rewards to particular individuals. See J. RAWLS, *supra* note 192, at 97-100. The problems associated with identifying the "least advantaged group," see *supra* note 434, do not undermine that argument.

n438 See *supra* pp. 1757-58.

n439 J. RAWLS, *supra* note 192, at 104; see also M. SANDEL, *supra* note 375, at 71 (reading Rawls as taking a position similar to that expressed in the text).

n440 See I. BERLIN, *FOUR ESSAYS ON LIBERTY XXXV* (1969); L. WEINREB, *supra* note 366, at 197; cf. Dick, *supra* note 411, at 257-58 (arguing for similar reasons that Rawls "pushes the doctrine of nonresponsibility too far"). For more general discussions of these issues, see J. LUCAS, *THE FREEDOM OF THE WILL* (1970), and P. VAN INWAGEN, *AN ESSAY ON FREE WILL* (1983).

n441 To mute the anxiety of those who fear that this line of argument tilts toward statism, it is worth noting that, if the proposition that meaningful work is rewarding and attractive, see *supra* pp. 1750-51, is accurate, little if any governmental coercion would be required to enforce this duty.

n442 For much more elaborate developments of this argument, see Dworkin, cited above in note 362, at 304-14, and E. Rakowski, cited above in note 362, at 47-51. For a more modest discussion to the same effect, see Dick, cited above in note 411, at 260. Both Dworkin and Rakowski devote many pages to the contention that persons also ought to be permitted to augment (or diminish) their shares by undertaking "voluntary risks." See Dworkin, *supra* note 362, at 292-304; E. Rakowski, *supra* note 362, at 52-80. To the extent the choice to pursue a career in literature or art is unusually risky, that contention is germane to the problem before us. Assessing Dworkin's and Rakowski's argument would not be easy. It would require, at a minimum, a judgment regarding the degree to which risk-preference and risk-aversion are innate or socialized traits. Cf. *supra* pp. 1757-58 (discussing the illegitimacy of distributing resources on the basis of talent). But, insofar as the outcome of such an inquiry would not materially affect any of the proposals advanced in the following pages, it will not be pursued here.

n443 Cf. J. RAWLS, *supra* note 192, at 280 (professing agnosticism on the question whether his theory of justice is consistent with socialism or capitalism). But cf. Clark & Gintis, *Rawlsian Justice and Economic Systems*, 7 *PHIL. & PUB. AFF.* 302 (1978) (arguing that Rawls' principles should prompt him to prefer socialism).

n444 Cf. Letwin, *supra* note 391, at 36-37 (arguing that the scope of the regulatory apparatus [and concomitant impairment of individual freedom] necessary to sustain an egalitarian regime provides a powerful reason for not instituting one); M. WALZER, *supra* note 372, at 316-18 (arguing that popular commitment to the principles of distributive justice he advocates could sustain the sort of society he describes without undue statism); Dworkin, *supra* note 362, at 312-34 (sketching an extensive system of redistributive taxation necessary to sustain the degree and kind of equality he advocates).

n445 Imagine, for example, that *A*'s aptitude for theoretical physics "earns" him a specialized education and an unusually rewarding job engaged in primary research. He then devotes an unusually large portion of his time to his work. Does his extra labor entitle him to a larger than average share of the society's surplus goods even though he already enjoys an (undeserved) premium job?

n446 Cf. C. GEERTZ, *Religion as a Cultural System*, in THE INTERPRETATION OF CULTURES 87, 89-123 (1973) (discussing the interaction of symbols, rituals, world view, moods, and motivations in defining and sustaining a religion). The connection between Geertz's argument and the discussion in section IV.D.7 of the power of the state to mold persons' preferences should be apparent.

n447 At various points in the following pages, it will be evident that a particular objective could be advanced more effectively through an adjustment in some other field of doctrine, like the federal income tax, than through modulation of the fair use doctrine. If and when opportunities for meaningful reform in those fields arise, they should of course be seized. In the meantime, however, we should not hesitate to harness copyright law merely because more powerful or efficient engines of change are imaginable.

n448 The challenge could be sharpened by pointing out that most of the proposals involve changes in judge-made law. Arguably, the reasons to be uneasy about paternalistic intervention by government in general apply with special force to interventions by unelected officials. See Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519 (1988). In keeping with the overall approach of the article, see *supra* p. 1699, the following discussion will not directly address this question of institutional competence.

