PLURALISM AND CONTEXT: INTELLECTUAL PROPERTY AND THE SOCIAL UNDERSTANDINGS OF INTELLECTUAL GOODS

by

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Abstract

Intellectual property affects an increasingly large range of social life. Despite the breadth of goods and activities affected by intellectual property schemas, policy-makers, legislators, jurists and even many social theorists have a narrow understanding of the basis for instituting intellectual property rights and understanding their limits: most see intellectual property rights only as a means to create more intellectual goods in society. My dissertation argues that our intellectual property schemas and policies need to be more sensitive to the diversity of values involved in the social meanings of different intellectual goods and activities. Contrary to those who claim that “information wants to be free,” I defend a property-based approach to the protection and regulation of intellectual goods. I argue that intellectual property schemas need to do a better job responding the the diversity of value that characterizes intellectual activities and goods. Finally, I argue that context is an important tool for marking out which values are to be promoted in different circumstances and communities.
An introduction

Intellectual property affects an increasingly large range of social life. From an individual’s ability to access medicine and other medical treatments (Pogge 2005) to his or her ability to participate in the expression and evolution of culture (Sunder 2012), intellectual property schemas determine the structure of costs and the very existence of a wide variety of resources. Yet despite the breadth of goods and activities affected by intellectual property schemas, policy-makers, legislators, jurists and even many social theorists have a narrow understanding of the basis for instituting intellectual property rights and understanding their limits.

Policy-makers, legislators and jurists of the Anglo-American tradition see intellectual property rights as a means to maximize the production of intellectual goods in society, the economists’ interpretation of the phrase “to promote the Progress of Science and useful Arts” (Lemley 1999; Boyle 1997). Notably, even many critics of intellectual property schemas have adopted this as the ground for their critiques (cf. Lessig 2004; Posner and Landes 2003). Yet even many theorists who do not accept incentives-based justifications for intellectual property see its normative basis narrowly—intellectual property rights are based in self-ownership and labor or rights of personality (cf. Moore 2001; Hughes 1988).

In this dissertation, I will argue that rather than seeing the grounds of intellectual property narrowly, our intellectual property schemas should be sensitive to the diversity of value that characterizes intellectual activities. Goods are social constructions; people have shared understandings regarding what makes something a good (Walzer 1983).
Intellectual goods are no different than others nor are the roles they play and the values they express homogenous. Examining the history of intellectual property reveals that different mechanisms for regulating intellectual goods and activities arise in particular social contexts based on different social understandings of those goods. Standard justifications of intellectual property, including incentives-based, rights of personality, and labor accounts, are all based on social understandings of authorship and the value of intellectual goods that were developed in specific historical contexts (Boyle 1997). Incentives-based accounts rely on the idea that an author is best characterized as the proprietor of a commodity, motivated by sales and profit. Labor accounts of intellectual property are also tied to the idea that an author is a proprietor entitled to many of the same rights of contract as proprietors of physical goods. And, without a Romantic notion of authorship to underwrite the intimate connection between the author and the work, rights of personality are bankrupt.

There is not a single answer to why intellectual products are goods because intellectual products exist in diverse communities and serve diverse values and ends. Much of Indigenous traditional cultural expression is made in contexts where authors are conceived as trustees (Brown 2003). And, thinking of the products of scholarly activities as commodities only hinders scholarly communication. These are two examples of intellectual goods which do not fit neatly into orthodox understandings of intellectual property, but there are many more--including human genetic information and programming code (cf. Boyle 1997). Our intellectual property schemas and policies need to be more sensitive to the diversity of values involved in the social meanings of different intellectual goods and activities. The standard justifications offered in the literature on intellectual property err by attempting to import social understandings of intellectual goods
into different contexts where those understandings are not appropriate. Given the diversity of intellectual goods and their increasing importance, we need a broader framework for thinking about intellectual property that does not make this mistake.

**Comments on methodology**

This dissertation is a work of normative cultural analysis situated within the field of information studies. While many academic disciplines or sub-disciplines are united by a commitment to a methodology, information studies is a developing, interdisciplinary area of inquiry united by research questions about the relationships between information, people, and society and a commitment to the value of diverse methodologies. Construed broadly, information studies includes library science, information science, computer science, communication, media studies, and journalism.

Intellectual property schemas structure the flows of information within society and affect individual’s ability to access information. As technology and globalization change the costs of the creation and dissemination of information, extant intellectual property schemas adapt to meet the challenges posed by those changes. As an example, the Anglo-American model has responded to increasing ease and profitability of digital piracy by strengthening rights’ holders control over digital embodiments of their works, in many cases at the expense of traditional limits on those rights like fair use and the doctrine of first sale.

Because of these changes, much of extant law, policy, and international agreement surrounding intellectual property needs to be revised to a greater or lesser degree, or in some cases, relevant law and policy need to be established. Acknowledging that intellectual property schemas can and should change means that we ought to ask how those changes should be made
well. My own approach to questions surrounding the proper structure of intellectual property schemas emphasizes the insights that analytic philosophy, particularly ethics and social theory, provides.

As a work of normative cultural analysis, this dissertation makes prescriptive claims about what sorts of policies we ought to implement. In support of these claims, I make and rely on many "value claims:" claims about the kinds of things that matter or what people ought to care about. As we will see later, what people actually value and how they do understand the significance of their activities are important components of my arguments for those policies. However, here, I wish to both reject ethical relativism and explain why I think we must leave relativism behind in order to implement successful policy.

Before doing so, however, I wish to explain what Charles Ess calls ethical dogmatism, the view that "universal ethical standards indeed exist, that these are known to a particular person and/or ethnos, and that these standards must indeed be acknowledged as universally legitimate, i.e. as normative for all people in all times and places" (Ess 2006, 215). Ethical dogmatism condemns different views, claims, etc. as wrong because they disagree with a set of putatively universal truths and values. It is my view that cultural relativism is motivated by a rejection of ethical dogmatism, and thus we start our discussion here.

Ethical dogmatism involves three separate claims:

1. There are universal ethical standards.
2. These standards are known to me or my group.
3. My or our standards should be acknowledged by people as universally binding.

To be dogmatic is to assert that I or we do know these ethical standards and to be closed off to the possibility of error or reasonable disagreement. Ethical dogmatism is arguably quite
problematic on many levels. The religious wars of Europe were a direct result of a certain kind of
ethical dogmatism--for them, religion and morality were not typically distinguished. Here we see
an instance in which ethical dogmatism led to violent conflict in the face of disagreement. Since
the world is characterized by disagreement, ethical dogmatism is often implicated in violent
conflict, also evidenced by terrorists the world over.

Even when not incitement to violent conflict, something else bothers many people when
they reflect on ethical dogmatism. Consider that ethical dogmatism relies on the idea that I or
we know the correct ethical standards. Faced with disagreement about this, the ethical dogmatist
asserts that the other party is wrong. In particular, they are closed off to the idea that they might
be wrong instead of, or as well as, the other party. Implicit in the ethical dogmatists view is the
idea that they have some privileged or lucky access to the truth that the other party does not
possess. The problem is that there do not seem to be good grounds for this claim, which
denigrates the other party as less capable of discerning the truth of the matter. Ethical dogmatism
does not seem to be respectful of other persons.

Faced with the apparent problems associated with ethical dogmatism, it is not uncommon
to adopt a form of ethical relativism. Ethical relativism is the view that ethics is dependent upon
certain perspectives such that what is right for one person may be wrong for another, and this a
function of either his or particular perspective (egoistic relativism), or the perspective of the
culture to which they belong (cultural relativism). Ess points out that relativism, like dogmatism,
is problematic. To say that X is right for you and wrong for me, or "to each his own" does very
little to solve practical disputes that stem from our need to coordinate and cooperate or from the
fact that because of our interconnectedness, your actions affect me. This leads to Ess second
criticism of relativism: in the face of this "problem or dispute solving gap," individuals and groups are also likely to resort to force rather than appeals to reason or agreement.

James Rachels (2003) points additional problems specific to cultural relativism: that facts about right and wrong, good and bad are determined by a person’s culture. Thus, it could be wrong in one culture to expose an infant to the elements such that it dies, but the right thing to do in another. Whether it’s right or wrong is just a function of the culture within which the action occurs. In particular, there are two main problems with cultural relativism as most commonly presented: the cultural differences argument (which is most often used to establish it) is invalid and there are deeply unappealing consequences to applying cultural relativism.

The cultural differences argument is as follows:

Premise: Different societies have different moral codes.
Conclusion: Therefore, there aren’t any independent truths about morality.

The point isn’t that the conclusion is necessarily false, just that it doesn’t follow logically from the premise. This doesn’t mean that cultural relativism isn’t true, just that this is not a good means for arguing that it is (Rachels 2003). For our purposes, the real objections to cultural relativism come from three unappealing consequences of applying the view.

1. Cultural relativism prevents us from critiquing the customs and practices of other cultures.

On the face of it, this is an appealing outcome. We often find criticism of other cultures to be insulting and disrespectful. But applied universally this is actually quite a problem for the cultural relativist. Despite what we might think about some criticism, it seems like a bad thing if we cannot criticize the Nazi’s for the Holocaust, or American policy toward Native Americans
during the 18th, 19th, and early 20th centuries. But the cultural relativist has to regard these practices and policies as not only immune from criticism, but morally acceptable. Why? Because these practices and policies were accepted and part of the cultures in which they occurred.

2. We can determine whether an action is right or wrong just by appealing to the current standards of our society.

Rachels points out: “Suppose in 1975, a resident of South Africa was wondering whether his country’s policy of apartheid--a rigidly racist system--was morally correct. All he has to do is ask whether the policy conforms to his society’s moral code (2009, 26).” A slaveowner in southern America in the 18th and 19th centuries could consult the moral code of his own culture to determine if chattel slavery was morally acceptable. Insofar as the practice conformed to the moral standards of his own society, then according to the cultural relativist, there was nothing wrong with it.

3. Moral progress seems questionable.

While a cultural relativist can certainly accommodate changes in our social practices, he cannot accommodate the idea that some of those changes improve our society. The Civil Rights Movement may have resulted in changes in our social practices and attitudes, but the cultural relativist cannot argue that these changes are for the better and morally superior to the ones that came before.
As Ess points out, a good deal of what is attractive and appealing about cultural relativism stems from the importance that we place on tolerance and appreciating diversity. But according to a cultural relativist, whether or not a person should be tolerant will be a function of whether or not their society’s moral code advocates tolerance. If it doesn’t, that person has no obligation or responsibility to be tolerant of others.

Cultural relativism is just one response that people have when they recognize that there are differences in people’s moral codes and do not want to resort to ethical dogmatism. Cultural relativism is thus a response to a certain kind of disagreement or difference. In fact, most forms of normative relativism are responses to disagreement and difference that seem to suggest that the presence of such disagreement undermines any notions of objective standards that we might adopt. Many people seem inclined to think of ethics as a choice between the extremes of ethical dogmatism and some form of normative relativism. Presented with this "choice," we may find the unappealing aspects of cultural relativism to be less bad than those of ethical dogmatism. Fortunately, this is what philosophers call a false dichotomy. These are not the only views available to us by any means. We can contrast the triumvirate claims of ethical dogmatism with a similar, yet less problematic set:

1. There are universal ethical standards.
2. These can be known to people or groups.
3. These standards, once known, should be acknowledged by people as universally binding.

The view here is that are universal ethical standards which can be known to people or groups and, once known, should be acknowledged by people as universally binding. This is consistent with a kind of humility--it is one thing to claim that there are such standards which could, in principle be known, and quite another to assert that one or one's group has such knowledge. The
field of ethics in analytic philosophy is a field of inquiry into those standards and their application. Like other disciplines, it is an ongoing investigation in which we hope to increase our knowledge of these questions, but do not claim to "know the whole story." Instead, scholars (and laypersons) are involved in an ongoing discussion in hopes of furthering our understanding.

In chapter four on intangible cultural heritage, we will return to questions about relativism and tackle related questions of cultural imperialism. Relying only on what one cultural strand takes to be morally correct, even if such attitudes are widely shared, is apt to ignore existing power structures, inequalities, and past injustices. In some cases, cultural relativism simply justifies an unacceptable status quo and fails to give voice to minority groups and persons.

In my investigation, I draw on research from several disciplines, paying careful attention to the reasons and arguments that are offered for statements about value and policy recommendations, and bring out the background assumptions that underlie those statements and recommendations. Richard Feynman once commented that scientists need philosophers of science as much as birds need ornithology. The attitude that philosophers, or philosophical modes of inquiry, have little to offer practical areas of inquiry or policy-making is difficult to dislodge. Philosophical inquiry is often characterized as impractical and abstract, separated from the “real” questions and challenges that we face today. There is perhaps no more stereotypical embodiment of an individual disengaged from solving real-world problems than the “armchair philosopher.”

Such conceptions of philosophical inquiry are misguided. Philosophers, especially ethicists and social and political philosophers, have made important contributions to debates
about public policy. Helen Nissenbaum, a Stanford philosophy PhD at NYU’s departments of Media, Culture and Communication and Computer Science, has put privacy’s contextual variance at the center of national agenda. The recent Federal Trade Commission Report on consumer privacy uses the word “context” 85 times, a marked increase that signals how much Nissenbaum’s work has influenced the way that regulators and policy-makers are thinking about consumer data (Madrigal, 2012). Similarly, Thomas Pogge has been influential in discussing the way that the structure of intellectual property affects the availability and development of medicine around the world and Allen Buchanan has made important contributions to debates about technology and human development (cf. Pogge 2005; Buchanan 2003, 2011). These contributions are by no means exceptional--more and more philosophers are increasingly concerned with applied ethics and the development of public policy.

Done well, philosophical inquiry helps to make us aware of the background assumptions that underlie different ways of looking at a question, or more broadly, the world. It helps us to recognize when debates about specific policy questions--access to traditional cultural expression, for instance--are not empirical debates about the best way to bring about an outcome, but debates about what those outcomes should be. When we have such debates about value, it is important to recognize the insights that the history of ethical thought can provide us.

This dissertation thus attempts to translate our reasoned convictions about value into specific policy proposals for intellectual property. In many respects, it begins the project of doing for intellectual property what Nissenbaum’s work has done for privacy. By clearing up the conceptual space surrounding privacy, making useful distinctions and pointing out equivocations, and paying careful attention to the structure of arguments, Nissenbaum’s work has provided
regulators and policy-makers with specific guidance not just about how to think about privacy, but how to implement legislation and policy that respect it.

This dissertation jumps from recent work on intellectual property in arguing that we must expand our understanding of the values intellectual property should promote (cf. Sunder 2012). However, critiques and examinations of intellectual property schemas have been strongly influenced by consequential accounts of social policy proposing that our aim should be solely to promote good consequences, supplemented with different account of what those consequences are--utility, capabilities, etc. I will argue against purely consequential accounts of social justice.

The framework I propose offers an account of which values particular societies should promote in specific contexts--and the policies and institutions they should use to do so--on the basis of their shared understandings of goods by drawing on Michael Walzer’s seminal *Spheres of Justice* and eudaimonic ethics. This framework will be developed in detail in the following chapter, but three key features are worth presenting at the outset. First, contrary to those who claim that “information wants to be free,” I will defend a property-based approach to the protection and regulation of intellectual goods. Second, I argue that intellectual property schemas need to do a better job responding the the diversity of value that characterizes intellectual activities and goods. Finally, I will argue that context is an important tool for marking out which values are to be promoted in given circumstances. In the following chapter, I will explain how eudaimonism, characterized by its commitment to value pluralism and emphasis on context, offers the best way for us to think about intellectual property.
Property as theoretical tool

Most critics of intellectual property argue that intellectual property simply needs to be revised. However, there are those who argue that property is an entirely wrong way to think about some or all intellectual goods. Property is often depicted in both academia and entertainment as a vehicle of malign governments and corporations for controlling access to information for profit or power (see e.g., Antitrust 2001; Boyle 2003). According to many technological determinists, the forces of conservatism may try to fight it but “information wants to free:” increasingly free flows of information are the inevitable outcome of new information technologies (cf. Bell 1973; Duguid and Brown 2000; Brand 1987).

Additionally, a large body of literature critiques the combination (and possible conflation) of culture and property (cf. Brown 2005; Prout and O’Keefe; 1992; Verdrey & Humphrey 2004). The primary criticism of applying the label ‘property’ to many of the materials of culture is that the term is laden with often inappropriate connotations, particularly the commodification of goods. Many commentators resist what they see as the commodification of cultural materials through the development of property institutions that govern cultural heritage and hinder cultural interaction (Brown 2004, Sunder 2012). Others worry about property’s association with Western understandings of the idea, that property institutions may extend “the influence of Euroamerican values” (Welsh 1997, 13). Some find the application of the concept property to cultural heritage, as an institution whose primary function is to protect individual rights, at odds with the community interests at stake in cultural heritage protection (Prout and O’Keefe 1992).

Yet there is growing recognition in law and policy circles that property is as much about relationships as it is about things (Brown 2004; Kirsch 2001). To illustrate, despite worries about
the commodification of culture, property institutions are increasingly means by which
Indigenous populations can seek damages for “cultural loss,” as, for instance, in the case of the
1989 Exxon Valdez oil spill in Alaska (Verdrey & Humphrey 2004). Once we recognize the
connection between property and relationships, we might argue that damage to social
relationships central to the exercise of culture can be compensated for through property law. In
this case we may hope that the continued discussion of cultural materials as property
mechanisms may contribute to a better understanding of property.

Property is a particularly useful theoretical tool that allows us to respect the diversity of values involved in information. A property right is really a bundle of different rights, many of which can be theoretically separated. This means that property is a particularly useful conceptual framework for thinking about the appropriate jurisdiction for different intellectual goods. Different kinds of property rights establish different levels of access and use of a good. For example, while private property like a chair may be the paradigmatic case of property we should also remember that public parks and historic homes are property, too. An individual may own a historic home yet have limitations regarding what he or she could do regarding its use. The law may prohibit or limit its renovation. “Property” admits of a wide range of permissions regarding usage and liability. Full ownership is simply on one end of the spectrum.

Discussions of intellectual property tend to imply that intellectual property is akin to chairs and coffee mugs (cf. Himma, 2008). Yet this way of framing intellectual property is ill-suited for many kinds of intellectual goods, as I intend to show. Intellectual property rights should be thought of simply as jurisdictional rights that establish who has access to, use of, and responsibility for intellectual goods. The challenge is to identify the appropriate range of rights
and rights holders over access and responsibility for a particular intellectual good. Are the rights analogous to those I have over my coffee mug? To a historic home? To the local public park?

