Patent Law's Latent Schism

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Wisconsin Law Review (forthcoming 2020)

Abstract: Under the conventional view, utilitarian theory has come to dominate patent law. Patents are viewed as the incentive we offer for innovation, from which all of society ultimately benefits, despite short-term monopoly costs. Patent doctrines are, in turn, assessed against the goals of optimizing that incentive and reducing those costs. On the other side, a minority of embattled jurists and scholars defend the relevance of freestanding moral principles, such as desert, autonomy, or justice, and argue for their re-incorporation into contemporary patent doctrine and policy.

This Article challenges that conventional view, and offers a unique reframing: the moral principles never left patent law, but instead have been cabined to one half of the field, where they exercise a disproportionate influence. While utilitarian theories do an excellent job of explaining modern patent validity law, patent infringement law is unmistakably infused with broad moral principles, and is even at times hostile to a traditional economic approach.

The Article examines in detail the most significant doctrines governing patent validity—novelty, non-obviousness, subject-matter eligibility, utility, written description, enablement, and inventorship—and demonstrates the strength of their relationship to utilitarian frameworks at the (often explicit) expense of others. The Article then explores the most significant doctrines with respect to patent infringement—relief (whether injunctive or damages), scope (vis-à-vis the doctrine of equivalents), and defenses (inequitable conduct and prior use)—and builds the case that moral frameworks are better able to explain their contours. This framework schism, the article argues, can be traced to three interrelated causes: the adjudicatory split between the USPTO and district courts, the influence of traditional property law, and the mix of private-law and public-law features that patents exhibit. Finally, the article concludes by briefly examining the implications for policymakers, using two case studies of reform efforts: patents on surgical techniques and plants.