n449 See, e.g., Feinberg, *Legal Paternalism*, I CAN. J. PHIL. 105, 105 (1971) ("The principle of legal paternalism justifies state coercion to protect individuals from self-inflicted harm, or, in its extreme form, to guide them, whether they like it or not, toward their own good." (emphasis added)); G. Dworkin, *Paternalism*, in MORALITY AND THE LAW 107, 108 (R. Wasserstrom ed. 1971) ("By paternalism I shall understand roughly the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced.") (Emphasis added).

n450 Indeed Mill, the first and foremost of the modern opponents of paternalism, was untroubled by governmental policies of the sort defended below -- efforts to enhance persons' appreciation of certain kinds of art by making them readily and cheaply available. See J. MILL, PRINCIPLES OF POLITICAL ECONOMY 953-54 (7th ed. 1871).

n451 Such rules include statutes requiring motorcyclists to wear helmets and forbidding the sale or possession of certain drugs; bans on self-enslavement, the sale of organs, and suicide; and the nonwaivability of certain contract terms (like the warranty of habitability implied in residential leases). See generally H. HART, LAW, LIBERTY, AND MORALITY 32 (1963); D. VANDEVEER, PATERNALISTIC INTERVENTION 13-15 (1986); Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 763-64 (1983). But cf. Shapiro, *supra* note 448, at 529-45 (discussing the strength of antipaternalist sentiment in the American public, legislatures, and judiciary).

n452 See Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 571-72 (1982). A clever variation on this argument is the contention that a paternalistic rule is justified when, in its absence, the person whose freedom is at stake would undergo changes sufficient to warrant describing him as a new and different "self," and that the new self would regret that the old self had been permitted to act as he did. Intervention under these circumstances, so the argument goes, is justified to protect one "person" from harm by another (earlier) "person." See Regan, *Paternalism, Freedom, Identity, and Commitment*, in PATERNALISM 113, 122-27 (R. Sartorius ed. 1983); Note, *The Limits of State Intervention: Personal Identity and Ultra-Risky Actions*, 85 YALE L.J. 826 (1976). Both authors rely heavily on Derek Parfit's theory of personal identity. See Parfit, *Later Selves and Moral Principles*, in PHILOSOPHY AND PERSONAL RELATIONS 137 (A. Montefiore ed. 1973). The strategy might be invoked to defend several of the proposals advanced below, but the flaws in the strategy itself, insightfully summarized in J. KLEINIG, PATERNALISM 45-48 (1984), are sufficiently serious to make it not worth the effort.

n453 See, e.g., G. Dworkin, *Paternalism: Some Second Thoughts*, in PATERNALISM, *supra* note 452, at 105-07; Gert & Culver, *Paternalistic Behavior*, 6 PHIL. & PUB. AFF. 45, 45-50 (1976); Wikler, *Persuasion and Coercion for Health: Ethical Issues in Government Efforts to Change Life-Styles*, in PATERNALISM, *supra* note 452, at 39, 52-55.

n454 See *supra* note 364; cf. J. KLEINIG, *supra* note 452, at 3-4 (associating the emergence of the "problem" of paternalism with the rise of liberalism).

n455 Much of the discussion in the literature is concerned with differentiating a person's own conception of his well-being from the collocation of his revealed preferences, thereby providing a foothold for paternalism consistent with liberalism. See, e.g., J. KLEINIG, *supra* note 452, at 68 (attempting to differentiate a person's central values from his peripheral wants); Dworkin, *supra* note 452, at 121-22 (distinguishing a person's choices from his overarching "life-plans"); Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 467-72 (distinguishing a person's "values" from his "wants").

n456 See, e.g., D. VANDEVEER, *supra* note 451, at 110-12; Luban, *supra* note 455, at 472-74; Wikler, *supra* note 453, at 39.

n457 See J. MILL, *supra* note 377, at 273.

n458 See, e.g., Brock, *Paternalism and Promoting the Good*, in *PATERNALISM*, *supra* note 452, at 237, 253-55. Special concern with the likelihood that government officials would abuse their authority is evinced in Wikler, cited above in note 453, at 43-44, and Sartorius, *The Enforcement of Morality*, 81 YALE L.J. 891 (1972).

n459 See J. KLEINIG, *supra* note 452, at 25-26. But see J. FEINBERG, *supra* note 374, at 94-97 (distancing himself from Kant).

n460 See, e.g., J. FEINBERG, *supra* note 374, at 61-62; D. VANDEVEER, *supra* note 451, at 88, 112-15; Wikler, *supra* note 453, at 38-39. Writers who take this position commonly argue that only the "incompetence" of the person at issue, see *infra* note 464, or his prior, hypothetical, or subsequent consent to the restraint on his liberty, see, e.g., Carter, *Justifying Paternalism*, 7 CAN. J. PHIL. 133 (1977); G. Dworkin, *supra* note 449, at 119-20, provide legitimate justifications for paternalism.