**Pluralism**

A recurring theme of this dissertation is the disconnect between the breadth of activities and goods affected by intellectual property schemas and the simple goal that those schemas arguably set out to achieve. Prior to the last few years, discussions and critiques of intellectual property had taken for granted the idea that intellectual property serves to incentivize the production of intellectual goods in order to maximize “production of more cultural goods, from R2D2 to iPads, for exchange in the global marketplace” (Sunder 2012 p. 3, emphasis mine). Even those critics who have seen the excesses of intellectual property schemas have argued that, in their current forms, the schemas at best fail to properly incentivize production of more and better goods and at worst, actively stymie innovation (Posner and Landes 2003).

More recently, commentators have begun to realize that intellectual goods serve varied purposes. They enable us to exchange knowledge and stories with each other in a variety of ways that make our lives more meaningful. Thus, it is important to see intellectual property laws and policies not merely as vehicles for making more stuff, but, to echo the Statement of Progressive Property Scholars, as mechanisms for “govern[ing] human interaction to ensure that people relate to each other with respect and dignity.” In the landmark case State v. Shack, Chief Justice of the New Jersey State Supreme Court ruled that “Property rights serve human values. They are recognized to that end and limited by it” (State v. Shack, 58 N.J. 297 1971). Given the breadth
and scope of activities governed by intellectual property laws, it is time for intellectual property to serve human values, emphasis on the plurality.

**Context and eudaimonism**

Value pluralism presents us with a difficulty: values notoriously conflict. Once we accept that intellectual goods involve a variety of values, it’s useful to have something to say about which values matter in particular circumstances. I will argue that we can use the ethical perspective of eudaimonism, with its commitment to relevant-reasons and emphasis on context, as a tool for thinking about value pluralism and which values should be promoted in different circumstances. The ideas of relevant reasons and context are discussed in depth in the following chapter.

There, I will draw a parallel between constructing an individual’s life and implementing social policy. On an individual level, our final end involves making choices about which values to promote and balancing our ends to make lives that are meaningful for us. At the social level, we are also faced with similar choices; we have to select values to promote and balance. Security and privacy may come into conflict with convenience, tolerance may conflict with the flourishing of minority groups, freedom of religion may conflict with gender equality. Striking the right balance between values will depend on the role they play in different social spheres, but also in the collective structure of the spheres and how individuals conceive of the relationship between them.
A glimpse of what’s to come

In what follows, I’ll first introduce the eudaimonic framework that explains if, when and why we need intellectual property rights. Then I apply the framework to scholarly communication, intangible cultural heritage, and personal information, giving an account of the extent of those rights and the institutions needed to promote them. What do scholarly communication, intangible cultural heritage, and personal data have in common? Aside from the fact that they will be treated within this dissertation, one is tempted to say, “Very little.” That is part of the point--there are a wide variety of intellectual goods which promote different values. Approaches to intellectual property should be sensitive to the diversity of values that characterize intellectual goods in different contexts.

For both intangible cultural heritage and personal information, we will see that concerns about privacy provide the normative basis or justification for a right to private property. Many theoretical frameworks want to keep privacy and property completely separate. Social and legal theorists have tended to see private property as a mechanism that allows individuals greater freedom through their ability to control things around them (Waldron 1988) while privacy concerns are typically related to issues of integrity and identity; they track our need to develop ourselves away from scrutiny (cf. DeCew 2012).

Once we have accepted a broader notion of property, it makes sense to say that privacy concerns can be used to ground new categories of intellectual property. Digital culture and the information society undermine the distinction between “the things around us” and cultural or personal information that is so important to our identity and the construction of meaning in our lives. Information simply is one of the things that circulates around us.
Scholarly communication

The first intellectual good we will turn to is scholarly communication. Social understandings of scholarly communication can be used to argue that the de facto set of rights conferred by copyright legislation are inappropriate for governing scholarly exchange. Anglo-American approaches to copyright law are based in the idea that the author is best characterized as a proprietor of a kind of marketable good. Scholars and academics are active producers and consumers of intellectual works. Thinking of those works as cultural commodities subject to market sale misunderstands the purpose of their activity and hinders education and research.

The literature on "the problem of academic publishing" tends to focus on solutions that, even if they recommend bypass of academic publishers, still understandably frame the discussion in the language of commodification. Thus, for example, calls for consolidation and consortia between universities are typically characterized as attempts to harness the power of scale in negotiations regarding terms of contract, particularly pricing schemas. The academic community should stop conceptualizing scholarly products as commodities distributed in a market. Instead, universities should implement open access mandates that license their institutions to freely share the work of their faculty.

Intangible cultural heritage

Information and knowledge situate us within our communities and creates valuable social roles—such as lawyers, healers or clergy. Some of this information and knowledge is embedded in tangible and intangible cultural materials. In a globalized, networked world, access to these materials and the expression of other groups and individuals’ is easier. It becomes possible to
participate in a "Japanese" tea ceremony on Vashon Island, WA in a shop decorated with a Navajo rug right after one's kundalini yoga session. Many herald globalization and the networked information society as an opportunity for individuals to construct meaning and identity from a wider array of cultural options. We can think of this as a kind of cosmopolitan ideal: as globalization brings people and cultural materials together from distant places, it opens up possibilities for people to find meaning in different activities and materials from all over the world (Waldron, 1991).

Not everyone endorses this state of affairs. For example, the Tulalip of Washington are currently engaged in a campaign to regain control of their traditional stories (Kapralos, 2007; Mathiesen, 2012). In 1912, a Snohomish Indian living on the Tulalip reservation began carving a sklaletut, or “story pole.” While the Bureau of Indian Affairs was at the time actively involved in the suppression of Tulalip cultural expression, they “allowed” Shelton to carve the pole on the condition that the stories be published (Riddle, 2009). These stories are currently in the public domain and many of them are available on the internet. In their statement to the “Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore” the Tulalip reject the both the applicability of the public domain for cultural expression and idea that their stories are common cultural heritage, even in cases where the stories have been shared with others (Tulalip, 2003).

This chapter will illustrate the limitations of purely consequential approaches to social justice. My fundamental objection is that either they identify an overly narrow set of values to be

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1 Also (incorrectly) referred to as a “totem pole.”
promoted or they underdetermine social policy by identifying a wide range of values to promote, suggesting different and conflicting policies.

I will argue that we need a new category of international cultural property rights. Traditional cultural expression and Indigenous knowledge should be protected by cultural property rights when the author is best characterized as a trustee and when the expression or knowledge is a mechanism by which a community organizes its social activities and practices. These rights should be market-inalienable, that is, many of the traditional rights of contract included in property rights should not be part of cultural property.

Data disenfranchisement

Information is a valuable tool for developing new goods and services; access to information can help individuals make better choices, procure better goods, and resist corruption and oppression. Recognizing the value in information, new industries have risen to meet demand. Information brokers sell aggregated collections of personal information to businesses and other organizations. Social media developers are rushing to develop new services that not only create new opportunities for sharing and engagement but also draw on information about participants. While this environment has fostered services that allow companies to make good recommendations about products you might like (Amazon recommends), individuals to search for nearby restaurants, read crowd-sourced reviews, and get directions all not just from a single device, but from a single interface (Google Maps synced with Yelp), the exchange of personal information threatens our privacy and some uses manipulate individuals.
In order reap the benefits derived from personal information while reducing worries about privacy and discouraging manipulation, we should legislate private property rights in personal information that include:

- An exclusive right to sell the information in the relevant.
- An exclusive right to transfer the information.
- A right to prevent the collection of information--i.e., do not track.
- A right to destroy some information--to have some kinds of records expunged.

Markets for personal information should be sphere-specific. Cross-market exchange should be blocked to reduce the risk of objectification. When information is tied to a particular sphere, composed not only by specific norms of information flow but also united by a purpose and goal, it is less likely that we will see the individuals identified by personal information objectified.

These discussions of specific intellectual goods are offered as evidence for the superiority of a eudaimonic approach to intellectual property. First, though, we need the theory in hand. The following chapter presents the approach in detail.
Introducing eudaimonism: A contextual and pluralistic alternative to standard approaches to intellectual property

In the previous chapter, I pointed out that the literature on revising intellectual property is dominated by an economic-utilitarian perspective that emphasizes economic incentive to create more intellectual goods. This perspective ignores not only many of the reasons that individuals create intellectual goods in different contexts and the variety of reasons for which those goods can be valuable. While we talk about intellectual property as if it were a relatively homogenous good, there are a wide variety of affected intellectual goods which are valuable for different reasons and which play different roles in people's lives.

This chapter presents a eudaimonic framework for thinking about intellectual property that emphasizes context as an important tool for understanding value pluralism. Thus, the first project of this chapter is to both explain and defend a pluralistic understanding of intellectual goods. The second project is to introduce eudaimonism and the related idea of a relevant-reason as context-sensitive tools to navigate a world of plural values.

Intellectual goods

This dissertation deals with the norms surrounding social goods. Exchangeable things become social goods when groups of people value them. Almost anything can become a social good, although which things are social goods varies from group to group. Love and membership are kinds of social goods; so are things like cars, couches, and beer. For brevity’s sake, I will dispense with ‘social’ and use the single term ‘good.’
Goods of this kind are social constructions; whether something is a good is dependent on the shared ideas we have about a thing and why it’s valuable. Those shared ideas are the ‘social understandings’ or ‘social meaning’ of a good. Not only can the list of goods differ from group to group, but groups may value things for very different reasons. Thus, the “same” good may have different social meanings among different groups.

Value is not uni-dimensional. Things do not merely have more or less value. We also recognize different kinds of value. For instance, loving and being loved are valuable for very different reasons than a having car is valuable. This is even more fine-grained than the distinction between intrinsic and instrumental value. Loving and being loved are certainly intrinsically valuable; we value them for their own sake. But fine works of art are also intrinsically valuable, though for different reasons.

Intellectual goods--those goods that are produced by thinking, creating, and imagining--have the same characteristics. Intellectual goods are varied and can be tangible, such as a work of art, or intangible, such as a song or an idea. Music, literary and artistic works; discoveries and inventions; and phrases, symbols, and designs are all examples of intellectual goods. To illustrate these ideas, we now turn to the history of copyright and the social understanding of literary works. Examining the history of copyright is important for two reasons. First, it serves as an illustration of social understandings and their relationship to the regulation (or lack thereof) of goods. Secondly, I hope to make a stronger case for the importance of recognizing the diversity of social meanings. Even similar activities--writing, in this case--can be understood in different ways by different stakeholders.
The historical roots of copyright: diverse social understandings

Legal historians and scholars have long examined the social and historical contingencies that lead to different legal instruments. Examining the history of copyright reveals that different social understandings of authorship are among the contingencies that led to different copyright schemas. For example, understanding authorship as the production of cultural commodities lead to the development of Anglo-American time limited copyright, whereas Romantic conceptions of authorship led to Continental models of intellectual property with perpetual, moral rights. The differences in these models are partly attributable to the different understandings of what authorship is and why it is socially valuable--that is, to the social meaning of authorship.

The Romantic author and Continental models of copyright

Consider the Romantic conception of authorship: the autonomous creation of original ideas and text (cf. Haynes 2005; Woodmansee 1984). This particular conception of authorship involves the notions of 'originality' and 'genius' and can be traced as far back as Edward Young's Conjectures on Original Composition (1759). His work would be influential on Continental rights of personality theorists who adopted his thoughts on original composition in their own works on the nature of authorship and literary property.

Prior to this point, the author was conceived as an artisan or as a craftsman: she or he uses traditional materials, rules, and ideas, handed down by posterity, to produce certain effects. Authors could occasionally move beyond the mere manipulation of received goods to create works that were truly great. In these instances, authors were said to be inspired by the Muses or
God (Woodmansee 1984). What is important is that the source of inspiration was external to the individuals who were actually writing.

Young substituted originality and genius for inspiration. The source of the great works was no longer situated outside of the author, but within:

The mind of a man of Genius is a fertile and pleasant field, pleasant as Elysium, and fertile as Tempe; it enjoys a perpetual Spring. Of that Spring, Originals are the fairest Flowers: Imitations are of quicker growth, but fainter bloom (1759).

This passage highlights two features that have been inherited by rights of personality theorists. First, it is notable that the source of originality lies in the mind of the writer. Secondly, while the genius produces both works that are imitations and works that are original, original works are to be valued more than imitations. While this may seem obvious to the modern reader, it is a marked contrast to earlier scholastic attitudes towards composition, knowledge, and authority and was a necessary step for the development of a rights of personality approach to intellectual property.

On this interpretation of authorship, we can equate "Mary is an author," with "Mary autonomously creates original ideas and text." That statement is much stronger than descriptive statements such as "Mary writes" or "Mary wrote that." While the latter two statements are descriptive accounts of a particular individual's activities, the former involves an evaluative judgment about the nature and result of those activities: that Mary acts autonomously, and that the results are original.

Scholars have argued that later 18th and 19th century German philosophers work on the nature of authorship and composition was motivated by, and contingent upon, a particular set of historical circumstances (cf. Saunders 1992; Woodmansee 1984). The German states were slow
to adopt copyright laws. Even as they did so, each state only had the ability to enforce the laws within their territory. Combined with a shared language and literary culture, this created an environment ripe for piracy (Saunders 1992). Piracy negatively affected writers as it reduced printers' ability to compensate them for their works. Most authors wanted to end piracy and therefore wanted more stringent, enforceable copyright laws that recognized their interests and rights in regard to their work. German philosophers were doing more than just theorizing about the nature of authorship. They were utilizing this conception of authorship as an argument for a particular kind of intellectual property law that endows authors with perpetual rights over their works.

The Statute of Anne and the production of cultural commodities: the origins of the Anglo-American model

The Statute of Anne was the first early-modern legal copyright law implemented, and also marked the first time that authors, rather than printers or booksellers, were the locus of the right to copy, sell, and distribute works. For our purposes, it is important that rather than cementing the status of literary property in early modern England, the Statute of Anne sparked a debate on the nature of authorship and literary property that lasted from 1710 until 1774, with the House of Lords ruling on Donaldson v. Becket (Rose 1994).

The role of authors within society was an important thread running through the debate. The early 18th century was the beginning of the rise of the professionalization of authorship heralded by the growth of a literary marketplace and a decline in the importance of certain kinds of patronage. Authors, including the likes of Samuel Johnson and Alexander Pope, were increasingly independent professionals who made a living not through the benevolent support of
patrons, but though income earned from the publication of their works and possibly, through their ability to profit from their personal “brand.”

This particular conception of authorship can be characterized as the professional production of cultural commodities: items to be sold and profited from. This idea butted heads with Romantic notions of authorship and its value in debates on the House floor:

Glory is the Reward of Science, and those who deserve it scorn all meaner Views.

I speak not of the Scribblers for bread, who teize the press with their wretched Productions: fourteen years is too long a privilege for their perishable trash. It was not for gain that Bacon, Newton, Milton, Locke instructed and delighted the world; it would be unworthy of such men to traffic with a dirty Bookseller for so much as a Sheet of Letter-Press.

So spoke Lord Camden, a former Lord Chancellor and influential member of the House of Lords, on the day that Donaldson v. Becket came to a vote.

When the House ruled to uphold the limits to copyright terms established by the Statute of Anne, they effectively ruled in favor of a conception of authorship that presented the author as a proprietor whose interests must be balanced with those of the public (cf. Ross, 1992). The current Anglo-American system of copyright based on the idea that the author is best characterized as a proprietor of a kind of marketable good.

Thus, we see two different social understandings of authorship influence ideas about how the practice should be governed. It’s worth pointing out, too, that those social understandings were developed within different historical contexts. Social understandings do not appear out of nowhere, but are shaped by the particular histories and characteristics of their communities.
While our current environment of information-exchange is decidedly different from the contexts in which these understandings of copyright arose, the social understandings described above are still embedded in discussions of intellectual property today.

**Justifications for intellectual property**

The justification of intellectual property is the project of determining the grounds and scope of intellectual property rights. To give an account of the justification of intellectual property rights is to offer an explanation of why and when certain kinds of intellectual works should become property and to explain the extent of the property rights in question. As might be expected from the increasing importance of intellectual goods in our world, it is a robust and growing area of inquiry.

The philosophical literature on the justification of intellectual property focuses on arguments that intellectual property is almost never justified (cf. Kuflik 1989; Hettinger 1989) or on three particular frameworks for justifications. Those who defend intellectual property rights typically do some from a within utilitarian, Lockean, or rights of personality frameworks. Adam Moore (1997, 1998, 2001, 2003, 2004) has been influential in developing a Lockean account of intellectual property. Edwin Hettinger (1989) has argued that only consequentialist arguments for intellectual property rights are viable and Himma (2005, 2006, 2008) has done an admirable job surveying the state of play between these different positions.

Despite their differences, these justifications share one important characteristic. They rely on different social understandings of authorship and the value of literary goods. Each tells a different story about the significance of intellectual activities and goods. They imply that when
societies institute intellectual property rights, they are justified to the extent that they conform to their accounts of what matters about those goods.

*The Utilitarian justification*

Utilitarian justifications argue that limits on access to intellectual works are necessary to ensure that the public eventually has access to as much intellectual work as possible. There are many different utilitarian arguments for intellectual property. However, they can be roughly characterized as follows (cf. Moore 2003):

1. Societies should only implement institutions and legislation that maximize social utility.
2. A system of intellectual property that confers time-limited rights over certain kinds of intellectual works is necessary to ensure maximal long-term access to intellectual works.
3. Maximal long-term access to intellectual works maximizes social utility.
4. Therefore, societies should implement a system of intellectual property that confers time limited rights over certain kinds of intellectual works.

The central idea behind utilitarian justifications of intellectual property is that property schemas incentivize the production of intellectual works. The social value of intellectual works derives from their ability to promote social utility, usually because access to those works contributes to progress (cf. Oppenheim 1952; Machlup 1962; Moore 2001 & 2003).

The utilitarian approach grounds intellectual property rights in the value of open access to intellectual products. Short-term monopolies are granted to authors and producers as an incentive to production in order to ensure a growing body of intellectual works for the public to access in the long-term.
Utilitarians focus on the significance of the products of authorial practices in producing good social consequences: the author is granted a temporary monopoly over his work because this incentivizes the production of works which will eventually be available for society to use. In the meantime, we can access those work for a price. The idea of incentivization is a natural fit when we think of the author as a professional, a producer of cultural commodities for sale and profit. Here, we see how modern utilitarian justifications are influenced by historical The measure of whether an intellectual property schema is effective is whether it serves to increase the production of socially useful items.