n461 See J. KLEINIG, *supra* note 452, at 25-27 (attributing such an argument to Mill); cf. Kennedy, *supra* note 452, at 640 (adopting a moderate version of the argument).

n462 See G. Dworkin, *supra* note 449, at 111. Dworkin argues that the ban on contracts of self-enslavement must rest on some idea of what life is fitting but is justifiable nevertheless. See also Kennedy, *supra* note 452, at 628 (insisting that paternalism often properly depends on judgments that the sorts of relationships into which people are willing to enter are simply bad for them); Kronman, *supra* note 451, at 786-97 (arguing that a number of paternalistic doctrines in contract law are justified by their tendency to cultivate persons' "facult[ies] of moral imagination"); Luban, *supra* note 455, at 482-84 (conceding that his proposed system for distinguishing legitimate from illegitimate paternalism "imposes a bias in favor of rational dialogue" that is not "neutral among theories of the good and the groups that hold them"); cf. Brock, *supra* note 458, at 250-53 (recognizing that the more one's "theory of the good for persons" incorporates states of affairs independent of persons' "desires," the greater the scope one will accord legal paternalism).

n463 See *supra* pp. 1748-50.

n464 See *supra* pp. 1750-51. This argument builds on a concession made by all but the staunchest of the opponents of paternalism. Virtually every writer in this field acknowledges the legitimacy of actions or rules that limit the freedom of persons who have been deprived (either temporarily or permanently) of the capacity to make "rational," "voluntary," or "informed" choices. See, e.g., D. VANDEVEER, *supra* note 451, at 88; G. Dworkin, *supra* note 449, at 123-24; Feinberg, *supra* note 449, at 110-13; Hodson, *The Principle of Paternalism*, 14 AM. PHIL. Q. 61, 65 (1977); Murphy, *Incompetence and Paternalism*, 60 ARCHIV FÜR RECHTS UND SOZIALPHILOSOPHIE 465-86 (1974). As Professor Brock persuasively argues, very few if any of our decisions are fully rational, voluntary, and

informed, and none of the opponents of paternalism has persuasively justified his decision to select an arbitrary line in the spectrum of voluntariness, and to immunize from paternalistic constraint all decisions that fall to one side of it. See Brock, *supra* note 458, at 239-49. For the most extensive effort to justify drawing such lines, which nevertheless fails to meet Brock's objections, see J. FEINBERG, cited above in note 374, at 94-142. What is proposed here is merely to recognize certain attitudes and habits fostered by contemporary American culture as sufficient impediments to fully voluntary choice to justify paternalistic intervention. Cf. G. LUKACS, *HISTORY AND CLASS CONSCIOUSNESS* 51-54, 64-65, 72 (R. Livingstone trans. 1971) (developing a similar argument about involuntariness in the context of class consciousness).

n465 Cf. Regan, *supra* note 452, at 116-21 (making a similar argument). For a less sympathetic explication of this approach, plagued by an overly abstract conception of the "freedom" that is to be maximized, see J. KLEINIG, cited above in note 452, at 51-53.

n466 See I. BERLIN, *supra* note 440, at 131-34; cf. L. WEINREB, *supra* note 366, at 152-55 (exploring the concept of "liberty as power").

n467 In other words, placing at the top of the list the use with the lowest ratio and at the bottom the use with the highest ratio.

n468 For a fuller statement of the principle, see pp. 1715-16 above.

n469 Cf. J. ELSTER, *supra* note 366, at 87-88 (arguing that Marx's emphasis on creation and production as opposed to consumption was excessive). But cf. J. MANDER, *FOUR ARGUMENTS FOR THE ELIMINATION OF TELEVISION* 24, 51 (1978) (offering, as one of his four arguments, that television has corrupted American culture in part because it has "substituted secondary, mediated versions of experience for direct experience of the world").

n470 See W. WHITMAN, *Democratic Vistas*, in *WALT WHITMAN: COMPLETE POETRY AND SELECTED PROSE* 929-94 (Library of America ed. 1982) (1st ed. 1867-68).

n471 See R. P. WARREN, *America and the Diminished Self*, in *DEMOCRACY AND POETRY* 3-37 (1975). If Whitman missed the mark at all, it was by undervaluing the capacity of great works of art to stimulate and provide raw material for creative impulses. Shakespeare need not be poisonous to the pride and spontaneity of the common people. Some of the reasons why Whitman's dreams have not yet been realized are considered above at p. 1747.

n472 In recent years, the use in a film of characters that first appeared in a copyrighted film has been held to constitute infringement. See 1 M. NIMMER, *NIMMER ON COPYRIGHT* § 2.12, at 2-171-2-178.2 (1987) and cases cited therein.

n473 In other words, whereas home videotaping for the purpose of "time-shifting" neither entails nor facilitates any transformation of the recorded movie, producing the sequel enables a large number of writers, actors, and directors to "make something of" the original.

n474 Needless to say, all the uses in the list should be scrutinized on the same basis, and all creative uses moved up or all noncreative uses moved down. Examples from the case law of activities that would qualify for preferential treatment include: incorporating portions of a copyrighted Amos and Andy show in the script of a theatrical production, see *Silverman v. CBS, Inc.*, 632 F. Supp. 1344, 1352 (S.D.N.Y. 1986) (holding that the activity was not a fair use), and using portions of copyrighted Charlie Chaplin films to make a 13-minute "compilation" of "highlights" for presentation at the Academy Awards and a film biography of Chaplin. See *Roy Export Co. v. CBS, Inc.*, 503 F. Supp. 1137, 1143-47 (S.D.N.Y. 1980) (holding that neither activity was a fair use), *aff'd on other grounds*, 672 F.2d 1095 (2d Cir. 1982).

n475 Viewed from the latter angle, it should be clear, the proposed strategy implicates the discussion of paternalism in the preceding section. Review of the guidelines offered there suggests that the proposed bias in favor of transformative uses is justifiable: it promises to help free persons from the mentality and habits of consumerism and enable them to assume greater control over their lives without unduly constricting the set of activities available to them; the probability that it would indeed have such an effect seems high; and the risks of error or abuse of authority in its administration are small enough to be acceptable.

n476 The initiative that went furthest was the effort of groups purporting to represent authors, publishers, and educators to develop a set of "guidelines for educational copying" to be codified as a separate section 107(b) of the Act. For the authoritative history of these conferences and their outcome, see W. PATRY, cited above in note 6, at 296-304.

n477 The most significant traces of the educators' suggestions are: (i) the ambiguous reference, in the opening sentence of section 107, to "teaching (including multiple copies for classroom use), scholarship, or research" as among the "purposes" for which copying copyrighted works might constitute a fair use; (ii) the clause in section 107(1), observing that "whether [a] use . . . is for nonprofit educational purposes" is a relevant aspect of "the purpose and character of the use"; and (iii) a provision for remittitur of statutory damages in cases in which the defendant was an employee of a "nonprofit educational institution, library, or archive." 17 U.S.C. § 107, 504(c)(2) (1982). For discussion of the puzzling origins of these provisions, see W. PATRY, cited above in note 6, at 304. Though no statutory provision was produced by the meetings mentioned above in note 476, a set of "guidelines" agreed upon by the parties did meet with the approval of the House and Senate committees, and is included in the committee reports. See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 68-72 (1976) (setting forth the guidelines and indicating that they constitute "a reasonable interpretation of the minimum standards for fair use"); H.R. CONF. REP. NO. 1733, 94th Cong., 2d Sess. 70 (1976) (describing the guidelines as "part of [the Conference Committee's] understanding of fair use"). The guidelines were not intended and have not been interpreted to be binding on the courts, but have been taken into account in some infringement actions. See, e.g., *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983). For analyses of the content of the guidelines, see D. CHISUM, *INTELLECTUAL PROPERTY: COPYRIGHT, PATENT, AND TRADEMARK* 5-80-5-89 (1980), and W. PATRY, *supra* note 6, at 404-08.

n478 W. PATRY, *supra* note 6, at 408 & n.253 (reviewing the pertinent cases).

n479 See, e.g., A. LATMAN, R. GORMAN & J. GINSBURG, *COPYRIGHT FOR THE EIGHTIES* 491 (2d ed. 1985); Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 62 (1987).

n480 *Cf. Harper & Row, Publishers v. Nation Enters.*, 723 F.2d 195, 206 (2d Cir. 1983) (arguing that the fair use doctrine "ensures a proper balance of the citizenry's need to be informed and the author's monopoly of his original writings"), *rev'd*, 471 U.S. 539 (1985).

n481 Underlying this guideline is the proposition that the law should be organized not just to avoid inhibiting debate on public issues, see *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), but to foster and enrich that debate, *cf. Goldstein, Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 988-90, 1009, 1011-14 (1970) (arguing that the fair use doctrine properly "accommodates" the public's "right to hear" and the need to encourage artistic expression by excusing "otherwise infringing conduct where the subject matter appropriated is relevant to the public's interest in its own political and cultural advancement and the infringer dedicates the subject matter to a use independently conductive to the public interest"). In assessing the tendency of different sorts of putatively infringing works to inform and enliven public debate, there is no reason to assume that "factual works" will contribute more than commentary or fiction. See Gorman, *supra* note 108, at 586.