Utilitarianism is a species of consequentialism, the idea that consequences are what matter most. While the utilitarian account of intellectual property has been the most influential form of consequentialism, there are other forms as well. In the chapter on intangible cultural heritage, I will explain and argue against these alternative versions.

Rights based approaches to intellectual property

While utilitarian accounts of the justification for intellectual property focus on the value of open access to intellectual works and the need for incentivization, two other approaches to intellectual property emphasize the creator’s right over their works in virtue of his or her relationship to them.

Rights of personality

Rights of personality theorists like Hegel emphasize an author’s rights over their work in virtue of it’s special status as an expression of the individual’s personality. They begin frame the
premise that we have inalienable rights over our experiences, character traits, and talents. Property rights in physical and intellectual good are necessary first, for us to self-actualize—to manifest our wills onto the world and gain control over our lives—and secondly, because our rights over our experiences, traits, and talents transfer to their expressions (Hegel 1967 [1821]). Those elements of our personality become “fused” with their expressions (Moore 2011).

We can see how the Romantic conception of authorship and literary works is intimately connected with rights of personality accounts of intellectual property. Without the connection between a work and the author’s personality, rights of personality are bankrupt. The Continental model, which presumes the Romantic notion of authorship, assumes that authors have certain moral rights in regards to their works. An author’s work is seen as an extension of the artist or author’s personality; affronts to the work can thus be seen as affronts to the person who created it (Rushton 1998). These rights do not leave the author or artist after the publication or sale of the work, instead, they protect the work—and thereby the author—from misappropriation.

Labor theories of intellectual property

Lockean approaches to intellectual property emphasize the importance of an individual’s labor. When someone labors, physically or intellectually, they are entitled to the fruits of that labor (Moore 2001 & 2011). Like rights of personality, Lockean accounts of property emphasize that we are self-owners (Moore 2001; Nozick 1984). However, rather than focus on the importance of ownership in our character traits, talents, and experiences, Locke emphasized that we deserve the fruits of our labor. Our labor is ours. When we mix our labor with other items, we make those items more valuable and useful. As our labor is mixed with what we have produced,
we expand our rights of self-ownership into rights of property over the good. As Moore characterizes it, “laboring, producing, thinking, and persevering are voluntary, and individuals who engage in these activities are entitled to what they produce” (Moore 2011). Individuals’ entitlements to the fruits of their labor are recognized through intellectual property rights. We can see a connection between the Lockean accounts of intellectual property and the idea that the author is a proprietor of a kind of good. Our Anglo-American model, while influenced by the Romantic notion in it's requirements on originality, is primarily based on the idea that the author is best characterized as a proprietor.

Below, I will argue that these justifications are simply too narrow. They err by relying on particular social understandings that evolved in specific contexts in their global justifications for intellectual property. The above approaches to intellectual property evolved within particular historical contexts and are often ill-suited in others because (1) human values are not necessarily coextensive and individuals and communities recognize many values and (2) different communities face different challenges.

The inappropriateness of the standard justifications

The standard justifications for intellectual property are not sensitive to different understandings of a good or activity that may be important within different communities and are not appropriate for all intellectual goods. They are not necessarily inappropriate answers to regulating a good or activity within a particular community--that depends on the context. Within the American system of copyright, for instance, some utilitarian critiques of extant copyright law are appropriate, for reasons which will be discussed below. Indeed, legislation like the Sony
Bono Copyright Extension Act seem problematic precisely because for some types of practices authors are understood as proprietors whose interests should be balanced with the common good. But because these justifications rely on specific understandings of literary works, they are not well-suited to grapple with the complexities of intellectual property today.

The framework I propose differs from utilitarian, rights of personality, and Lockean approaches to intellectual property in that it does not attempt to import understandings from one context to another. Where the standard justifications seek a single, top-down approach to intellectual property rights, I appeal to the way that particular communities or societies structure and organize their own affairs in response to the problems that they face. Eudaimonic relevancy, described in what follows, recognizes plural grounds for intellectual property rights based on the context in question.

**Intellectual goods and eudaimonism**

Part of the problem with the justifications above is that their reliance on specific social understandings renders them too narrow for thinking about the norms for intellectual goods today. The first step in developing a more appropriate approach to intellectual goods is thus to step back and think about intellectual goods more broadly.

Intellectual goods are special in that not only are they produced by activities and practices underwritten by social understandings, they are also important means through which individuals can interpret, challenge, and question existing social understandings. When thinking about intellectual property as a mechanism for regulation and governance, it’s important to realize that it is implicated not only in intellectual goods--the things produced--but also in intellectual
activities that are valuable for reasons other than making more stuff. Intellectual goods are important components of culture and its evolution.

Culture is the “order of life in which human beings construct meaning through practices of symbolic representation” (Tomlinson 1999, 18). ‘Cultural processes’ are thus those practices through which meaning is constructed. Despite early theoretical accounts of culture as static, received tradition (cf. Tylor, [1871] 1988; Malinowski 1962, Mead 1935), more recent accounts of culture recognize that cultures are constantly constructed, rather than merely received: culture is what results from the beliefs, values, and actions of living individuals, who do not merely passively receive but also interpret, question, and challenge. Cultures, and the social understandings that constitute them, evolve.

In political philosophy, we see a long-standing debate between liberals and communitarians based on different understandings of how individuals create meaning and value in their lives. Liberals emphasize individuals' ability to choose projects, activities, and relationships that accord with values that they have adopted for themselves, for example, through the pursuit of some conception of goodness (Dworkin 1985) or by living life in accordance with a plan (Rawls 1999). Communitarians, on the other hand, emphasize the importance of community and culture in the construction of meaning and identity; received and shared values that individuals have in virtue of their embeddedness in a community or culture may not be chosen in the same sense, but such processes for acquiring meaning in our lives are not only important but also more accurately capture the way that we construct meaning in our lives. Much of the debate between these groups tends to obscure that what individuals need is a balance between stability and flexibility of context (Radin 1996).
Eudaimonism, described below, strikes a balance between an individualistic picture of meaning construction and adherence to the values and understandings we receive in virtue of community membership.

_Eudaimonism: a brief overview_

In the literature surrounding the ethical dimensions of information and information technology, there is surprisingly little mention or discussion of eudaimonism as a viable source of insight. While some authors have explicitly discussed virtue theory, flourishing ethics, or have implicitly adopted eudaimonistic or virtue ethical values and approaches (Nissenbaum 2010), there has been very little explicit consideration and discussion of eudaimonism as a basis for answering questions of value surrounding access to and development of information and information technologies. Given the recent reemergence of interest in in eudaimonism other fields, especially in positive psychology and public policy, it is worth examining what insight the theory can provide in questions surrounding information and information technology. This dissertation develops a eudaimonic relevant-reasons approach to intellectual property as a contextual, pluralistic alternative to those now available.

Eudaimonism is an ethical perspective that answers paradigmatic moral questions about correct action and obligation by appealing to how people lead good lives. Questions about character, relationships, and what it means for a human being to have a good life must be answered first, before one can give an account of right action or what one ought to do in a particular circumstance, not because those questions are more important, but because they are necessary constituents of accounts of the “moral thing” to do in a given situation.
Different accounts of eudaimonism have answered these questions in different ways. Epicureans, for instance, have argued that pleasure is the key to understanding what it means to lead a good life. Aristotelians emphasized that one needs virtue and a modicum of external goods, while Stoics argued that virtue is sufficient. The version of eudaimonism I will present is neo-Aristotelian; it offers us an account of personhood and agency that instructs individuals to exercise virtue in the building of their lives, in fitting their projects and relationships into a sensible whole such that their lives have meaning and value for them.

Eudaimonism offers us an account of the good with formal constraints on the construction of a good human life. When eudaimonists say that the constraints are formal, they mean to draw an analogy with building or construction. The laws of physics combined with the particulars of a given location (it’s slope, the kind of ground below the foundation, it’s size) will constrain what kind of building an individual might be capable of constructing. Yet within those constraints it’s possible to build a variety of different structures, each of which might be built better or worse.

Practical reason and the construction of a life

When we ask “Why?” of the day-to-day activities that people engage in and the decisions that they make, we see that these are often nested, that is, part of some broader aim. If we keep asking “why?” ultimately, we come to a group of ends which are valued for their own sake: health, spending time with family and friends, perhaps a profession. These are things people care about because they are valuable in their own right, rather than as means to some further end.
To illustrate, sometime in the last week I probably went to the grocery store. We can imagine the following conversation:

"Why did you do that?"

"Well, the pantry was bare and we needed food for the week."

"Why did you need the food? Couldn't you just go out or get take out?"

"Take out isn't very healthy and going out is expensive."

"But sometimes you get take-out."

"Well, sure. But we can't always go out. If we always got take-out we probably wouldn't be very healthy, and we simply can't afford to eat out all the time. So sometimes we do those things, but mostly we cook at home."

"You could eat out all the time if you didn't have so many other expenses--if you spent less money on tuition and rent and your car payment and your mobile phones and all the other things..."

"Yes. But we like our house, it has a great backyard and plenty of space. And our car is reliable and under warranty, with 4 wheel drive for the snow and camping. And my iPhone helps me to keep in touch with what all my friends are up to. I'm not giving up all those things just so that we can eat out all the time."

While we don’t usually think about the relationship between our different activities and goals or how they relate to the things we care about for their own sake, that doesn’t mean that they aren’t there. Instead, upon reflection individuals can summon reasons for what they do. This is part of what it is to organize one’s life: to make choices that reflect one’s values.
For most individuals, there are several of these good-in-themselves ends. The multiplicity of these ends raises an important question regarding their balance. Why does one spend such-and-such amount of time with his or her family, and such-and-such amount of time working? After all, one only has so much time to spend and it is likely that both career and family are important. Even saying that family is more important to a particular individual than his or her career doesn’t explain particular balance: perhaps one might work 40 hours per week, but not more, or choose to work only part-time rather than full-time. But why? Good-in-themselves ends are not situated in a hierarchy of nested ends--there is no obvious appeal to some other, more fundamental end to explain their relative balance.

Virtue ethics introduces the way that these good-in-themselves ends fit together and one’s aiming at their achievement as one’s final end. Your final end is what you ultimately aim all your deliberate activities toward; it is the “ultimate good” that anyone could have (Annas 1995). Our final end gives structure and focus to our individual lives. It is rather like the goal of having goals that make life worth living for each of us (Russell 2012).

If we think of our final end as “leading a good life,” we can see that it’s not so odd to think that everyone has one final end and that everyone’s final end is the same. “Leading a good life,” admits of a lot of diversity. If we take seriously the diversity of human life and the distinctness of persons, we can even say that human fulfillment requires individual fulfillment--it is simply not possible to lead a good human life without taking into account the differences that make each of us who we are. Yet is is also important to think about our final end as leading a good life; because our final end is about leading our own lives, our final end must involve our own activity and must connect to the values that we particularly wish to recognize and promote.
The virtues

The virtues are the skills that allow one to structure one’s life: how to fit one’s projects and relationships into a complete and self-sufficient whole. Roughly, the word ‘virtue’ applies to both virtues of character--dispositions to adopt certain ends, feel certain ways, and respond to certain kinds of reasons--and the virtues of the intellect, excellent practical reasoning. When combined, these enable us to successfully build lives that are fulfilling; that means that the virtues are rather broad and can be realized in different ways. For instance, the virtue of courage has to do with our ability to assess both risk and what things are worth taking risks for. That’s why courage is different from recklessness: the reckless individual takes risks, but is not good at judging when those risks are worth taking. When a soldier risks their life to save their comrades, s/he acts courageously when they correctly judge that it’s worth the risk s/he takes. But a person can also be courageous when they speak out against an popular idea or practice, risking their job or their reputation. The virtue of justice has to do with our ability to recognize what people are owed and our willingness to see that they get it, honesty our ability to recognize how and when to tell the truth, generosity our ability to recognize how and when to give to others, etc.

For our purposes, I wish to highlight the importance of context to the exercise of virtue. Virtuous individuals respond to certain kinds of reasons for action. Often, those reasons are supplied by the context. Generosity is not merely a willingness to give, but a sensitivity to the particulars of a given situation. We will be returning to this point in a moment, when we discuss spheres and relevant reasons.
There is a considerable amount of disagreement about what the virtues are and whether there is one list or many. However, most eudaimonistic virtue ethicists agree that the process for determining whether a disposition is a virtue requires appealing to our natures as beings who use practical reason in trying to lead good human lives—lives of individual and human fulfillment.

*For better or worse: building a good life and limits on value*

Eudaimonists tells us that we must build our own lives based on what we value, though it puts limits on those values and offers an account of what makes a better or worse construction. A life is better or worse for an individual on the basis of their own values, strengths, and abilities. Individuals are distinct and we have idiosyncracies that make each of us unique. We can be more or less extroverted or introverted, risk-averse, patient, friendly, etc. As someone who finds it difficult to speak to strangers, a career in sales and or event-planning would be a poor fit. This isn’t to say that we cannot adapt or that our natures are fixed, instead we can make choices about whether and when to adapt and how much adaptation is feasible. The choices that we make about what our lives will be like should reflect our reasoned convictions about what we find particularly valuable and good assessments of our own strengths and abilities. There is much of value in the world, yet we only have one life to lead.

The limits on what we should find of value are grounded in an account of the human nature such that:

(1) It’s good for you to to be virtuous.

(2) It’s good for others when an individual possesses the virtues.
The first point, that the virtues benefit the possessor, emphasizes that individuals have reasons to
develop the virtues: the virtues are the best strategy we have for leading a good life. A sociopath
may say, “I do not care about developing friendships or other kinds of relationships.”
Eudaimonists are committed to the idea that despite that, it would be better for the sociopath if s/
he did care. Thus the eudaimonist embraces the idea that external considerations about what it is
to lead a distinctively human life can be reason-giving for individuals. According to a
eudaimonist, could a sociopath enter therapy and develop empathy, considerations about what it is
to lead a distinctively human life would give him or her a reason to do so.

The second point is that the virtues are supposed to benefit not only their possessor, but
also make a person a good social creature: there’s nothing incompatible with my final end and
your final end. We can contrast this with a Nietzschean account of the virtues and human
excellence in which outstanding individuals are the kind of people who leave cities devastated in
their wake. Eudaimonism, as present, is thus not only a view about individual excellence, but
makes substantive claims about human cooperation and coexistence. Rather than simply being a
view about individual ethics, eudaimonism has much to offer in the way of social and political
theory. It is to these questions that we now turn.

Eudaimonism and the relevant-reasons approach to social justice

In social and political philosophy, the general project has most often been to create a
theory of justice which resembles a scientific theory: we search for a fundamental principle, e.g.
Justice requires that individuals receive their due, where due is a function of desert, or a few
fundamental axioms, e.g. Rawls’ two principles of justice, and we work out their application
*Pluralism, Justice, and Equality* [PJE hereafter], pg. 1).

In the *Politics*, Aristotle raises the following point:

General opinion makes [justice] consist in some sort of equality....In other words, it holds that justice involves two factors--things, and the persons to whom things are assigned, and it assumes that persons who are equal should have assigned to them equal things. But there is an important question that is not to be overlooked.

Equals and unequals, yes--but equals and unequals in what?

Here, Aristotle points us to the difficulties surrounding determining what counts as relevant reason for distributing a particular good (Gutmann 1980). The relevant-reasons is an approach to justice and social policy which holds that justice is achieved when goods are distributed according to relevant reasons that are sensitive to the some aspect of the good in question.

Bernard Williams has argued that relevant reasons track the essential meaning of a good--the proper ground of medicine is ill-health, for example, and those who would distribute medical care on the basis of ability to pay rather than need have misunderstood the nature of medicine (Williams 1973). The most influential version of the relevant-reasons approach to justice and social policy is Michael Walzer’s seminal *Spheres of Justice* (1983). Walzer’s thesis is that justice is achieved when goods are distributed according to their social meanings, the shared understandings of what a good is and why it is valuable. As a result, justice is local and pluralistic: different goods should be distributed according to different reasons, and as different communities conceive goods differently, justice is achieved differently in different communities.
What follows is a eudaimonic bent on Walzer’s account—Walzer is our point of departure, rather than our foundation. We have reasons for what we do. When our activities and projects require cooperation or coordination, typically at least some reasons for and understandings of activities or goods are shared. Those reasons and understandings reveal the purpose of certain activities. Some activities overlap or are “nested.” Together, they form a sphere of activity; for example, teaching and learning are part of the sphere of education. Different spheres are structured by different norms, values, and goals. To illustrate, we can think of libraries as a sphere, with their goal of providing access to information and increasing knowledge, guided by norms of confidentiality, and committed to values like freedom of expression, privacy, and equity of access.

The norms that structure the spheres have developed over time; they reflect what has been needed for the sphere to function successfully. Privacy and confidentiality are important norms for libraries because, as Schoeman notes:

"...privacy provides people with the emotional and intellectual space to review unpopular ideas and deliberate upon them without the pressure of social sanctions. Privacy makes it possible for individuals holding unpopular views to seek support for their positions and to work toward the expression of their ideas in a way that will be publicly more acceptable" (1984, pg. 209).

Privacy is necessary for intellectual freedom, the raison d’etre of library and information services. That gives librarians and other information professionals good reasons to respect patron privacy, even when privacy conflicts with other values like security or convenience. Those
values do not play the same role in the successful functioning of the sphere, and thus librarians, qua librarian, have good reason to champion privacy over those values. Above, we saw that virtuous agents respond to certain kinds of reasons that are supplied by the context. Here, we see one way that context supplies those reasons. Virtuous agents are sensitive to the norms of the spheres in which they find themselves.

Eudaimonism and evolving social understandings

There is an oft neglected aspect of building a life that has meaning and value for an individual. It is often said that virtue is not exercised in a void, instead we need external goods with which to practice virtue. But lurking here is a different point about human life: we are born into communities and cultures with established cultural practices and social understandings of goods. As in Spheres of Justice, a eudaimonic approach to social policy takes the social understandings of different goods to be important factors in the distribution of that good. But unlike Spheres of Justice, eudaimonic relevancy accepts that some reasons cut across the spheres. For instance, in the chapter on intangible cultural heritage, we will see the principle of reparation operate independently of any sphere, because the virtue of justice involves caring about righting wrongs. Importantly, norms and policies should be sensitive to the broader social context, not only to the role that it plays but the role it should come to play. These may not be part of the “internal” meaning of the good.

To illustrate, the fact that privacy is necessary for individuals’ freedom of expression gives librarians a good reason to champion privacy. But it is also important, all things considered, that other spheres of social life have important checks on privacy. Law enforcement
agencies and the criminal justice system are equipped with subpoenas and other legal permissions to infringe on privacy when certain conditions are met. Absent these checks, libraries would not necessarily be justified protecting patron privacy as much as possible. Were our legal system to change substantially, library practitioners would have to reassess the role of librarians in protecting patron privacy, lest it run roughshod over other values.

The measure of how a society promotes and balances the plurality of values that characterize human life is analogous to the measure of building a life of meaning for each of us. Individuals’ ability to lead lives of fulfillment and meaning performs an important check on how we balance conflicting values--values and balancing acts that prevent some individuals from leading good lives are unacceptable. Our own values, strengths, and abilities shape what would be a good life for us--a good balance between our professional goals and our family life, for instance. Our social understandings of different goods and the relationship between social spheres functions similarly. In other words, social conceptions of who a society is shapes the values that societies’ promote and the balance struck between them.

Those shared understandings shape our values and the projects and relationships we undertake in building our lives--it would be odd to choose to be a librarian without particularly valuing intellectual freedom. Yet simultaneously, as we undertake projects and cultivate relationships, we influence the social understandings that help to structure social life. Part of what it is to be a professional librarian is not just to adopt the value of intellectual freedom, but to interpret what intellectual freedom is and requires in evolving circumstances.
What eudaimonism offers

Eudaimonism presents us with important tools for navigating a world of plural values. Individuals are unique beings who undertake projects and relationships that appeal to them and in their undertakings they influence the social understandings of those projects and relationships. Social understandings are fluid and evolving—they are subject to an ongoing process of social interpretation. Whether we accept, reject, influence, or radically re-conceive the goods and activities that make-up our own lives shapes the social understandings that underwrite them. At the same time, the norms that compose different spheres of social activity provide individuals with reasons for acting and importantly, policy-makers resources for thinking about the proper flows of intellectual goods. In the following chapters, I will examine the social understandings of different intellectual goods and use the insights from eudaimonism to explain if, and to what extent, we should use intellectual property to regulate the good. It is to those that we now turn.
This chapter engages critically with the legal and policy environment surrounding scholarly communication. As I argued in the previous chapter, Anglo-American approaches to copyright law are based in the idea that the author is best characterized as a proprietor of a commodity. While academics are active producers and consumers of original works of authorship, thinking of those as cultural commodities misunderstands the purpose of their activity and hinders education and research. Rather than being motivated by financial profit, individual academics create works in order to impact and influence their fields. As many commentators on the state of scholarly communication point out, this is best achieved when scholarly works are widely and easily available. Scholarly communication is best served by the value of open access, with emphasis on attribution and recognition.

The current structure of academic publishing, in which academics transfer their copyrights to academic publishers who charge for access, is based on an antiquated business model with high costs of print runs. In a digital environment where the costs of dissemination are minimal, this model creates artificial scarcity and introduces unnecessary barriers to access. Our policies regarding scholarly communication need to support changes to the structure of scholarly communication that will open up access. Thus, while I argue that we should not change copyright law to exclude scholarly works, I argue that universities and other academic communities have obligations to implement open access mandates, which license them to freely distribute academic works of their faculty.

The policy solutions I offer are neither radical or new. Nor will the reasons that I offer for those policy solutions seem surprising to any who are familiar with debates surrounding the
The debate about how to change scholarly communication (and copyright’s role therein) mirrors this structure. Indeed, I think there is much for scholars of intellectual property to learn from the way that academics talk about copyright and its role in scholarly communication. Thus, this chapter is presented as an illustration of both how the framework I presented works in practice and its fruitfulness.

Copyright

Before presenting the case for implementing open access mandates, we need a clear picture of both the current legal and policy environment and the state of academic publishing. First, we turn to the legal and policy environment. Copyright, in Title 17 of the United States Code and amended with the Copyright Act of 1976, is the legislation that applies to works of authorship, e.g., novels, music, poetry, blog entries, photographs, paintings, and sculptures are all covered by copyright. The best way to think of copyright is as the de facto set of legal rights that authors have over their works once they bring them into the world. To be eligible, works must be original expressions. The requirement on originality is a novelty threshold--works must contribute something new to the world rather than being merely derivative from other works. In the past, interpretations of this requirement excluded much Indigenous art and
expression. As those works often utilized traditional patterns, narrative structure, and characters, judges ruled that many of these works were not sufficiently original for copyright protection (cf. Brown, 2003). By protecting expression, copyright does not apply to facts or ideas. Instead, it applies to particular way that ideas or facts are expressed in a tangible form. One can't claim copyright over the fact that Copenhagen is located in Denmark, but one can copyright one's limerick about the location of Copenhagen.

Copyrights are a bundle of several specific exclusive rights:

• An exclusive right to make copies of the work
• An exclusive right to produce derivative works (e.g., a sequel to a novel)
• An exclusive right to distribute (e.g., sell) copies of the work to the public
• An exclusive right to display the work publicly

Works of authorship are protected via copyright automatically, without authors needing to apply or register. However, copyrights are not inalienable; authors can waive their rights. Creative Commons licensing does not provide an alternative to copyright so much as provide an explicit framework through which authors can waive some of their rights while retaining others.

In addition to waiving copyrights, it is also possible for copyright holders to distribute works under more restrictive terms through contract. This is especially pertinent for scholarly communication, which is increasingly composed of electronic resources: ebooks, journals, and other content delivered digitally. Rather than purchasing physical books subject to archiving exceptions and the doctrine of first sale, access to digital content is contracted, typically under a licensing model that allows for much more restricted usage.
Built into the law are a series of exceptions and limitations, intended to protect important public interests, to which we now turn. The first is straightforward. Copyrights are held for a limited time period, though the trend in copyright legislation has tended toward increasing duration. Current copyright lasts for the lifetime of the author plus seventy years. Three other important limitations to copyright, particularly the way those have been interpreted by courts and circumvented by publishers, have contributed to the current landscape of academic publishing. It is to those that we now turn.

*Fair use*

Fair use, in section 107 of title 17, creates exceptions to copyright law that let others use a work without the copyright holder’s permission. In particular, the law allows people to make socially beneficial uses of copyrighted works (e.g., in education) that do not substantially interfere with the copyright holder's ability to make a profit. Rather than presenting an explicit statement of what counts as fair use and what does not, the law presents four criteria that are supposed to be taken into account when courts are called to arbitrate.

1. The purpose and character of the use that is made of the copyrighted work. For example, if I am using the work for educational purposes, it is more likely to be fair use. By contrast, if I am using the work for commercial purposes, it is less likely to be fair use.

2. The nature of the copyrighted work. If I am making use non-fiction (a scholarly book, for instance), it is more likely to be fair use. However, if I am using a novel, as a creative piece of fiction it is less likely to be fair use.
(3) The amount and proportion of the copyrighted work that is used. The less used, the more likely the use is fair.

(4) The effect of the use upon the potential market for the copyrighted work. Quoting a few lines from a book in a review is more likely to be fair use than quoting extensively or using aspects of the book that drew readers to the book in the first place. The latter consideration is often referred to as using the “heart of the work.” For instance, when The Nation published a 300-400 word excerpt of Gerald Ford's autobiography on his thoughts on pardoning Richard Nixon, courts ruled that despite the relatively small amount, courts ruled the Nation had infringed on copyright. Readers were less likely to purchase the book having read the excerpt.

Fair use is intentionally vague. It does not give us a clearly articulated standard for understanding what sorts of use count. It’s vagueness was arguably intended so fair use would be broadly understood and therefore widely applicable. However, that is not necessarily how it has been applied. Instead, courts have consistently weighted market impact more heavily than other considerations (citations).

**Doctrine of First Sale and Library Archiving**

Once a copy of a copyrighted work is sold, the copyright holder no longer controls what happens to that particular copy of the work. This is the provision, found in section 109 of title 17, that allows a library, once they have purchased a copy of a work, to lend that particular copy to its patrons without getting the permission of the author. Second, in section 108, libraries and other cultural heritage institutions are also allowed to make copies of works for the purpose of
archiving. This exception allows cultural heritage institutions to preserve works for posterity. As we will see below, both exceptions are often circumvented when libraries and other institutions license digital content rather than purchase books, discs, or other physical copies of a work.

Licensing is a means for renting or leasing the use of some intellectual good. Where property is best characterized by the degrees of ownership, licensing is better characterized as a permissions-granting framework. That is, when we license content, we do not acquire any property rights in what we have licensed. Instead, we acquire permission from the owner to use content in different ways, as dictated by the licensing contract.

**Academic publishing**

Having covered copyright, the law that applies to the intellectual goods in question, we now turn to the state of academic publishing. According to the National Center for Education Statistics, in fiscal year 2008 academic libraries spent $2,700,000,000 to purchase materials (NCES 2008). That's not a typo--academic libraries spent over 2 billion dollars acquiring materials for faculty, students, and researchers. Especially troubling is the fact that while libraries are spending more on materials, digital licenses often require libraries to waive many of the de facto rights accorded by copyright law, granted by the Doctrine of First Sale, fair use exceptions, and library archiving exceptions (Starratt & Armstrong 2011).

The rising costs of academic publishing are driven by many of the same factors that contribute to the rising cost of higher education. As a baccalaureate becomes requisite for a wider range of entry level positions, demand for a college degree increases. Federal subsidies in the form of grants and loans ensure that despite rising costs, students have access to the funds to pay
them and do not see many other viable life-planning options. As more students enroll in institutions of higher education, academic publishing becomes more lucrative--while pricing schemas for access to academic works are notoriously opaque, content is often licensed on the basis of student enrollment (Fitzpatrick 2011).

In what follows, I give an overview of conditions in the publishing industry generally, particularly those that affect academic publishing. Print runs are costly. Academic works, with their small specialty audiences, are more expensive per work to physically print and disseminate than other sorts of published content. Before digital dissemination, academic works were expensive to produce. Digital technology removes many, though not all, of publishing costs.

In the context of scholarly communication, authors typically sign copyright over their work over to publishers, who license access to libraries and other organizations under historically stricter terms. And yet, many of the costly value adding services that other publishers provide are not provided by academic publishers. Instead, academics are paid by universities to do them. Faculty are expected to be active scholars, including editing, peer reviewing, and producing content for publishers. We sign our copyright over to publishers, we edit and review our peers work, and the university--via tuition, state subsidies, federal and state grants--pays to access the content. In an era dominated by print, academic publishers were necessary to physically print and disseminate academic work. In a digital environment this is no longer the case.

*Digital technology and publishing costs*

The publishing industry has changed greatly over the last 15 to 20 years. Many of those changes--such as the rise in popularity of ebook readers, a growing number of (and market for)
self-published novels, and changes in the ways that books are marketed—are due to digital technology. Some of them, such as increasing consolidation of publishing houses, are only loosely related to digital technology, if at all.

Digital technology removes many of the costs associated with the dissemination of ideas and information. Information used to be tied to a physical medium that itself had to be produced, at cost. When content is created and disseminated digitally, those costs disappear or are greatly reduced. However, digital technology doesn’t affect the costs of producing ideas or expression, in the sense that it is still costly—in terms of time and energy and money—to write a novel, edit it, design and format it, and importantly, market it. Print runs may be costly, but they are not nearly as costly as the editors, designers, and public relations professionals who are employed by publishing houses. Digital technology makes it less expensive to disseminate a book and it streamlines many of the value adding services that publishers provide, however it fails to remove them: those costs are still a large portion of publishing costs (Thompson, 2010). Publishers fear digital technology because of how easy it makes dissemination—it’s very simple to copy a PDF and email it to a friend, or as we’ll see below, host it online for an a group of people to access.

Publishers and other producers have responded to this feature of digital technology by “locking it down” as much as possible (Thompson 2010). In other words, because without certain kinds of protection it would be very easy for me to share my entire iTunes library with all my friends, that same protection also makes in more difficult for me to say, play my music library on different devices or share the music with my husband.
Changes in academic publishing

As in the publishing industry generally, academic publishing has undergone (and is undergoing) radical change. Both producers and consumers of scholarly content have seen changes--in the publishing model (how much is published, for instance) and in the cost of access. In Planned Obsolescence, Fitzpatrick relates difficulties in publishing one of her prior books with a particular academic press. Not because publishers and editors were concerned about the quality of the book--instead they were concerned whether the book was profitable. When explaining to her mother that the book had been rejected and why, her mother responded, "They think they might profit on academic books!?!??" (Fitzpatrick 2011, pg. 2).

Truly, no academic publisher expects a single academic text to produce revenues in the way that say, Dan Brown's latest novel might. Yet in the past, reputable university presses could rely on university libraries to purchase at least one copy of their books. Today, in a time when university presses face slashed budgets, libraries are relying on such services as interlibrary loan and system-wide sharing rather than purchasing one copy per library. The result is that university presses face challenges publishing the same number of titles. Correspondingly, many academic authors have greater difficulty publishing their work.

On the other end, libraries, also facing budget cuts, are presented with ever rising costs of access to electronic databases. The result of these changes is an environment in which libraries spend more yet receive less, academic authors--especially those attempting to publish books in the humanities and social sciences--have difficulty publishing their work, and students pay more in tuition, fees, and for their books and course packs (Fitzpatrick 2011). The only beneficiaries in the current environment of scholarly communication are the large academic
publishers: Elsevier, Springer, Informa, Thomson, Wiley, and Wolters Kluwer. The STM publishing market alone is estimated to be around 8 billion dollars (Starratt & Armstrong 2011). This despite the fact that, as publishers go, academic publishers have the least claim to adding value.

Cambridge University Press, et. al. V. Becker, et. al.

Not so long ago copy machines were novel technology. Instructors and teachers saw them as an opportunity to leave the confines of a particular text book or set of textbooks. Copy machines enabled them to structure their own courses by taking excerpts from books and articles. This was often handled by businesses like Kinko’s, who would make copies of the content requested by instructors and sell the packs to students. Courts determined that this did not fall under fair use exceptions to copyright law: businesses were profiting from the service, often appropriating an entire article or significant excerpt from a book, nor could such uses be described as transformative. In response, the copyright clearance center was established to manage the licensing and copyrights for academic usage. Today, rather than printing out coursepacks, faculty and their institutions have taken the same kinds of content and posted them online for students to access. While these are sometimes licensed via the Copyright Clearance Center, this is not always the case, and institutions have handled online content differently.

In April of 2008, three academic publishers, Cambridge University Press, Oxford University Press, and Sage Publications, brought suit against officials at Georgia State University, claiming that they were responsible for copyright infringements occurring at the university (Cambridge University Press et al. v. Becker et al., 2008). Like many other academic
institutions, Georgia State allowed faculty members to use university networks and electronic reserves to copy and distribute book excerpts (and other kinds of content not included in the suit) to students, without paying licensing fees. The publishers argue that GSU’s use of digital reserves and bypass of the Copyright Clearance Center exceeds the scope of fair use exceptions to copyright law and identified 99 cases of alleged copyright infringement. Intuitively, digital reserves are not so different from the ‘coursepack’ which courts have already ruled are not necessarily fair use. For publishers, much rode on the claim that there shouldn’t be any difference between print coursepacks and digital reserves or collections. The content and function are the same; we should not handle the items differently.

In addition to denying that such use exceeds what is allowed through the fair use doctrine, officials also claimed sovereign immunity—as a state institution, they claimed immunity from infringement liability. On February 17th, 2009, Georgia State University issued a new copyright policy requiring faculty members to complete a Fair Use checklist prior to making electronic content available to students. On September 30th of that year, Judge Evans issued a pre-trial ruling that rejected the publishers’ claim that officials had committed direct and vicarious copyright infringement; instead, the trial would consider whether those officials could be held liable for contributory copyright infringement on the basis of the new copyright policy.

In her final ruling, Evans ruled that faculty at GSU had committed 5 copyright infringements from 4 titles, just a fraction of the publishers claims. She also required publishers to pay Georgia State’s legal fees, totally nearly 3 million dollars. The ruling may suggest to many publishers that suing academic institutions over copyright claims is likely to be an expensive, unproductive endeavor. The Association of American Publishers expressed their disapproval of
the ruling, arguing that it “encourage[s] educational institutions to engage in massive infringement of copyright at a great cost to the entire academic community” (AAP 2012).

Yet the ruling is not entirely favorable to libraries and academic institutions with interests in placing scholarship on electronic reserve or otherwise online for students. Rather than emphasizing the nature of these works and their educational use, Evans stays consistent with precedent that makes market impact the most important aspect of fair use doctrine. While Evans argues that permission fees are “not a significant percentage of the plaintiff’s overall revenues” and that loss of these fees does not substantially threaten their business, this perspective paves the way for publishers to make permission fees both more available and more central to their business models. Evans suggests that when content is not easily licensed digitally, publishers cannot claim that academic institutions threaten their revenues by placing such content online.

The GSU case helps to illustrate that if the weightiest consideration for fair use is effect on the market, the majority of practical uses for scholarly communication do not fall under fair use exceptions. Unlike other works eligible for copyright, like music, poetry, and novels, works of scholarly communication are primarily used in higher education, in the classroom or as a contribution to the scholarly work of others. Certainly, if faculty and instructors are able to use scholarly materials freely, those materials lose their market value.

The social meaning of scholarly communication

In the previous chapter, we learned that social understandings derive from the shared ideas and motivations of participants. Scholarly activities require cooperation and coordination. While academics have individual reasons for engaging in their specific research projects,
academics are united by a concern for the pursuit of knowledge and clearer understanding of ourselves and our world. There is currently a large body of literature surrounding the "problem of academic publishing." All make some claim, implicit or explicit, to the social meaning of scholarly communication and scholarly works. The overwhelming consensus in all these works is that the more easily available and widely used academic works are, the better the values of scholarly communication are realized (cf. Borgman, 2007; Willinksy 2006; Fitzpatrick, 2011).