n482 The reader should not infer from the length of this list that virtually all uses of copyrighted material will be entitled to preferential treatment on the ground that they are "educational" (and thus that the factor is useless in differentiating between uses). Many recent fair use cases have involved activities that surely would not qualify under even the

most expansive interpretation of the standard. See, e.g., *Bourne Co. v. Speeks*, 670 F. Supp. 777, 779-80 (E.D. Tenn. 1987) (holding that unauthorized amateur performances of copyrighted songs at "Country Music Theatre" were not fair uses); *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706, 714-15 (S.D.N.Y. 1987) (deeming the use of a facsimile of a copyrighted depiction of the relationship between New York City and the rest of the United States for the purpose of promoting the movie *Moscow on the Hudson* to be unfair); *Rural Tel. Serv. Co. v. Feist Publications, Inc.*, 663 F. Supp. 214, 219 (D. Kan. 1987) (holding the copying by one publisher of portions of a telephone directory compiled by another publisher to be unfair). Many more activities to which the fair use doctrine is, in theory, applicable -- for example, the conduct of "Pirate Publishing Company" described in section IV.B -- also would not qualify.

n483 See *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986) (holding the use was fair), *cert. denied*, 107 S. Ct. 2201 (1987).

n484 See *Salinger v. Random House*, 811 F.2d 90 (2d Cir.) (holding the use was unfair), *cert. denied*, 108 S. Ct. 213 (1987).

n485 See *Craft v. Kobler*, 667 F. Supp. 120 (S.D.N.Y. 1987) (declaring copying for the purpose of impugning the prior biographer's assertions to be fair, but declaring copying for the purpose of "mak[ing] a richer, better portrait of Stravinsky" to be unfair).

n486 See *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983) (holding that the fair use doctrine did not permit a teacher of public-school "food service career classes" to copy portions of a copyrighted booklet on cake decorating and include them in a packet of materials, substantial portions of which were original, made available to her students); cf. *Encyclopedia Britannica Educ. Corp. v. Crooks*, 558 F. Supp. 1247 (W.D.N.Y. 1983) (holding that it was not a fair use to copy for classroom use copyrighted programs broadcast over the public airwaves when those programs were available for rental). Because the copying in *Encyclopedia Britannica*, apparently unlike the copying in *Marcus*, did not facilitate the preparation of a set of materials tailored to the teachers' lesson plans, it would be entitled to less preferential treatment in the proposed fair use analysis. However, because it did facilitate education to some degree, if only by enabling the defendants to spend more on other resources or activities, it would deserve a modest boost.

n487 See *Maxtone-Graham*, 803 F.2d at 1256-57; cf. *Time v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (basing its conclusion that the reproduction of the Zapruder photographs was a fair use partly on the ground that "[t]here is a public interest in having the fullest information available on the murder of President Kennedy" and that the photos made the defendant's assassination theory "easier to understand").

n488 For development of this point, see pp. 1751-52 above. Cf. Stewart, *Regulation in a Liberal State*, 92 YALE L.J. 1537, 1568-81 (1983) (arguing that one of the goals of administrative law should be enhancement of the "diversity of economic, cultural, and physical environments," and applying that proposal to environmental law and the regulation of broadcasting).

n489 See 17 U.S.C. § 106 (1982) (according copyright owners the exclusive right to prepare or authorize the preparation of such works).

n490 Judge Newman made this point powerfully and precisely in an opinion excusing from copyright liability the makers of a television show that parodied the character Superman: "It is decidedly in the interests of creativity, not piracy, to permit authors to take well-known phrases and fragments from copyrighted works and add their own contributions of commentary or humor." *Warner Bros. v. American Broadcasting Cos.*, 720 F.2d 231, 242 (2d Cir. 1983) (footnote omitted). The insight embodied in this passage was missed by the district court judge who, while imposing liability on the creators of a series of "singing telegrams" that parodied Superman, opined: "Defendants have the right to discuss, and even to criticize, plaintiff's stories and characterizations; but defendants do not have the right to change plaintiff's property by altering the popular associations carefully wrought by plaintiffs." *DC Comics, Inc. v. Unlimited Monkey Business, Inc.*, 598 F. Supp. 110, 118-19 (N.D. Ga. 1984).

n491 See Davis, *Criticism and Parody*, 26 THOUGHT 180, 181-82 (1951); Note, *Parody Defense*, *supra* note 13, at 1395; R. POSNER, *supra* note 299, ch. 7, at 41.