It’s difficult to to find a clearer or more precise statement of the problem and the question that Elizabeth Fitzpatrick’s: “Clinging to a principle [copyright and ownership] designed for the marketplace when our own mode of exchange doesn’t adhere to marketplace values seems rather beside the point. Instead, we might usefully ponder the mode of exchange that best suits academic culture, and what rights authors must retain within that mode of exchange (2011, 82). Christine Borgman's points out that "Scholarship progresses by discussion, transparency, and accountability--all of which require that scholarly works are widely and readily available" (2007, 101). And other authors have pointed out the academy’s long history of commitment to open access, beginning in the principles of open science that characterized the Enlightenment (Willinsky 2006). Scholarly communication is thus governed by norms of discussion and engagement, transparency, and integrity. The free flow of information is an important component of the pursuit of knowledge, facilitating open debate and testing of ideas (Mill 1998 [1859]). Citation, an important way for scholars to point readers to further resources and acknowledge intellectual debt, is less effective when all readers are not able to access those resources.

For all the disagreement about the best way to change the structure of scholarly communication--whether or how to change peer review, how best to implement repositories and
archives, what should count as a contribution, etc--there is almost no argument among academics themselves over whether it is better for scholarly works to be more widely available to both students and researchers alike. Without being widely available, it is difficult for participants to engage with each other or to communicate concisely through citation.

And yet rather than being as accessible as possible, in the current system, copyright contributes to the rising costs of scholarly communication and its limited availability. By signing copyrights to academic publishers, academic authors enable them to charge for access. The problem is not in how copyright has been interpreted and applied to scholarly communication such that were copyright interpreted or applied differently, the problems would disappear. Rather, copyright law is antithetical to the free exchange of scholarly communication because of its emphasis on market language.

Markets, access, and the autonomy of the schools

When we discuss scholarly communication and intellectual property in my courses, students often say that the market is not affected when an instructor puts an article or book chapter up for their class. While this may seem to ignore the fact that demand for academic works is overwhelmingly demand for course content and use in other scholarly work--at least in the humanities and social sciences--there is another, more charitable, interpretation of this claim. Perhaps students don't see the products of scholarly activity as marketable goods, not because they fail to be valuable but because they do not think scholarly activity should be governed by market rhetoric--classroom and scholarly use of these materials don’t affect “the market” for
scholarly products because they happen within a separate social sphere, enclosed from other activities and exchanges.

In 2009, The Right to Research Coalition was founded on the belief that no student should be denied access to articles because their institution cannot afford the cost of access. The coalition has over 73 institutional members and currently over 7 million individual signatories (Right to Research, 2013). The organizations fundamental claim, that access to research should not be dependent upon ability to pay, echoes Michael Walzer’s concerns about the importance of the autonomy of the schools. The aim of schools are to develop “critical understanding and for the production, as well as reproduction, of social critics” (1983, 198). For Walzer, education’s role in instilling critical capacities explains why education is a separate sphere regulated by its own distributive principles, rather than say, nested into different spheres. When market rhetoric and principles enter the educational sphere, it loses its ability to instill such capacities because cost and ability to pay, rather than merit alone, become salient considerations. As Barbara Fister writes, “...in the marketplace of ideas you can’t win market share by offering a cheaper idea” (Fister, 2011). More accurately, in the marketplace of ideas one shouldn’t win marketshare by offering a cheaper idea. If scholarly communication relies on discussion and accessibility, then unnecessary barriers to scholarly works should be avoided. The social meaning of scholarly activity (including the educational activities that take place in the classroom) should exclude those goods from market exchange because markets introduce one such unnecessary barrier to access to information--ability to pay.
Open access policies

To date, several dozen universities and colleges, including prestigious institutions such as Harvard, Princeton, Duke, and MIT to name just a few, have implemented open access policies that license their institutions to share the scholarly work produced under their auspices (SPARC 2007-2014). Those policies differ in whether they are real mandates, to which exceptions are rare and faculty are bound by terms of contract, or merely strongly encourage and facilitate self-archiving, the practice of placing the penultimate draft of peer-reviewed research online or in an institutional repository.

Open access policies are not akin to works-for-hire, where copyright in the works created is held by the organization doing the hiring. Open access policies begin from the premise that faculty are the copyright holders in their works. They do not require faculty to “sign away their copyright” to the university, nor do they ban faculty from “signing away copyright” to publishers, as some rhetoric implies. Open access policies recognize that faculty authors are copyright holders in their works yet either require or request that faculty license universities to share certain kinds of their work, prior to negotiating terms with publishers. Faculty are technically free to relinquish their copyright over to publishers, provided that the publishers respect the prior agreement with the university. Thus, open access policies are not as radical as many academic publishers would have one believe.

Universities should adopt mandated open access policies, such as the ones implemented by Harvard and Princeton. First, while some universities merely strongly recommend and facilitate open access participation, Duke is a notable example here, the pressure on individual faculty members to accede to publishers demands in greater when participation is not mandated
and it becomes more difficult for individual faculty to publish in journals. Mandates, as argued by Harvard University’s Office of Scholarly Communication, allow “individual faculty [to] benefit from their membership in the policy-making group. The University can work with publishers on behalf of the faculty to simplify procedures and broaden access. Without a blanket policy, the unified action benefit of the policy would be vitiated” (Harvard OSC, 2010). Prior publishing and the Ingelfinger rule gives us a good example of the power of collective action. At first, publishers stance that online posting constitutes prior publishing was effective in keeping academics from posting anything online. But when a sufficient number of academics contributed their papers, publishers had to change their position or loose out on important flows of information (Borgman 2007).

Secondly, without at least an opt-out program, open access policies are not apt to be successful. When the National Institute of Health’s public access policy was first implemented as an option, only 4% of works were included (Harvard OSC 2010). Outside physics and computer science, voluntary deposits rates averaged 15% in 2005 (Ponder, 2006). Given the high pressure for faculty to publish in the best journals, those individuals have more incentive to continue to publish as in the past than to publish in lesser known journals that are friendlier to open access.

These are practical concerns regarding the effectiveness of the policy. But more to the point is the fact that the principles of sharing and openness are essential to the practice of scholarship itself--granting universities license to freely share works simply recognizes this fact. This is why opt-out programs are not enough. They do not adequately respect the fact that open
access is an important aspect of scholarly activity: opting out of a such a policy would be antithetical to the practice.

The interests of authors

If we take anything away from the history of copyright, it should be a skepticism of the claims of publishers on behalf of the rights of their authors. In the previous chapter’s discussion of the history of copyright, I highlighted not the commonly cited Statute of Anne, but the lesser known case of Donaldson v. Becket, the case that cemented the term limits on copyright and entrenched the notion that authors are best characterized as producers of cultural commodities. Many of the arguments based in Romantic conceptions of the author and their claim to rights in perpetuity were not put forth by authors themselves, but by booksellers (who filled the role of modern publishers). As today, they were the most common holders of copyrights. We should look to their arguments about the perpetual rights of authors with some skepticism, as they were in fact arguing for the rights of authors to transfer perpetual rights to booksellers. And yet, this quote from Lord Camden on the motivation for authors is worth revisiting in this context:

It was not for gain that Bacon, Newton, Milton, Locke instructed and delighted the world; it would be unworthy of such men to traffic with a dirty Bookseller for so much as a Sheet of Letter-Press [emphasis added] (Rose 1994).

While Camden’s admonition against the “dirty Bookseller” seem elitist and at least inappropriate today, the claim that it was not for gain that such authors created their works is especially pertinent to our discussion of scholarly communication—not all authors create works because they intend to profit. In fact, academics are one such case: they rarely publish their works for profit. Instead, academics publish to contribute to and influence their respective fields and are
paid salaries by universities for teaching and research activities. Publication is a means to establish recognition in the field, not profit. Academics benefit when they are able to impact and influence their fields. And, as several studies have pointed out, the more easily available works are, the more likely they are to be cited (Wilinksy 2006). That means that while the moral of rights of authors relating to academic integrity are especially important--rights to recognition and attribution for instance--it is not in the interests of academics to have barriers to their works. Licensing their institutions to share their works benefits them and the fields in which they work.

Publishing and quality

In order for scholarly communication to function well, works must not only be readily available. We also need some mechanism for filtering or signaling quality. When works are costly to produce, it makes sense to produce only the best works--to “filter-then-publish”, as Cory Doctorow describes (2004). In the context of print runs and the high costs of scholarly publishing, not only does the filter-then-publish model makes sense, but academic publishers add value by physically disseminating works. When works are filtered before publication, the result is that publication serves as a metric of an individual's contribution to a given field. However, in an digital environment, where the costs of dissemination are negligible, this model creates artificial scarcity--less is published than could be and the academic publishing industry takes a cut disproportionate to the value they add. It’s important for us to disentangle publishing, the act of making a work available, from quality control.

Much of the debate surrounding the academic works centers on this concern. Yet without changes to the current structure of copyright, it is difficult to develop new models for assessing
quality and impact, as much of the reward structure in academia is built on the importance of publication in the old system, "publish or perish," as the saying goes. Status at the university is contingent upon--at least for tenure-track faculty--the quality of their contribution to their field. Individual academics thus have strong incentives to publish their works in established journals, even without renumeration from the publishers that charge for access to them. Despite this, there is promising work on multiple fronts to separate quality control from publication. For instance, MediaCommons and MediaCommons Press, the brain child of Elizabeth Fitzpatrick with the support of the Institute for the Future of the Book and the NYU Digital Library Technology Services, have been working to create to scholarly publishing networks that in addition to making works available, also serve as a alternative “vetting” settings to standard peer review. Many of the new systems use online reputation systems, where participants are rated not only on the impact of the complete works they contribute, but also on the quality and constructiveness of their comments on the work of others (Fitzpatrick 2011; Borgman 2007). These systems are good candidates for incorporation with professional and institutional repositories that store academic works.

Why not change copyright?

As I pointed out above, we are faced with options regarding what to do. Implementing internal policies that alter the structure of rights and responsibilities over academic works is one option. Indeed, if anything, building in licensing options for institutions to employment contracts seems like a weak response to the arguments presented above. A stronger approach would involve altering copyright law to exclude academic works, effectively placing academic works
immediately into the public domain. While this would be an effective way of opening access to scholarly work and bringing such works into the public domain fits with the purpose of the activity, it is likely to run into problems.

Are all non-fiction works created by academics properly thought of a “academic works?” It seems fairly easy to come up with examples of works that, while created by academics and on a scholarly topic, should not be properly thought of as academic. Ian Mortimer’s *A Time Traveler’s Guide to Medieval England* is one such work, and other popular titles are similar. Changing copyright law to exclude scholarly works is likely to run into problems deciding what the appropriate criteria are and how to apply them. While this is always a problem for policy-making, it’s easily avoided in this case where there are other more efficient alternatives available. In the university setting, it is fairly simple to devise policies that give faculty leeway to decide which of their works should be considered “academic”--if works are to be used in evaluating faculty performance and impact, then those works should be licensed to the university for distribution. This remains consistent with recognizing the aims of the academy, as well as recognizing authorial intent and author’s rights to their expressions.

**Scholarly communication and relevant-reasons**

Scholarly communication provides a clear illustration of the structure and promise of the approach I’ve defended. By appealing to the social meaning of scholarly communication—the shared conceptions of why scholarly communication is valuable—we begin to think about the appropriate jurisdiction for access and use. Since the social understanding of scholarly communication suggests norms of open access, universities and other academic institutions
should implement open access mandates that license universities to share works openly. This is not to treat those works as if they were free to produce and disseminate. Instead, it prevents universities and academics institutions from paying twice for works, once through the salary and compensation of their researchers and scholars, and secondly to the academic publishers who make works available. Universities will need to pay for the resources to make those works available, yet given the large amounts of money they pay for access to in the current system, it is difficult to see how such measures could be anything but significant cost-reductions in the long-term.

As this chapter is offered as a simple illustration of the eudaimonic approach to intellectual property, it’s worth highlighting the structure as described. The theory claims that agents and policy should be sensitive to the social understanding of the goods in question and the functioning of the sphere in which those goods are created. In the context of scholarly communication, we see a simple connection between engagement and discussion, transparency, and accountability and access that is as open as possible. Thus, according the theory, we need to structure the rights in such as way as to ensure access. I have argued that the best to bring that about is to implement open access mandates that require faculty to license their institutions to distribute their works.

In the next chapter, we will see that while social understandings are important components of the proper norms, the policies and legislation suggested by the theory are not always so simple. Now, we turn to intangible cultural heritage and navigating diverse social understandings for a good.
Intangible cultural heritage and international cultural property rights

The next intellectual good to which we turn is intangible cultural heritage. The term "cultural heritage" includes both movable and immovable objects--buildings, gardens, ritual and ceremonial sites, natural sites endowed with special significance, artworks of every kind, objects of daily life, and objects of archeological significance—for instance, evidence of habitation and past skill. More recently, cultural heritage has been understood to include the intangible aspects of cultural experience: rituals, songs, artistic patterns, and other forms of expression and knowledge. In this chapter I will argue that we need a new category of international cultural property rights that allow groups to restrict access to their private traditional cultural expression and knowledge. I will demonstrate that, consistent with their social meanings, traditional cultural expression and Indigenous knowledge are private when the author is best characterized as a trustee and when the expression or knowledge is a mechanism by which a community organizes its social activities and practices. Cultural property rights should be market-inalienable, that is, many of the traditional rights of contract included in property rights should not be part of cultural property.

Cultural heritage

In 1972, The World Heritage Convention convened to discuss the protection of the shared heritage of humanity, emphasizing that certain parts of cultural heritage “need to be preserved as part of the world heritage of mankind as a whole.” In emphasizing the importance of movable objects and human built structures, the Convention was criticized for ethnocentricity: they failed to recognize the value of cultural expressions like the oral traditions of Indigenous peoples or
others “whose cultural energies have not been poured primarily into buildings or landscaping” (Prott and O’Keefe 1992, 307-308). These criticisms were influential in the development of a broader understanding of cultural heritage that includes intangible items such as rituals, skills, stories, techniques, and other traditional aspects of cultural life (Prott and O’Keefe 1992).

Intangible cultural heritage is often divided into two sub-categories: traditional cultural expressions and traditional knowledge. ‘Traditional cultural expression’ is a term coined and used by the World Intellectual Property Organization (WIPO). Used interchangeably with the term ‘expressions of folklore,’ it refers to “music, art, designs, names, signs and symbols, performances, architectural forms, handicrafts and narratives” (WIPO 2012). In explaining the role that traditional cultural expression plays in home cultures, WIPO says that traditional cultural expressions “are integral to the cultural and social identities of Indigenous and local communities, they embody know-how and skills, and they transmit core values and beliefs. Their protection is related to the promotion of creativity, enhanced cultural diversity and the preservation of cultural heritage” (WIPO 2012). ‘Traditional knowledge’—which I will refer to as Indigenous knowledge for reasons of consistency—refers to (1) "personal or family information" (2) "cartographic materials of such things as sacred sites or areas, village sites, territories, use areas" and (3) "archaeological data, ethnobotanical materials, or genealogical data" (WIPO 2006).

Concerns about the disposition of cultural heritage are not new. While readers may be familiar with the modern debate surrounding the repatriation of the Parthenon Marbles to Greece, it is useful to remember that the sculptures were originally removed from the Parthenon in late 1801 and early 1802. Thomas Bruce, the 7th Earl of Elgin, was fascinated with antiquities and
art. In addition to the removal of the famed marble sculptures, Lord Elgin also removed fifteen metopes, seventeen pedimental fragments, a caryatid, and a column from the Erechtheion. Not only did he remove these artifacts, he hired a team of artisans and craftsmen to take sketches and casts, carry out digs, and take away inscriptions and reliefs from the Acropolis. The intent was to capture images and models of classic Greek art to influence aesthetic taste and practice back in Britain. Later, as Lord Elgin’s estate became indebted partially as a result of his foreign exploits, he sold the artwork to the British government. Early reactions to the Parthenon marbles focused primarily on the authenticity and aesthetic value of the marbles, as for instance, Richard Payne Knight, the “arbiter of fashionable virtu,” remarked, “You have lost your labor, my Lord Elgin. Your marbles are overrated: they are not Greek: they are Roman of the time of Hadrian” (St. Clair 1983, 175). He would later revise his assessment of the marbles and declare them authentically Greek yet “merely architectural sculptures” meant to be viewed at “the height of more than forty feet from the eye.” Certainly he found them no comparison to the Roman classical art he and his friends collected (St. Clair 1983, 178).

The publication of Lord Byron’s *Childe Harold’s Pilgrimage, A Romaunt* in 1812 forever changed the discussion and debate surrounding the marbles. Questions about the authenticity and aesthetic value of the marbles promptly gave way to questions about the ethics of removing them: “what right had Elgin to remove the precious remains of a weak and proud nation, what right had he to raise his hand against a building that had stood for over two thousand years” (St. Clair 1983, 189). These questions remain controversial today (cf. Hitchens, Browning, & Binns 1988).

As the broader notion of cultural heritage becomes more entrenched, similar questions about appropriation have been raised regarding traditional cultural expression and traditional
knowledge (Brown, 2005, 2003). Many have worried about the use of Indigenous artistic elements in the fashion industry, about Native American spirituality adopted by white upper middle class Americans. These questions, if possible, are even more controversial than those comprising the debate about tangible cultural heritage. The Parthenon marbles can only be at one place at a time—they may be digitized and viewed online, but the experience of the marbles themselves can only be had in a physical location. Intangible cultural heritage is not like this. Many people can know and tell a story and many artists can use a pattern. Because the experience of stories and patterns is not bound to any particular location or object, they can be shared and enjoyed by any number of individuals simultaneously. While the debate surrounding where the Parthenon marbles should be located may seem natural, they can only be at one place at time after all, one may reasonably wonder what is problematic about open access to intangible cultural heritage.

Globalization: the promise and perils

As early as 1927, John Dewey noted that “Only geographically did Columbus discover a new world. The actual new world has been generated in the last hundred years. Steam and electricity have done more to alter the conditions under which men associate together than all the agencies which affected human relationships before our time” (141). The comparison between Columbus’ “discovery” of the “new” world and the rise of globalization is noted with dark irony, as by some accounts, globalization has been at least as good for Indigenous populations as colonialism--some have even characterized globalization as its modern reincarnation (add citations). The term ‘globalization’ refers to several changes that begin in the late 19th century and continue at an accelerating pace throughout the 21st. While there is a vast body of literature
on the changes that comprise globalization, for our purposes it is enough to say that globalization involves the decreased importance of physical location for social activity and the ease and speed with which ideas, goods, people, and services transfer (cf. Tomlinson 1999; Scheuerman 2010).