n492 Cf. *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980) (per curiam) (relying partly on the principle that "in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody," in affirming a ruling that the song "I Love Sodom" (a parody of the popular jingle, "I Love New York") constituted a fair use).

n493 Arguably, the primary interest of most producers of intellectual products is maximizing their income. The questions of how and how much that concern may be accommodated are reserved for section V.C.2.

n494 Some commentators have argued that respect for artists' dignity and personhood requires not only that they not be disturbed when creating their works, but also that their finished creations be protected from alteration, destruction, and unflattering public display. See, e.g., Katz, *The Doctrine of Moral Right and American Copyright Law -- A Proposal*, 24 S. CAL. L. REV. 375, 381 (1951). The French system of *droit moral* has long accorded artists some degree of this kind of protection, see Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 554-55 (1940), and the question whether the United States ought to adopt some or all of the French system is currently being considered in many contexts, see, e.g., Horowitz, *Artists' Rights in the United States: Toward Federal Legislation*, 25 HARV. J. LEGIS. 153, 200-06 (1988) (discussing proposed amendments to the federal copyright statute that would incorporate portions of the French regime); Schiller, *Black and White and Brilliant: Protecting Black-and-White Films From Color-Recording*, 9 COMM./ENT. L.J. 523 (1987) (discussing current controversy over the "colorization" of black-and-white films); Scott & Cohen, *An Introduction to the New York Artists' Authorship Rights Act*, 8 COLUM. J. ART & L. 369 (1984) (describing an art preservation statute of the kind now in force in several states); *House Panel Opens Copyright Hearings*, N.Y. Times, June 18, 1987, at C20, col. 4 (describing the debate over whether the United States should ratify the Bern Convention).

Careful analysis of this topic would carry us some distance from the fair use doctrine, but a few points bear mention. Insofar as the argument for adoption of the French system rests on the proposition that the alteration or destruction of a work of fine art threatens the "artistic personality" of the creator, the claim is shaky. It does not seem essential either to the idea of creativity or to the larger conception of meaningful work elaborated in these pages that the fruits of creative labor should remain unaltered forever or even for a significant period; the artistry of an architect, cabinet-maker, or chef is not impaired by the fact that we do not or cannot prevent the purchasers of their products from changing or destroying them. Insofar as the argument depends on the proposition that the destruction of a work of fine art threatens the diversity and richness of our artistic heritage (both by permanently removing an artifact from the collection and by discouraging fame-conscious artists from creating new artifacts), it is considerably stronger. See Elsen, *Why Do We Care About Art?*, 27 HASTINGS L.J. 951, 953 (1976) (quoting from the Hague Convention of 1954); *supra* section V.A.2.c. But it is not clear that the most effective and appropriate route to that end is to accord artists inalienable rights to block the destruction of their works -- a reform that most likely would compel them to accept reduced compensation from purchasers.

n495 See Goldstein, *supra* note 481, at 1004. An additional cause for concern is the danger that artists would not undertake projects that would be vulnerable to premature disclosure.

n496 See *supra* pp. 1674-75.

n497 An example of a case in which adoption of the more precise criterion would have made a difference is *Salinger v. Random House*, 811 F.2d 90 (2d Cir.), *cert. denied*, 108 S. Ct. 213 (1987). See *supra* p. 1771. The letters copied by the defendant in that case had not been published but surely were considered finished by the plaintiff.

n498 See *supra* pp. 1709-10.

n499 See F. HAYEK, *supra* note 391, at 95. This is not to suggest that we must be content with a regime in which artists' incomes bear no relation whatsoever to their effort; all else being equal, differences in artists' diligence to some degree will, through the ordinary operation of the market structured by copyright law, result in corresponding differences in their incomes. But manipulating the fair use doctrine to assure that artists receive precisely what they deserve seems, for the time being, out of the question.

n500 See *supra* p. 1720.

n501 See *supra* pp. 1718, 1739.

n502 Cf. Scanlon, *supra* note 434, at 1049 (arguing that Rawls' difference principle imposes severe constraints on the use of inequalities of income to establish incentives for productive labor).

n503 See *supra* pp. 1752-53.

n504 The reason the modified difference principle does take such things into account is that it measures net impact on each person's access to the good life. See *supra* pp. 1759-60. The reason the economist's test does not do so is that it measures consumers' aggregate willingness to pay for goods, services, and states of affairs and, for the reasons indicated by Dworkin, cited above in note 321, at 147-52, increases in opportunities for allusion and nuance are unlikely to figure significantly in that calculus.