_The promise of globalization_

An important lesson from the Parthenon marble controversy is that human beings have a fascination with remote, exotic, or otherwise romanticized materials of culture. The processes of globalization make access to the cultural materials and expression of other groups and individuals’ easier. Many thus herald globalization as an opportunity for individuals to construct meaning and identity from a wider array of cultural options. We can think of this as a kind of cosmopolitan ideal: as globalization brings people and cultural materials together from distant places, it opens up possibilities for people to find meaning in different activities and materials from all over the world (Waldron 1991). We see this in the increasing number of tea shops and yoga studios in the United States and the fact that many American Buddhists are upper-middle class Caucasians with secular or Christian upbringings.

_The perils of globalization to minority cultures_

Not all groups and individuals endorse this state of affairs. For example, the Tulalip of Washington are currently engaged in a campaign to regain control of their traditional stories (Kapralos 2007; Mathiesen 2012). In 1912, a Snohomish Indian living on the Tulalip reservation began carving a sklaletut, or “story pole.”\(^2\) While the Bureau of Indian Affairs was at the time actively involved in the suppression of Tulalip cultural expression, they “allowed” Shelton to

\(^2\) Also (incorrectly) referred to as a “totem pole.”
carve the pole on the condition that the stories be published (Riddle, 2009). These stories are currently in the public domain and many of them are available on the internet. In their statement to the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore the Tulalip reject the both the applicability of the public domain for cultural expression and idea that their stories are common cultural heritage, even in cases where the stories have been shared with others (Tulalip, 2003). Why do many Indigenous groups object to open access to the intangible cultural heritage of others? Why not allow individuals from diverse backgrounds the opportunity to construct meaning in their lives from as wide a set of cultural materials as possible? Answering these questions requires highlighting two important features of the social understanding of traditional cultural expression and Indigenous knowledge. First, those expressions often involve conceptions of authorship in which the author is best characterized as a trustee: ownership of and responsibility for the work rests with the group to whom the author or artist belongs. Second, knowledge is not necessarily a good to be distributed widely. Instead, it plays an important role in social and cultural identity. These ideas about ownership and responsibility from part of an epistemology that is not separable from broader ethical orientations to the world (cf. Mathiesen and Lenhart, unpublished manuscript; Deloria, 1999).

Authorship as a trust

Many indigenous and non-Western cultures view the community, society, or tribe as the possessors and originators of ideas, information, and knowledge (cf. Brown 2003; Townley 2002; Endeshaw 2005). While individual writers, artists, or storytellers may be entrusted with preserving and sharing such information or knowledge, their role as authors is more akin to that
of a trustee (Brown 2003, p. 46). Ultimate responsibility for and ownership of the intellectual
good rests with the community, group, or society.

The case of *Bulun Bulun and Milpurrurru v. R & T Textiles Pty. Ltd.* is a good illustration
of the way that many indigenous cultures view the relationship between an author and the
community (Brown 2003, p. 44). The first plaintiff in this copyright infringement suit, Bulun
Bulun, is an Aboriginal artist whose work has attained a global following. The second plaintiff,
George Milpurrurru, is a senior clan official for the Ganalbingu community. When a textile
company imported fabric containing images from one of Bulun Bulun’s more famous paintings
without his consent, Bulun Bulun and Milpurrurru together brought suit: they alleged that not
only was Bulun Bulun harmed, but his community as well (Brown 2003, p. 45-46). While Bulun
Bulun may be entrusted to depict certain kinds of religious and cultural imagery, he does so for
the benefit and under the supervision of the traditional owners: the clan.

Knowledge and privilege

Indigenous cultures do not necessarily accept that knowledge is should be openly
accessible. Instead, cultural knowledge can be a means of social and cultural identity. Sharing of
non-publicly available information is one way that relationships are differentiated. This happens
for individuals, as for instance some things I share with my acquaintances, more with friends,
even more with my close friends, and perhaps most with my romantic partner. But it is also an
important means for groups to organize their affairs. Some stories or know-how may be an
important way for groups to create valuable social roles and identities. As an example, a tribe in
Australia requested that stories from initiation and coming-of-age ceremonies marking passage

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3 It is worth noting that this is not an instance of the kind of expression that should be protected via cultural property
for reasons which will be discussed below.
into adulthood not be distributed within libraries nearby (Brown 2003). Within this tribe, adulthood consists in holding certain cultural knowledge; the knowledge differentiates children from adults and members from nonmembers.

What is significant about sharing is that it is an instance of trust and intimacy: part of what makes my relationship with my romantic partner intimate is that he or she is entrusted with information about me that is not available to others. When information is openly available, it cannot be entrusted in this way. I may disclose a piece of information about myself, but the act is no longer one of trust, signaling and constituting intimacy (Mathiesen, 2012). Groups for whom the distinction between members and non-members is particularly salient often use expression or knowledge similarly, as in the way a secret handshake functions to indicate membership.

Traditional cultural expression and Indigenous knowledge are different from a novel published by a Western author, an American folk tale, or a scientific discovery made by a lab. The social understandings of these goods in their communities of origin reflect the fact that they serve a different role and function differently than many other intellectual goods. When expression or knowledge has both of these features, we should recognize its function to distinguish members from nonmembers, to establish persons as members of sub-groups, and authorize individuals to fill social roles, all aiding to the organization of the community’s social life. Thus, while globalization offers individuals a wider array of cultural options from which to construct their lives, it also potentially limits the ability of minority groups to establish membership in the traditional way.
The capabilities approach and pure consequentialism

The capabilities approach was first introduced by the economist and philosopher Amartya Sen (1987, 1992) and significantly developed by Martha Nussbaum and others (Nussbaum 1988, 1992; Crocker 2008). Rather than a single theory, the capabilities approach is best understood as a framework for both assessing individual well-being and the evaluation of social arrangements and policy proposals. The framework relies on individuals’ capacities to do and be different things, and thus on the kind of life that he or she might achieve, in contrast to other measures that emphasize subjective categories like happiness or pleasure, or the material means to obtain different goods and services, for instance, wealth or income. As understood by Martha Nussbaum, the capabilities approach is a means of weighing the success of societies and policies by assessing individuals’ capacity to realize important functionings that make us human. While Nussbaum's own approach to capabilities is non-consequentialist, as it appears most commonly in the development and public policy literature, the capabilities approach is a particularly influential form of consequentialism. First, important capabilities are identified as “the ones that matter.” Second, the approach relies on various weighting and aggregating procedures for a measure of overall well-being.

A person's life can be naturally seen as a combination of different "beings and doings" (Sen, 1992, 39). My life can be captured neatly in a description of both the different roles that I assume, for instance, a romantic partner, wife, a student, friend, and other important abilities that I realize, for instance, being happy, being healthy, being nourished, etc. These "beings and doings" are my achieved living. My capability is my significant freedom to choose from different combinations of functionings, rather than my achieved living.
In 2012, Madhavi Sunder published From Goods to a Good Life: Intellectual Property and Global Justice that applied a capabilities approach to intellectual property. Sunder’s ambitious and elegant work lays out a “new normative vision of culture,” built on the important recognition that intellectual property structures many kinds of social relations. In applying a capabilities approach to intellectual property, Sunder argues that intellectual property should contribute positively to individual capability: to individual’s significant freedom to choose from different combinations of functioning. Sunder’s book is an important contribution to the project of expanding our understanding of intellectual property, and he offers an especially compelling argument in favor of open access and participatory culture as means of expanding global capability. But perhaps because Sunder sees little value in closed groups or secrecy, he sees no tension between opening access to expression as much as possible and the ability of minority groups to establish members in traditional ways. Both, however, are important functionings. The problem is that the capabilities approach alone fails to have the resources to adjudicate such conflicts. This brings us to my critique of consequentialism generally.

*Against pure consequentialism*

In what follows, I will argue against purely consequential accounts of social justice. My fundamental objection is that either they identify an overly narrow set of values to be promoted or they underdetermine social policy by identifying a wide range of values to promote, suggesting different and conflicting policies for a particular society.

Consequentialism is the ethical view that the sole measure of whether actions are right and/or policies good are the consequences that they produce. Different consequentialist theories propose different accounts of what kinds of consequences are valuable. This section will argue
that consequentialism alone is insufficient by arguing against both master principles, such as utilitarianism, and pluralist versions, like the capabilities approach.

Master principle versions of consequentialism are those that introduce a single principle as the measure of all actions and policies: “Maximize happiness” or “Maximize satisfactions” are both examples of master principles. Regardless of the content of the principle, the problem is that they “are either tyrannical, ruling over foreign domains, or impotent, failing to do the work of determining how different social goods should be distributed” (PJE, 102).

Amy Gutmann illustrates this with the principle, “maximize utility.” Directly applied to the distribution of say, love or sex, the principle is tyrannical. We would not wish to live in a society in which our love lives were decided on the basis of what would make most people happy--our love lives are a special domain in which we are only responsible for our own happiness. Recognizing this, very few utilitarians apply such master principles directly to such aspects of life. Instead, they rely on secondary principles which are claimed to fulfill the master principle. However, the master principle itself offers little advice for deriving the secondary principles, which are what do the real work of distributing goods (PJE, 102-103).

Pluralist forms of consequentialism, as in the case of capabilities approach, avoid this problem by specifying a wide range of values to promote or principles to follow, yet alone they do not tell us what to do when conflicts arise. The problem with pure consequentialism is that we are left with few resources to derive secondary principles or to navigate value conflicts.

Eudaimonism is not anti-consequentialist. Instead, the view offers us a connection between values and the specific circumstances in which certain values take precedence. In chapter three, I demonstrated that we can appeal to the social meaning of scholarly
communication to argue that the values of transparency, accountability, and discussion are best facilitated by open access. Below, I will argue that the social meaning of some traditional cultural expression makes that expression private and the virtue of justice gives us special reason to respect the privacy of traditional cultural expression.

The privacy of traditional cultural expression and Indigenous knowledge

When traditional cultural expression and Indigenous knowledge function as above, they are private. Here I mean to adopt Helen Nissenbaum’s account of privacy as contextual integrity (2010). According to a theory of contextual integrity, privacy violations are not due to lack of control over information or access to some set of information deemed “private” as opposed to public. Instead, privacy violations occur when context-relative norms are breached and, all things considered, there are no good countervailing considerations that underwrite the breach.

On Nissenbaum’s approach to privacy, it is easy to argue that when dissemination of traditional cultural expression and Indigenous knowledge is not governed by cultural protocol, a privacy violation has occurred. If traditional cultural expression or Indigenous knowledge is openly available, the information and knowledge ceases to play the same role mediating social relations or constituting identity (Mathiesen 2012). In order to preserve their function, those works must not be openly accessible; they must be governed by cultural protocol. Rather than simply being a function of the violation of the community of origin’s expectations about its dissemination, cultural protocols are essential to the community’s ability to meaningfully distinguish children from adults, members from non-members, and to create individually and socially valuable roles.
Conflicting understandings and considerations of justice

Why it is that we, as outsiders who find ourselves in the possession of such knowledge, should respect a principle specific to a sphere that doesn't exist in our communities? We have our own social understandings of and distributive principles for similar goods--freedom of expression, self-realization, the public domain, fair use are important components of these--why is it that even within our own communities we should respect the privacy of traditional cultural expression and Indigenous knowledge? Afterall, the overarching argument thus far has been that goods should be distributed in accordance with their social meanings, and that those social meanings differ from context to context. And yet, here, I suggest that we depart from our own social understanding.

Traditional cultural expression and indigenous knowledge are governed by very different social understandings of authorship and the value and function of different intellectual goods. They thus are examples of intellectual goods whose social meanings in their communities of origin lie outside the bounds of many received understandings of intellectual property. Many organizations have pointed out that respecting the privacy of traditional cultural expression and Indigenous knowledge conflicts with freedom of expression, intellectual freedom, preservation, and commitments to fair use within the Western intellectual property tradition (LCA 2011). In what follows I will argue that we have an obligation of justice to respect the privacy of traditional cultural expression and Indigenous knowledge because they are essential to the functioning of their communities and because of the importance of righting wrongs.

In chapter two, I argued that while we should be sensitive to the social understanding of a good and the norms of spheres we find ourselves in, the virtues can provide us with reasons to
act that cut across contexts. We must be sensitive to the broader context surrounding traditional
cultural expression. The virtue of justice involves caring about righting wrongs. It is for this
reason that we should respect the privacy of traditional cultural expression.

**Virtue and traditional cultural expression**

Many Indigenous groups’ cultures are threatened and their ability to live their lives as
they see fit is endangered. Significantly, the threat is not merely accidental or coincidental: it has
happened as a result of imperialistic, oppressive, and/or discriminatory actions. That makes
respecting the privacy of traditional cultural expression an important element of the virtue of
justice: understanding what people are due and willingness to see that they get it.

In many circumstances, how we structure our particular communal life will affect others’
ability to structure their communal life. How this relationship should generally be taken into
account when we make choices about our internal communities is difficult to answer: it involves
questions of global justice, the value of membership in a particular kind of community, and what
we owe to members and nonmembers. Answering those questions could be (and has been) the
subject of many, many books. Fortunately, those questions needn’t be answered generally before
we see that justice requires us to right wrongs.

**The virtue of justice**

The virtue of justice is a virtue of character. As such it is a disposition to adopt certain
ends, feel certain ways, and respond to certain kinds of reasons. As justice involves what people
are due and our willingness to see that they get it, the relevant ends, feelings, and reasons track
those considerations.
Righting wrongs is an important component of justice because individual’s who have been wronged are owed. What they are owed and from whom is dependent on the particular circumstances: some may be merely owed an apology, others may demand more extensive reparations. Just individuals will care about righting wrongs; it’s an end that they will adopt and will find reason-giving. Importantly, just individuals will care about righting wrongs even when they are not directly implicated in the wrong-doing. Individuals who are just will not simply avoid wrong-doing in their own actions and be concerned to remedy their errors; because they find wrong-doing and injustice abhorrent they will be concerned to see wrongs righted and injustice remedied, whether or not they are themselves blameworthy.

We can be more or less implicated in acts of injustice and wrongdoing. Sometimes acts of injustice are wholly our own, for example, a business owner may decide to refuse to serve members of the community on the basis of the color of their skin. Sometimes we are less directly implicated in injustice, perhaps we vote for a candidate who is influential in passing a discriminatory law. We can be completely uninvolved in acts of injustice, for instance, those that happen on the other side of the world from which I do not even benefit.

One way of thinking about injustice and reparation is to think in terms of what we owe others on the basis of our own implication in wrong-doing. The more we are implicated in wrong-doing, the stronger the claim that others have on us. This is an important insight about the nature of our obligations. However, it’s also the case that if we truly care about justice, not just as a measure of our own actions but because we recognize the evils of injustice generally, we will take righting wrongs to be reason-giving for us even when we are not implicated.

The virtue of justice will require that where we are implicated in wrong-doing, we have obligations to right those wrongs. This will require many communities to respect rights to control
some expression and knowledge, because they are implicated in wrong-doing even if individuals’ have not directly done wrong. But it also suggests that we have a reason to care about righting wrongs generally, even those wrongs in which we are not involved and have not benefited from. We should respect the privacy of traditional cultural expression and Indigenous knowledge because we are just, because we see injustice as an evil that should be remedied.

**International cultural property rights**

Increasing globalization means that rather than affecting rights-holders ability to control a work in different territories, piracy in other nations can affects rights-holders ability to control the work in any territory. If the HBO series *A Game of Thrones* has been pirated on a Turkish website, the content is available whether one is located in Turkey or not. This highlights a general feature of digital technology that is significant for the development and dissemination of intellectual works: information is “greased” (Moor 1997). Digital technology lowers the barriers surrounding the creation and especially the dissemination of information; this makes it easier for anyone, creator or not, to spread information. If we wish to protect traditional cultural expression and Indigenous knowledge globally, we need international agreement.

In March of 2011, WIPO released a draft of guidelines for the protection of traditional cultural expression. The document is a good example of the kinds of practical schemas that are recommended to protect expression with the features above. The draft calls for legal schemas that establish perpetual rights to control cultural stories, images, symbols, performances, architecture, etc. A global registry should be created for traditional cultural expression and individuals and organizations wishing to use registered ideas and expression would need prior permission from representatives of the home culture.
The associated rights for these ideas and expressions should have many of the characteristics of copyright. Thus those rights should include:

- An exclusive right to make copies of the work
- An exclusive right to produce derivative works
- An exclusive right to distribute copies of the work to the public
- An exclusive right to display the work publicly

But there are limits to the analogy with copyright. Unlike current copyright, it is important that cultural property rights be perpetual. As these rights are intended to protect the function of the expression in establishing social roles and membership, it is important for them to persist rather than expire. Additionally, as will be discussed in depth below, there should be limits on distribution. In particular, these rights should be market-inalienable and expression protected via cultural property should not be for sale, even by the rights holder.

**Objections to cultural property**

WIPO’s draft recommendations were received poorly in many circles. In particular, the Library Copyright Alliance, an influential organization that includes the Association of Research Libraries, the Association of College and Research Libraries, and the American Library Association, objected that the draft guidelines are overly broad, interfere with intellectual freedom and First Amendment expressive rights, and are contrary to the preservation of cultural heritage. (LCA 2011). The organization’s objections illustrate how the protections necessary to preserve the functions of these kind of cultural expression run up against Western values of open access, individual rights to expression, and restrictions and limitations in copyright law that have roots in the utilitarian justification for intellectual property rights.
They object that the public domain, those works which are currently openly accessibly, is reduced by such protections and that the recommendations “seriously [restrict] intellectual freedom, freedom of expression, and exceptions to copyright law” (LCA 2011). Requiring permission for all uses of traditional cultural expression hinders socially useful activities and limits individuals’ expressive liberty. Finally, the LCA worries that other groups may seek to claim protection under provisions for traditional cultural expression; they ask, “Does ‘traditional and other cultural communities’ include religious groups? Is the Old Testament the cultural expression of observant Jews? Is the New Testament the cultural expression of Roman Catholics? The Koran the cultural expression of Muslims?” (LCA 2011). It should be fairly easy to see that these objections are grounded in a utilitarian approach to intellectual property that understands those rights as vehicles for maximizing long-term open access to intellectual works.

The challenge that traditional cultural expression and Indigenous knowledge present is a value conflict; it is not enough to assert that protecting them will limit intellectual freedom and rights of expression because it unclear whether those values should trump Indigenous groups’ abilities to exercise their culture. Not only is open access not necessarily valued by those who engage in traditional cultural expression, above we have seen that it undermines the purpose of those works.

While traditional cultural expression and Indigenous knowledge should respected despite these objections, they are useful as a means of determining the limits of cultural property rights.