n505 In other words, the increase in the quality of life of every member of the culture secured by encouraging, in each generation, a few more persons with the potential of Melville, Ansel Adams, or Stanley Kubrick to develop and apply their talents might well justify (even under the severe limitations imposed by the difference principle) holding out to all artists very large incentives.

n506 See *supra* pp. 1756-57.

n507 See *supra* pp. 1717-18.

n508 See *supra* pp. 1751-52.

n509 See *supra* pp. 1761-62.

n510 *But cf. Tron* (1982) (movie depicting video game designers as highly motivated by financial rewards).

n511 Identifying artists who fall into this loosely defined category, ascertaining their incomes, and comparing those figures with the national mean would surely not be easy. But a judge with the time and information-gathering capability assumed by this section's analysis would not find application of the minimal compensation guideline impossible.

n512 The average American adult watches television three to four hours a day (approximately 50% of his free time), the average child even more. See J. MANDER, *supra* note 469, at 24; Cuniberti, *Leisure Time Measured in New Survey*, L.A. Times, Jan. 13, 1986, pt. 5, at 1, col. 6. The prevalence of the habit does vary substantially by occupational group, class, and race. See *Poll: Farmers Don't Watch Much TV*, U.P.I. News, Feb. 25, 1986; Sanoff & Thornton, *TV's Disappearing Color Line*, U.S. NEWS & WORLD REPORT, July 13, 1987, at 56.

n513 See *supra* p. 1766.

n514 Utopian theorists have been notoriously lax in addressing this question. See S. LUKES, *MARXISM AND MORALITY* 86-140 (1985) (criticizing the "wait-and-see" consequentialism of most Marxist theorists).

n515 See, e.g., *MCA, Inc. v. Wilson*, 677 F.2d 180, 181-82, 185 (2d Cir. 1981) (quoting derogatory references to the quality of the defendant's work and concluding: "We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society."). But see *id.* at 191 (Mansfield, J., dissenting) (criticizing the majority's reasoning and observing: "[P]arody 'has thrived from the time of Chaucer.' Even the *Canterbury Tales* indulged largely in sexual satire." (citation omitted)).

n516 For example, Melville's long period of withdrawal and self-doubt beginning in the mid-1850's and, broken only by the brilliant flash of *Billy Budd*, extending to his death in 1891, see W. BERTHOFF, *THE EXAMPLE OF MELVILLE* 47-62 (1962), had at least something to do with the unprofitability of his work. See H. MELVILLE, *PIERRE* 1441 (Library of America ed. 1984) (noting that Melville's lifetime earnings from his eight books totaled approximately \$ 10,400); E. M. METCALF, *HERMAN MELVILLE, CYCLE AND EPICYCLE* (1953). In Fitzgerald's case, the artistic and physical deterioration that began with the publication of *Tender is the Night* (1934) -- the waste of his time and talent on "popular" stories, movie scripts, and alcohol -- had a good deal to do with the diminishing income generated by his serious fiction. See A. MIZENER, *THE FAR SIDE OF PARADISE* 263-338 (rev. ed. 1965). Other American authors whose work suffered for similar reasons include Hawthorne, Henry James, Nathanael West, and Edmund Wilson.

n517 For a strong statement of skepticism regarding the feasibility of such determinations, see R. POSNER, *supra* note 299, at 6-7, 19.

n518 See, e.g., D. MACKENZIE & M. CURRAN, *A HISTORY OF RUSSIA AND THE SOVIET UNION* 549-59 (rev. ed. 1982) (documenting the repressiveness of the "anticosmopolitan" policy pursued during the "Zhdanovshchina era"); F. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND 1476-1776* (1952) (describing the establishment and deterioration of a comprehensive system of censorship); Hauptman, *Suppression of Art in the McCarthy Decade*, in 1 *LAW, ETHICS, AND THE VISUAL ARTS* 268-75 (J. Merryman & A. Elsen eds. 1987); Herbert, *Impressionism, Originality and Laissez-Faire*, 38 *RADICAL HIST. REV.* 7, 11-14 (1987) (discussing the impact of "the system of prizes, government purchases and church commissions" in nineteenth-Century France, not only upon traditional artists, but also upon the work of the upstart impressionists). For a vehement and influential statement of the risks associated with empowering judges to resolve copyright controversies on the basis of aesthetic judgments, see *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903) (Holmes, J.).

n519 See *supra* pp. 1773-74.