**Limits on cultural property**

Thus far I have argued that only certain kinds of traditional expression and Indigenous knowledge should be eligible for cultural property protection, namely, when the author is
understood as a trustee and when the privacy of the expression or knowledge is necessary for a community to organize its social activities and practices. Adding these criteria to eligibility for cultural property rights does much to assuage many of the worries associated with cultural property. Some of worries about scope are immediately alleviated by pointing out that materials like The New Testament, fairy tales, and American folk tales do not meet these criteria.

Reflecting on the fact that privacy is necessary for the expression to operate as a mechanism for groups and communities to organize their social affairs, we can see that for expression or knowledge to play this role it cannot be sold or otherwise made public. This is why the work in *Bulun Bulun and Milpurrurruru v. R & T Textiles Pty. Ltd.* is not a candidate for the kind of cultural property in question--given the group’s openness to general accessibility, on appropriate economic terms, it seems difficult to argue that the privacy of the work is necessary for social organization.

Since these cultural property rights are grounded in the necessity of privacy, these rights include the ability to restrict others’ use of expression or knowledge. But they do not include a right to profit economically, that is, to sell or otherwise license use. The rights are market-inalienable. This is an important limit on the extent of cultural property rights that helps to alleviate worries about other individual’s expressive rights. Since these cultural property rights do not include many rights of contract, there are costs associated with their registry. Those costs help to ensure that only those expressions and knowledge that function as described will be registered.

*Membership, stake, and contested expression*

Even with the above comments regarding which works are eligible for cultural property
protection, there remain significant questions regarding who belongs to a group, what cultural heritage belongs to which group, and how to determine the will of the group. These issues are central to any theory of group rights. What/who counts as “the group” is, as Michael Brown points out, “more than a theoretical point” (2004, 53). Given the high rates at which members of Indigenous groups are marrying outside of their ethnic groups, determining who belongs to a group or culture is an increasingly complex task (Brown 2004). While it is beyond the scope of this dissertation to offer a complete theory of group rights, some comments need to be offered regarding the practical task of understanding membership and adjudicating contested expression.

The cultural property rights I defend are grounded in the ability of minority groups to organize their own community’s social life. When expression or knowledge has the features described, we should recognize its function to distinguish members from nonmembers, to establish persons as members of sub-groups, and authorize individuals to fill social roles. It would be contrary to the purpose of these rights to do anything other than to respect groups’ internal mechanisms for determining membership, governance, and adjudicating internal conflict. At the same time, we need respectful forums to navigate conflicts and ensure that all members of communities have a voice.

It has been said that "any Native American has more in common with any other Native American than with any non-Indian" (Hester and Cheney 2010). This point has also been extended to include a pan-Indigenous identity; while there are significant differences in world view among Indigenous groups and conflicts between them, it still makes sense to think of Indigenous peoples as having shared interests (United Nations, 2014). We can understand these interests through the United Nations documents on understanding the term “Indigenous.” Rather than defining the term, the UN relies on self identification and certain paradigmatic shared
characteristics, including “historical continuity with pre-colonial and/or pre-settler societies, strong link to territories and surrounding natural resources; and a resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities” (United Nations, 2014).

The shared interests of Indigenous peoples is important for thinking about how we ought to go about navigating conflicts between groups. I propose the creation of an international panel of representatives, perhaps related to the United Nations Permanent Forum on Indigenous Issues, from different Indigenous groups who can first attempt to facilitate agreement, and failing that, issue judgment on cases of contested expression. The point of such a panel or forum is to provide a space for discussion and constructive critique that attempts to avoid problems of cultural imperialism or disrespect, but recognizes the importance of discussion and even critique between groups.

Conclusion

Traditional cultural expression motivates the idea that the framework in question provides us with a much needed perspective on issues in intellectual property. Traditional cultural expression highlights the differences in value embodied by standard justifications for intellectual property and indigenous and non-Western understandings of intellectual goods. The point is that we have good reason to protect traditional cultural expression (TCE) but the standard justifications are unable to explain why that is.

The utilitarian approach grounds intellectual property rights in the value of open access to intellectual products. Short-term monopolies are granted to authors and producers as an incentive
to production, in order to ensure growing body of intellectual works for the public to access in the long-term. There is an obvious fundamental inconsistency with traditional cultural expression. The utilitarian approach to intellectual property grounds those rights in the value of long-term open access to intellectual works. Not only is this not necessarily valued by those who engage in TCE, open access actually undermines the purpose of those works: when access to TCE is open, those TCEs cannot play the same role in social and cultural identity.

On Hegelian or Lockean justifications, individuals have rights over their intellectual works because of special features of what it is to be an individual human being. However, TCEs are communal goods: in many cases, ultimate ownership and responsibility rest with the tribe or group and the author or artist often understands his or herself as a custodian, guardian, or trustee.

*What cultural property rights won’t do*

While grounded in a conception of justice and reparations, these rights are not intended to address the economic inequality of many Indigenous and other minority groups. There is currently a large amount of interest in Indigenous and local knowledge, and significant debate about whether (and by whom) such knowledge could be patented and profited by. These economic inequalities should be addressed, but cultural property is not the vehicle to do it. Cultural property rights are grounded in a respect for Indigenous and minority groups ability to exercise their own cultures and in seeing Indigenous groups as thriving, living communities. Indigenous groups the world over have resisted colonialism, imperialism, and attempts at assimilation and survived to assert cultural rights over their expression and knowledge. The international community ought to respect them.
Data disenfranchisement

“Data, as we know, is power—and as our personal metrics become ever easier to amass and store, that power needs rebalancing strongly towards us as individuals and citizens. We impeded medical progress by letting pharmaceutical companies selectively and on occasions misleadingly control the release of clinical-trials data. In the emerging yottabyte age, let's ensure the sovereignty of the people over the databases by holding to account those with the keys to the machine.” David Rowan, Editor, Wired UK

The final good to which we turn is personal information and data. The phrase "data disenfranchisement" was first used by David Rowan, the editor of Wired's UK edition, in his answer to Edge's 2013 question of the year: What should we really be worried about?’
'Disenfranchisement' is a serious claim. To be disenfranchised is not only to be separated from something rightly yours, it also implies an inability to participate in many important social circles. The disenfranchised have not only lost something, they've also been excluded. Applied to data, one might think that the claim is hyperbolic. And yet the ability to analyze and control data, including many kinds of personal information, is an increasingly important aspect of participation in certain circles.

Businesses and other organizations are able to draw on insights gleamed from personal information and data to develop useful goods and services and to pass information on to consumers that enables them to access those services and make better decisions. Many, if not most, people are familiar with Amazon’s recommendation service, an example of what can be done with information profiling. By comparing your purchases with the purchases of customers who bought some of the same things, Amazon is able to generate recommendations regarding what you might like. Libraries and librarians, who do not retain circulation records out of a
concern for privacy and abuse, can attest to the popularity of the service: they are often asked why they are unable to provide a similar service. Like profiling, predictive analysis is able to generate lots of new information about people by processing large amounts of data and determining the statistical significance of connections between data points. The larger the data set available, the better they can make these predictions and generate more information.

And the available data is enormous. The social media giant Facebook logs 2.5 billion pieces of content and 500 terabytes of data per day. That may sound large, yet it’s only a fraction of the 24 petabytes of data accumulated by Google, whose video service, YouTube, alone adds 72 hours of video per minute. IBM reports that we generate 2.5 quintillion bytes of structured and unstructured data everyday, and that in turn has been increasing at around 60% per year (Rowan, 2013).

Using this data, scientists are able to map out the flow of ideas (by analyzing communications data), predict where flu outbreaks are likely (using mobile phone data) and help explain hitherto badly understood phenomenon like financial crashes, political upsets, and flu epidemics. But “the ability to track, predict, and even control the behavior of individuals and groups of people is a classic example of Promethian fire: it can be used for good or ill” (Pentland, 2013).

This chapter will explain how data threatens our privacy and can be used to manipulate people. In response, I propose a new category of intellectual property in personal information: we should introduce legislation that establishes private property rights in our own personal information. Rather than having a single market in personal information, we should have individual markets tied to particular social spheres of activity--healthcare, education, etc.
Scholars have pointed that part of the value in privacy is to protect us from harms. This chapter will suggest that manipulation is one of those possible harms. The policy suggestions I propose will not completely eliminate the possibility of being manipulated in this way; manipulation is still a risk. Instead, these policies give individuals the choice to risk manipulation or not, in order to reap the benefits of the exchange of personal information, while limiting the likelihood that manipulation will happen by tying information to the social spheres in which it originates.

**Personal information and personal data**

Much of our daily interactions leave a digital trail. Purchases with debit and credit cards, phone calls, many activities performed on smart phones, social media posts, emails and texts messages, and browser clicks can all communicating information to third parties. “Personal information” refers to information about identifiable persons (Nissenbaum, 2010). It is a very broad category that includes information from a wide variety of sources. Personal information includes contact information, for instance, phone numbers, addresses, and email accounts. It also includes government records such as one’s social security number, criminal record, birth certificate, marriage certificate, and filings for divorce. It includes financial information of the sort that is included in a credit report, including installment loans and revolving accounts, as well as information about accounts and credit ratings from other kinds of financial institutions. Even information about one’s purchases, for instance, those made with grocery store “club cards” is a kind of personal information. Information from one’s technological use--your search histories, clicks, social networking friends lists, likes, and check-ins--are also be personal information.

Personal information is also "personal" in the sense that it tells a story about us, particularly when different kinds of information is aggregated. As an example, it’s easy to
discern a lot about an individual on the basis of the things that they buy. My Amazon purchase history will tell you that I am a mother, that I breastfed for a period before utilizing a breast pump, that I enjoy graphic novels and young adult literature, that I watch television like Gossip Girl and Pretty Little Liars and am interested in novels reflecting on aging and death. One can tell that I am a runner and interested in charcuterie and cocktails. Imagine how much you'd know about me if the information from Amazon history were combined with say, my medical record, my educational background, and my credit report. The point is that personal information can be used to tell a very robust, even intimate, story about individuals.

When information is “anonymized” and aggregated, I will use the term “personal data” rather than personal information. For instance, GPS or cellular triangulation data derived from phones and other mobile devices is anonymized and analyzed for performance and other trends. Personal data is very useful for understanding social trends and systems and understanding social dynamics. Some researchers object to the inclusion of personal data in conversations about the uses of personal information: because that information has been anonymized, they argue, it can no longer be a threat to the privacy of the individual originally identified by that information nor is such information likely to be used in ways that might harm him or her. This is mistaken on two counts. First, what is anonymized can fairly easily be recombined, as demonstrated by Michael Zimmer (2010). Second, and more important, predictive analysis and other tools of analyzing data can be useful for generating information about individuals over and above what has been shared. That information is used, for instance, to develop targeting marketing strategies for individuals, as we will see below. In other words, even if anonymization were perfect and irreversible, personal data still generates insights and information about real people, even when they themselves have not shared that information.
Some of the information that is currently available has been “public” for some time (cf. Nissenbaum 2010, Zimmer 2010). However, decreased cost of electronic storage and processing power have also lowered the costs of accessibility and aggregation. These decreased costs and an awareness of what can be done with large quantities of information have led to an environment in which an entire industry has sprung up collecting, aggregating, and mining our personal information.

Privacy and personal information

As in the previous chapter, I will again adopt Helen Nissenbaum’s account of privacy as contextual integrity, where privacy violations are not due to lack of control over information or access to some set of information deemed “private” as opposed to public (2010). Instead, privacy violations occur when context-relative norms are breached and, all things considered, there are no good countervailing considerations that underwrite the breach. On this account, privacy violations occur when the norms that govern an information exchange are violated and there are no all-things-considered reasons for the violation.

When we share information, we share it in specific contexts. Those contexts are governed by social norms that help shape our expectations about that information. A norm is like a rule that governs our social relations. Norms can be explicit or implicit. When my best friend and I go out for coffee to discuss an aspect of her relationship with her partner, the exchange is structured by the norms of trust and friendship--it goes without saying that while she shares information with me, it should go no further. Similarly, when my doctor asks for information about my current medical condition, the exchange of information is structured and governed by the norms of confidentiality of our relationship as a doctor and patient. While the doctor may share that
information with nurses in the practice, or perhaps my insurance company, where that information can ethically go is dictated by our relationship as doctor and patient. The doctor/patient relationship occurs in the context of the sphere of medicine. Confidentiality is an important norm that governs this relationship because without this norm, patients may not share information with their doctors that would be essential to the provision of medical care.

The personal information that circulates about us presents a threat to our privacy because the information often circulates without regard to the norms of information exchange that governed the context in which it was acquired. Information collected by Safeway about my purchases may be sold to a third party vendor, who is interested in mining that information to see what sorts of patterns arise.

The value of privacy and harms

Scholars have argued that privacy is necessary for our relationships, both as a precondition for intimacy and our ability to divide up our lives into different spheres. (cf. Fried 1984; Inness 1992; Gerstein 1978). In the previous chapter, we saw the relationship between group privacy, intimacy, and organizing a community’s social life. Privacy is similarly important to individual lives; it enables us to divide our lives into different compartments and relationships--professionals contacts, family, book club friends, drinking buddies, etc. The ability to do this enables us to develop and experiment with different aspects of our character and to build relationships that help those aspects flourish. It may be important to me to have drinking buddies--people with whom I occasionally go out to get drinks with. In this context, I may be irreverent, silly, and loud. And it might be important to me that information about this aspect of my life remain unavailable to my professional contacts, not necessarily because I don't endorse
the behavior and wish to hide it, but because knowing my secret hash name might interfere with the way my colleagues saw and acted with me.

Here, we see one reason that consequentialists have embraced privacy—it protects from certain kinds of harms. In addition to the harms that may arise when others view me in an adverse light, privacy can also be a protection against certain kinds of manipulation. Below, I will argue that the free flow of our personal information and data can be used to manipulate us.

**Manipulation and the architecture of choice**

Many of the uses of personal information reflect problematic attitudes about persons identified by information that are not fully captured by concerns about privacy. Marketers and advertisers have long known that individuals can be persuaded to purchase goods and services that are not in their own interests. In fact, the business of marketing and advertising has long been one of “choice architecture”—shaping individuals’ decisions by leveraging the social and psychological factors that typically influence our decisions. The more information that marketers and advertisers have about individuals, the more they have to draw on to shape those choices. While many of the best examples of this come from advertisers and marketers of commodities—our example will come from the retailer Target—the “architecture of choice” happens in wide variety of social areas, including politics.

*Target’s pregnancy predictor*

Every person who comes into a Target store likely has what Target calls a Guest Id. Target keeps track of what you buy with your debit or credit card, whether you open their emails to you, if you use a coupon, what was on your wedding or baby registry, etc. For years, they've been
buying data about whether you're married and have children, what your mortgage is like, what
your estimated salary is, your age and other demographic information like your race. Having
such large amounts of data enables researchers to make connections between certain data points
and "big life events." Target has developed a list of 25 products that make up their "pregnancy
predictor:" an estimation of how likely it is that a customer is pregnant and a fairly precise
prediction of their due date.

“...a man walked into a Target outside Minneapolis and demanded to see the
manager. He was clutching coupons that had been sent to his daughter, and he was
angry, according to an employee who participated in the conversation.

“My daughter got this in the mail!” he said. “She’s still in high school, and you’re
sending her coupons for baby clothes and cribs? Are you trying to encourage her
to get pregnant?”

The manager didn’t have any idea what the man was talking about. He looked at
the mailer. Sure enough, it was addressed to the man’s daughter and contained
advertisements for maternity clothing, nursery furniture and pictures of smiling
infants. The manager apologized and then called a few days later to apologize
again.

On the phone, though, the father was somewhat abashed. “I had a talk with my
daughter,” he said. “It turns out there’s been some activities in my house I haven’t
been completely aware of. She’s due in August. I owe you an apology.” From
http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html?smid=pl-
share

Target is interested in knowing whether its customers are pregnant because like most of our daily
activities, shopping is mostly a product of habit rather than reasoned reflection. Most people do
their shopping at many different stores. It's difficult to change established habits. But during
periods of upheaval in our lives--moves, marriages, divorces, and babies, for instance--our habits
are thrown off and we become amenable to change. Target wants to know whether their
customers are pregnant because if so, the company wants to change your habits: ideally, while a
customer is at Target buying diapers, he or she will also pick up a frozen pizza and maybe some
orange juice (people with young babies buy lots of both). If customers get used to buying frozen pizza and orange juice at Target during the early parts of their baby's life, it's likely that they will continue to do so. Personal data allows Target's predictive analytics team not only to predict which customers have babies, but also to get a sense of the kinds of things that people with babies (and at other important life stages) typically buy.

Flyers and ads and the coupons that one receives at the register are all tailored to Guest IDs. For Target, the best thing that could happen is something like the following: Target knows on the basis of your purchase history that you are expecting a child. They give you coupons or ads for some of the things you would expect to buy at Target (infant clothing, bottles, pacifiers, etc.) in addition to some of the things you may not associate with Target (orange juice and frozen pizza). The coupons for the things that you don’t associate with Target push you to pick those items up while you are there for the purpose of picking up what you do associate with the company. Ideally (and very likely), these purchases persist long after Target ceases to give you coupons. Target will have succeeded in shifting your shopping habits, your unreflected activities. Personal information is thus very useful if what you want to do is influence people's patterned behavior.

Objectification and manipulation

In what follows, I will argue that some uses of personal information and data are problematically manipulative: they objectify individuals, who are used as tools for the benefit of others. To “objectify” is to treat as an object something that is not an object (Nussbaum, 1995). In her “Objectification,” Martha Nussbaum list seven ways in which persons can be treated as objects. We are primarily interested in only (1) and (2).
(1) Instrumentality: to treat someone as a “tool of his or her purposes”

(2) Denial of autonomy: to treat someone as "lacking in autonomy and self-determination."

For our purposes, we will treat instrumentality synonymous with manipulation. To manipulate, then, is to treat someone as a tool of his or her purposes. While it is tempting to see a tight connection between instrumentality and denial of autonomy, many mechanisms for manipulation are better characterized as parasitic on individual’s autonomy and self-determination. In lying and making false promises, for example, we treat a person’s ability to reason about what to do as a means to bring about our own ends. Thus, to manipulate someone doesn’t require a denial of their autonomy of self-determination, but it does require a lack of respect for that capacity, a willingness to subvert it for one’s own interests.