n520 This proposed factor differs in two respects from the published/unpublished factor recently endorsed by the Supreme Court: (i) it draws the line at completion of the work, rather than at the moment of publication; and (ii) it treats completion as a prerequisite to invocation of the fair use doctrine, rather than as simply a consideration to be weighed with other factors. Thus, to take two examples, the proposed test would be more hospitable than the present doctrine to unauthorized copying of portions of a completed manuscript or film that has received limited circulation prior to its public release and less hospitable to unauthorized news stories that include passages from uncorrected proofs of forthcoming books. Cf. *Copyright Law Revision -- Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* at 27 (H.R. Comm. Print, 88th Cong., 1st Sess. Feb. 1963) (discussing the two sorts of putative infringement); Montgomery, *Ehrlichman Says Burger Discussed Court's Cases*, *N.Y. Times*, Dec. 10, 1981, at A18, col. 1 (exemplifying the second of the activities).

n521 The reasons for selecting categories of this sort are summarized in section IV.D.1. Categorization of the latter sort has already been implicitly approved by the Supreme Court. See *Sony*, 464 U.S. at 451 ("A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that *if it should be*

come widespread, it would adversely affect the potential market for the . . . work." (emphasis added)). Categorization of the former sort would require a change in the courts' approach.

n522 In some contexts, variability in the amount of copying involved will make categorization of the "type" of conduct at issue difficult. For a possible solution to the difficulty, see p. 1721 above.

n523 For discussion of the degrees to which these criteria function as proxies for the magnitude of harm, see pp. 1672-73 and pp. 1677-78 above.

n524 Situations in which this first condition applies would be unusual. Indeed, the mere fact that the plaintiff has brought suit ordinarily shows that privileging conduct of the sort engaged in by the defendant would result in injury (as defined in the preceding paragraph) to the producers of such works. In only two scenarios is this likely not to be true: (i) the plaintiff is eccentric; unlike the plaintiff, most producers of works of the type in question would feel benefited rather than hurt by a rule that the conduct in question is fair; and (ii) producers of the type of work in question customarily assign their copyrights to others (e.g., to their publishers) and for some reasons injuries sustained by the copyright holders would not redound to the detriment of the producers. A rare example of the latter scenario might have been the photocopying of articles from medical journals at issue in *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975). *See supra* note 62. The harm (if any) suffered by the plaintiff publisher as a result of the copying apparently had no impact on the fortunes of the authors of the articles, simply because "[t]he authors, with rare exceptions, are not paid for their contributions." 487 F.2d at 1359. Thus, application of the proposed doctrine to the facts of *Williams & Wilkins* would have yielded the same result as that reached by the Court of Claims -- namely, that the copying constituted a fair use.

n525 It is important that the judge determine not only that the output of current producers would not be adversely affected, but also that the recruitment and productivity of future producers would not be impaired. Fidelity to the "minimal compensation" principle, *see supra* p. 1777, would require that this instruction to the judge be qualified by the proviso: "unless the result would be to depress markedly below the national mean the incomes of the majority of producers." However, the infrequency with which the proviso would be material, combined with the difficulty of accumulating the data necessary to apply it, *see supra* note 511, counsel against including it in the proposal.

n526 In other words, we should resurrect the "productivity" factor that once figured prominently in fair use cases. *See supra* p. 1685.

n527 *See supra* pp. 1730-31.

n528 *See supra* p. 1772.

n529 *See supra* pp. 1768-69.

n530 *See supra* pp. 1770-72.

n531 *See supra* p. 1742.

n532 *See supra* p. 1774.

n533 Most notably, it abandons the "custom and propriety" factor adopted by the Supreme Court in *Harper & Row*. *See supra* p. 1679. The reasons for making this change are: (i) in only a minority of cases will there be any colorable justification for invoking that consideration, *see supra* p. 1681; and (ii) the conservative effects of tying copyright law

to society's "shared values" (in the unusual cases in which such a consensus exists) are inconsistent with the utopian program.

n534 For example, the proposed approach modifies the "publication" factor to align it more precisely with its rationale, demotes the "amount-of-copying" and "commercial/noncommercial" factors to proxies for the question of harm to the copyright owner, and redefines "harm" itself to incorporate the arguments advanced in sections II.B.1 and IV.E.1.a.

n535 *See supra* pp. 1691-92.

n536 *Cf.* L. Sargentich, Complex Enforcement 106-07 (unpublished draft of March 1978) (describing how federal courts in the 1970's, called upon to bring prisons, schools, mental hospitals, and other institutions into conformity with the Constitution, gradually worked out "model decrees," which clarified the constitutional provisions at issue and helped administrators to anticipate and comply in advance with the courts' determinations).

n537 For an example of how such reflection might proceed, see note 563 and accompanying text below.

n538 *See supra* pp. 1694-95; *cf.* F. Michelman, Law's Republic (unpublished draft May 1988) (pursuing alternative routes to the same end).