Marcia Baron (2003) has argued convincingly that while offers or incentives for certain behaviors are not always (or even usually) manipulative, they can be: “…whether an offer is manipulative turns in large part on uncertainty over whether the incentive in being introduced puts forward the wrong sort of reason for opting for the activity.” Thus, offering to improve a student’s grade if he or she performs sexual favors is a kind of manipulation, whereas offering to improve a students’ grade on the basis of an extra-credit assignment is not (or is at least not obviously so). We can assess the appropriateness of reasons on the basis of the spheres in which they occur: it is inappropriate for educators to exchange grades for sexual favors because of the goals and norms of education. Appealing to the sorts of reasons that are offered as incentives or inducements in marketing and advertising is a useful lens for understanding whether a strategy or campaign is manipulative, and corresponds with the approach on offer here.
Marketing and offering reasons

Much of what happens in advertising and marketing is not manipulative at all: encouraging someone to purchase a ballpoint pen because it works well and is priced competitively is to offer a good reason to buy a pen. Standard economic models of what is happening in marketing and advertising—creating products that are valuable to individuals and communicating with them about their use and pricing—do not seem to involve manipulative behavior precisely because the offer the right sorts of reasons as inducements. So, too, with Amazon’s recommendation service. When Amazon advertises a product through their recommendation service, they are not offering the wrong sort of reasons for your purchase. Here we see a good example of the way that personal information can be used in ways that benefit individuals. When such information is traded among parties who intend to create services and products or disseminate information that tracks what people legitimately need or want, it is hard to make the case that the exchange of information objectifies those individuals. Rather than seeing those individuals as means to their own ends, those types of exchanges can be more easily characterized as "good for everyone."

This raises interesting questions about the ethics of branding and emotional appeals in marketing and advertising. Coca-cola wants to convince you to buy Coke rather than Pepsi. Rather than providing you with relevant information about the benefits to you of Coke rather than Pepsi, they want you to feel good about Coke so that you buy the product in the store without reflecting on whether you ought to buy Coke, or Pepsi, or neither. Because it is not clear whether this kind of appeal counts as a good reason to buy Coke, such appeals seem more questionable, yet not clearly manipulative as changing a grade on the basis of sexual favors.

Much of what is problematic about advertising and marketing is not that they offer the wrong sorts of reasons to make a purchase, but rather, that they intend to influence one’s
unreasoned behavior. There is nothing insidious about offering someone a coupon for $2 orange juice. But when one receives a series of offers that are intended to change one’s patterns of behavior, such that the behavior continues when the incentives are withdrawn, that behavior is manipulative.

When marketing bypasses autonomy

Rather than thinking about individuals who use practical reason to make choices to bring about their ends, this involves thinking about people the way one might think about getting rats to perform certain tasks or go through a maze. Indeed, much of the literature on habit formation and breakage and patterned behavior is very explicit about the analogies between human and animal patterned behavior. When companies and other organizations try to leverage our unreflected, patterned behavior this way, they are treating us as subjects or objects to be manipulated, rather than agents who make choices. This does involve a denial of our autonomy: advertisers are attempting to bypass our capacity to make choices and instead influence what we do as a matter of habit.

Objectification in this way is not always morally problematic. We all engage in rational self-objectification when we do things to combat weakness of will, such as purchasing computer software that temporarily blocks access to the internet, or setting the clocks 15 minutes fast to avoid being late. Nor is it obvious that paternalistic manipulation is wrong, for instance, Cass Sunstein and Richard Thaler (2009) have argued for the use of certain framing strategies to influence individuals’ choices in ways that benefit them and society.

What sets apart the manipulation involved in marketing and advertising that leverages patterned behavior is that advertisers intend to use the fact that human beings form habits to
manipulate them in ways that benefit the advertisers and the companies whose products they represent, regardless of the interests of those targeted by advertising. There’s something especially nefarious about manipulating people in the context of a market exchange.

*Undermining markets*

Those who endorse market economics do so precisely because when markets are functioning well they are not zero-sum games. Instead, market exchanges benefit both parties: I decide to purchase something because I see that the purchase benefits me, and vice versa with the seller. For this reason, markets are especially good at distributing resources in a way that maximizes utility. The fact that we each voluntarily engage in the exchange, deciding that it is beneficial, is important. The problem with attempting to influence people’s patterned behavior is that bypassing their capacity for reasoning about what to purchase makes impossible to say that the purchase benefits me by own lights. This begins to undermine the idea that the exchange wasn’t zero-sum; instead, it appears as if one party (the manipulator) is attempting to profit without my full understanding.

A recurring point in this dissertation is that our policies should be sensitive to the social understandings of different goods and the norms that govern spheres of social activity. Commodities and markets are one such area. While many dislike markets as mechanisms for distribution, those who embrace them argue that what makes markets valuable and successful is the way they maximize utility and benefit participants. Yet in engaging manipulative marketing behavior, many advertisers subvert the successful functioning of the market.
Property rights in personal information

Thus far I have argued that the circulation and use of personal information and data poses a threat to our privacy. Some of the uses of personal information and data are manipulative and violate the social understanding of the market. In response to these problems, I will suggest property rights in personal information that track different spheres of social activity. As I mentioned in the introduction to this chapter, these policy and legislative changes will not entirely prevent the problematic behavior. One important feature of the above the discussion is the extent to which it is difficult as a matter of policy to differentiate between giving an individual a coupon for orange juice and the advertising strategies which attempt to leverage individuals’ patterned behavior in ways that benefit advertisers and those they represent. However, there are two policy strategies which are helpful. Rather than attempting to differentiate the advertiser’s behavior, we can give individual’s more control over their personal information through property rights and limit the exchange of personal information to sphere-specific markets.

The legal environment surrounding privacy

Public discussion about the privacy of our personal information has been ongoing since the 1960s. The American legal privacy environments is a mix of federal and state laws that separately govern the use of different kinds of information and regulate different contexts, usually guided by specific concerns about the problematic use of information in different areas. While the patchwork approach works well for privacy’s contextual variance, there are important gaps in coverage stemming from the fact that early concerns about privacy were fundamentally about “leveling the playing field” between individuals and the small number vested powers who
had the resources and capacity to collect, store, and cross reference vast quantities in information. Today developments in information technology have vastly lowered the costs associated with collection, storage, transmission, and processing of information. It is no longer the case that the greatest threat to the privacy of personal information comes from governments ability to cross reference different sets of information. The challenge that we are faced with respect to personal information is to create institutional structures that balance the good things that personal information can do for us with privacy and worries about objectification.

Private property rights in personal information

In order to achieve the rights sort of balance, we need private property rights in personal information. The rights in the bundles of property rights may themselves reflect the purposes and goals of the different spheres, though the list below is a good starting point:

- An exclusive right to sell the information (because this right tracks a non-rival good, it must be explicit in the law that this right is exclusive).
- An exclusive right to transfer the information.
- A rights to prevent the collection of information--i.e., do not track.
- A right to destroy some information--to have some kinds of records expunged.

One important feature of the legal conception of property is the requirement that information be purchased before it is collected or used. This will increase the cost of many kinds of collection and mining. This is probably a good thing. One of the problematic aspects of the way personal information is exchanged is that much of the information is inaccurate (cf. Nissenbaum, 2010). Because it is cheap, this isn't particularly problematic for the people using the information--as long as a lot of it is accurate, it's still going to be useful for their purposes.
However, it's a big problem for people who end up being denied goods or services on the basis of inaccurate information. Introducing costs may actually help to internalize them onto the people who are utilizing personal information, rather than having those identified by the information bear the burden.

By tying personal information to different markets tracking different spheres of social life, we can better track both the norms that govern individuals expectations regarding their information and limit the extent to which personal information is used to leverage behavior in ways that do not take into account the interests of those identified. By giving individuals more control over information, we also build that into their expectations regarding what will happen to the information—when individuals control whether and to whom their information is sold, they are able to make their own judgments about what should happen to the information, and whether (or at what price) they are willing to make trade-offs.

To illustrate, we need to go back to Helen Nissenbaum's account of privacy and contextual integrity and Walzer's spheres. Remember that when we share information, we share it in specific contexts governed by social norms that help shape our expectations about that information. As I argued in chapter two, the norms that structure these exchanges have developed over time and stem from the functioning of the contextual sphere in which the exchange occurs. When information is tied to a particular sphere, composed not only by specific norms of information flow and united by a purpose or goals, it is less likely that we will see exchanges that don't reference the interests of those identified by the personal information—those interests are reflected in the structure of the sphere itself. Think about the sphere of education, composed of activities like teaching and learning. When the sphere functions well, the norms, values, and goals reflect the interests of students qua student as well as those of teachers qua teachers.
The problem with the current industry of information exchange is that it is not sensitive to
the norms that govern different spheres of social activity. The goal of the policy suggestions here
is to both give individuals more control over their personal information, but also to keep personal
information and personal data within their originating spheres, in order for the flows of
information to be sensitive to the social understandings involved.

Costs of implementation

One of the objections to implementing such an extensive system for managing personal
information are the social costs of the system. As Don Fallis points out, “the requisite technology
would have to be created and people would have to spend time using it. Also, if people had to
opt-in, things like Amazon recommendations would not be nearly as effective” (personal
communication 2014) There are several things to say in response.

First, there is at least one successful model for the sort of system that I envision. Health
information exchanges are built on similar ideas of ownership, access, and permissions.
Information is associated with patients and different actors have access to different sets of
information based on their role in the system, whether they are doctors or other providers,
insurance companies, administrators, or other relevant parties (cf. HIMMS 2014). While such a
model would certainly need to tweaked in order to meet the relevant needs of a particular market,
the technology to do so certainly exists.

Secondly, it is true that there are individual costs associated with this sort of exchange.
However, part of the point of this chapter is to point out that while the exchange of personal
information does have some beneficial effects, there are also significant moral costs to the
current structure. Individuals should have the opportunity to decide their level of involvement.
It’s not quite right to think of these competing considerations as on equal footing--instead, we should lend more weight to individuals ability to decide their level of involvement in the exchange of personal information than to the convenience and luxury of these services.

As argued above and in previous chapters, privacy is deeply implicated in individual’s and groups ability to organize their lives. It’s thus an important component of autonomy and respect for persons. But the idea is to balance these considerations, not completely undermine the goods that are brought by this exchange.

*Against legislating a civil right to privacy*

On my account, similar to the previous chapter, concerns about privacy are providing one justification for a right to private property. As I pointed out in the introduction, privacy considerations are salient in determining who should control access to personal information, which is essentially the function of property.

In the popular television series *The West Wing*, White House staffer Sam Seaborn remarks, on the big questions faced by society, “In the '20s and '30s it was the role of government. '50s and '60s it was civil rights. The next two decades are going to be privacy. I'm talking about the Internet. I'm talking about cell phones. I'm talking about health records and who's gay and who's not. What could be more fundamental than that?!” The episode aired in 1999 and it was an especially prescient description of one of the most pressing questions we face today. In recognition of the fundamental important of many privacy concerns, privacy advocates have argued that we need a clearer, explicit statement of the right to privacy in our Constitution. Privacy should be a clear civil right of importance, not easily traded off with other values. Many
European nations have undertaken similar approaches to privacy, perhaps because of their history with the consequences of Nazi record-keeping efficiency (Samuelson, 1995).

While privacy is deeply important, its contextual variation and people’s desire to balance privacy with other values—security and convenience seem particularly salient—mean that attempts to amend the Constitution so as to clearly state what privacy rights we have are not apt to capture our reasoned reflection about what is of value about privacy. Doing so would amount to a top-down approach to privacy: we articulate what privacy amounts to, why it is valuable, and then attempt to determine how that account is applicable in different sorts of situations. This is apt to result in a watered down notion of privacy that does not adequately respond to the privacy challenges we face, or allow privacy to run roughshod over both other values and individuals’ own ability to decide what they deem private and when they are willing to make trade-offs.

Freedom of expression

A common objection to the property approach to personal information is based in the importance of freedom of expression. One worries that individuals may assert their property rights in such a way as to limit individual’s ability to express themselves or communicate to others. It would be odd to imagine legislation that enables someone to bring suit against their neighbor for sharing information about them with others, unless it were a clear case of slander or defamation. Property rights in personal information would, by some accounts, enable individuals to file suit against their neighbors for what amounts to relatively harmless gossip.

Yet private property rights in personal information should be thought of as protections for individuals within an existing commercial system of the exchange of personal information;
absent commercial or financial interest, individuals would have no just cause to bring suit against other individuals. In the case of a neighbor sharing information, our intuitions about the legitimacy of bringing suit seem to change if the neighbor is being paid considerable sums of money for information about us. Now, it seems open to question whether individuals identified by that information shouldn’t have a legitimate claim to compensation.
Concluding remarks

As I see it, this dissertation makes two important contributions to information studies and information policy. The first, and most important, is that it offers a pluralistic and contextual framework for understanding intellectual goods and intellectual property. Given the increasing importance of intellectual goods in both the global economy and individual lives, having a better understanding of how we think about access to and control over intellectual goods is no small matter. Yet I think that the dissertation also contributes to broader debates about the aims of public policy more generally, pointing out the limitations of purely consequential approaches to policy, and finally, by arguing that the neo-Aristotelian version of eudaimonism that I have defended provides us with useful resources for correcting the deficiencies of those approaches.

Normative success

Throughout the dissertation, I have argued that intellectual goods are valuable for different reasons and our intellectual property schemas and policies should be sensitive to them. As suggested in the introduction, what ties the approach together is a respect for the different values involved in intellectual goods from different spheres. The norms that govern intellectual goods are typically context dependent, supplied by the social understandings of goods and the spheres from which they originate. The foregoing discussions of specific intellectual goods were offered as evidence that the eudaimonic approach to intellectual property is superior to the alternatives. Having presented the legal and policy proposals for those goods, we can now say more about whether (and why) it succeeds. In the introduction, I argued that as a work of normative cultural analysis, our inquiry takes place in the space between two extremes: ethical dogmatism and
cultural relativism. Harkening back to this point is important to understanding what I take to be the criterions for success of the theory at hand: it illustrates the importance of taking into account “our reasoned convictions” about what matters in particular circumstances.

First, such convictions should be “ours” in a very broad sense. The goal of ethical inquiry is to understand norms and values in a such a way that they apply to human beings, thus, all persons should have a stake and voice in the project. We start with social understandings of goods not because we have a fetishistic concern for _goods_, but because social understandings are held by individuals who draw on them in the building of their lives. At the same time, our convictions should be “reasoned,” as opposed to dogmatic. Convictions are dogmatic when we are not open to the possibility of our own error and closed to the possibility of new evidence or perspectives. Thus, social understandings are the starting point for the inquiry, not the whole.

I have claimed that this dissertation begins the attempt to do for intellectual property what Helen Nissenbaum’s work has done for privacy. Like Nissenbaum, I emphasize social understandings and the importance of context. Yet Nissenbaum has been particularly criticised for lack of normativity: her work relies too much on the existing social understandings that structure the norms of information flow to allow for prescriptive changes to those flows. As an example, we might point out that norms against talking about salary and compensation are apt to perpetuate inequalities in pay between the genders. Yet Nissenbaum’s approach has very little resources to say that those norms should change. On my account, we do see cases where overarching reasons, supplied by the virtues themselves, override those concerns as in the case of intangible cultural heritage. In that chapter, I argued that despite our own understanding of these
intellectual goods, the virtue of justice and the principle of righting wrongs gives us a reason to respect the social understandings of the originating communities.

In many cases, the policy solutions I have recommended are neither radical nor novel. The reasons offered for them have sometimes been presented before. This should be no surprise when an important goal of the dissertation is to “translate reasoned convictions” into policy proposals. But what this approach to intellectual property offers is a holistic way of thinking about intellectual goods and intellectual property that also supplies resources to think about how those should evolve in the future.

**Eudaimonism and consequentialism in policy**

Public policy has been dominated by a purely consequentialist understanding of what policy aims to do—namely, bring about good consequences. In a loose sense, it would be wrong to say otherwise. Eudaimonism is a non-consequentialist view only because it argues that good consequences are not always the best way to capture what is important about ethics. I think this is best evident in the work Bernard Williams. Williams’ arguments are directed towards utilitarianism specifically, yet can be applied to consequentialism generally. Williams thinks that utilitarianism cannot accommodate the idea that each of us is specially responsible for what he does, rather than for what others do (1976). In particular, utilitarianism cannot make proper sense of the relationship between an individual and her projects and actions. He notes that utilitarianism accepts that if I am ever responsible for anything, then I must be just as much responsible for things that I allow or fail to prevent as I am for things that I myself bring about. The point here is that ‘It’s me’ can never by itself be a morally comprehensible reason. This applies not just to utilitarianism, but most consequentialist theories as well.
Williams begins by asking us to consider what sorts of projects the utilitarian has. At the highest level, the utilitarian is involved in the maximization of happiness. But we can also ask what else the utilitarian is involved in, that is, what other projects he or she has. An obvious utilitarian answer is that he or she pursues her own happiness. But, in pursuing her own happiness, she is not only pursuing their happiness: instead, pursuing her own happiness will involve projects and commitments, some of which may involve the promotion of impersonal values that she finds important. Looking back, however, at her higher-order project of maximizing happiness and her acceptance of negative responsibility, we see that utilitarianism is not able to lend adequate weight to the fact that these are her projects and her actions. This is because at the highest level, the level of maximizing happiness or producing good consequences, she is merely an “agent of the satisfaction system:” her decisions are a function of all the satisfactions or good consequences that she can effect from where she is. What Williams finds problematic about this is that her decisions are, to a great extent, determined by the projects of others. The point is that intuitively, we should not be thought of as channels between a nexus or system of everyone’s projects and some optimal outcome. This is to miss that we are identified with our projects, commitments, and relationships; these are what our lives are about. Thinking of persons as channels alienates them from their actions and the source of their convictions.

That is not to say that good consequences are never important. In fact, I think that thinking about the consequences of a policy is perhaps the most important aspect of creating successful public policy. But as I argued in chapter four, consequentialists need better resources to determine what counts as a good consequence in a given situation and must be supplemented
with rich accounts of personhood--persons are agents with their own lives to lead, not channels for producing good consequences.

I have argued that eudaimonism leverages context and the virtues to identify the relevant values and outcomes in a given circumstance. The eudaimonic approach to social policy that I have presented offers a rich normative framework with accounts of a good life for an individual and the requirements of virtue. At the same time, the theory emphasizes plural values and the importance of context, maintaining its advantages over the alternative approaches to policy that do not lend adequate weight to different understandings of goods. As a result, it is worth thinking about other areas of normative inquiry in technology and information may benefit from eudaimonic treatment. It’s my hope that this dissertation sparks future research in this area.
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