

PANEL 1**AUTONOMY, SOCIAL SELVES, AND INTELLECTUAL PROPERTY CLAIMS**

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Providing a normative framework for evaluating intellectual property claims, let alone one that attempts to make sense of existing national and international laws, is a daunting task. No such general attempt at doing so will be made here, especially since my interaction with this topic, compared with the experts here, is relatively limited.¹ So my comments will be provisional and piecemeal. But my intention is to trace out, in some detail the meaning and implications of what I view as a powerful normative lens through which to view intellectual property (IP) claims, that of individual autonomy.

Clearly, until recently the dominant mode of analysis of IP has been the study of incentives, utilizing as a background framework either a broadly utilitarian model or more specifically a wealth maximization standard.² However, other commentators have advanced considerations that deviate from these strict instrumentalist justifications, including Lockean (labor-based) arguments, claims based on personality theory and self-expression, connections to democracy and participation, and consideration of broader social goals (for an overview, see Fisher 2001).

One consideration that has gotten relatively less attention, but which crisscrosses a number of those just mentioned is the evaluation of IP based on considerations of autonomy. Although hardly unexamined in this literature, attention to the value of autonomy, as I will unpack it here, may help tie together some of the core elements of various approaches and may well avoid some of their most glaring difficulties, though as I will suggest, its power to justify strong IP protection in some areas may be limited.

¹ In discussing "intellectual property" (IP) I am referring mainly to copyright and patent laws (along with licensing and fair-use regulations that come with them), although that category also applies to trade secrets, so-called "rights of publicity," and trademarks. I will also make mention below of rights to "geographical indicators" (GI) which is sometimes treated under this rubric.

² For an overview see Fisher 2001; for critical discussion, see, e.g., Sunder 2006.

In order to illuminate this question, I want to focus on cases where indigenous groups attempt to claim IP protection for various home grown arts and technologies, generally grouped under the term “traditional knowledge”. Specifically, I want to examine the claim that the autonomy of the group members is in peril unless IP protections are afforded. I will conclude by suggesting that considerations of autonomy alone, no matter how powerful in capturing the normative core of other arguments and approaches, provides relatively weak support for most clusters of rights and privileges allowed under many IP provisions both nationally and internationally.

I will only sketch the argument for this last point. My procedure here will be to examine the key concepts involved: first “autonomy” where I will suggest a straightforward understanding of that idea which ties it to values central to many arguments about property. In this section I will also discuss the value of autonomy, as I understand it, and propose a close connection between valuing autonomy and supporting democratic procedures; I will next spell out how the protection and promotion of autonomy for individuals is nevertheless consistent with seeing *selves* – the “self” of self-government – as fundamentally *social*, and in this way attention to individual autonomy can motivate our focus on the survival and integrity of cultural forms of particular sorts. This point will connect with claims made by some groups for IP protections concerning intellectual products and traditional knowledge that are claimed to be central to cultural identity. In order to help build a connection between the value of autonomy and IP claims, it will be necessary to unpack the components of ownership in order to make as clear as possible the general links between property ownership in general and the protection of autonomy. I do this in Section IV. I will then return, in closing, to arguments defending IP claims by culturally defined groups based on the value of autonomy; in that discussion, I hope to show how considerations of autonomy might illuminate discussion of IP in some sectors but would provide less support than some have alleged for IP claims as they are traditionally conceptualized.

II. AUTONOMY AND AUTONOMY-RELATED INTERESTS

The conception of the autonomous person plays a variety of roles in various constructions of liberal political theory. Principally, it serves as the model of the person whose perspective is used to formulate and justify political principles, as in social contract models of principles of justice (Rawls 1971, Scanlon 1998). Also (and correspondingly) it serves as the model of the *citizen* whose basic interests are reflected in those principles, such

as in the claim that basic liberties, opportunities, and other primary goods are fundamental to flourishing lives no matter what moral commitments, life plans, or other particulars of the person might obtain (Kymlicka, 1989: 10-19, Waldron, 1993: 155-6).³ It underwrites the fundamental interests of the participants in democratic regimes that secures the basic rights of such participation and, as I will discuss below, proffers validity on the outcomes of those deliberations.

That is to say, one of the cornerstones of liberal democratic theory is the fundamental value placed on individuals' capacities to be self-governing, to be free in the sense of being both independent of coercion and manipulation as well as having the ability to follow a conception of the good which is "self-authenticating", that is, that reflects a person's ability to fashion or accept a framework of value that is truly her own.⁴ However, while phrases such as "self-determination" and "individual sovereignty" are used as synonyms, nothing in the idea of autonomy as I will understand it here carries the implication that people create themselves or their values out of whole cloth (or even are always able to alter them or choose other than what they direct), nor does it imply that such individual capacities are exercised alone or out of rational self-interest.

I will discuss this last point shortly. For now, let us understand "autonomy" as self-government, specifically as the individual capacity to reflectively accept the fundamental value framework that guides her life, over time and in light of personal history, into a coherent autobiographical narrative, given the social and material conditions she faces. However it is further unpacked, autonomy here is meant as equivalent to what Rawls calls "rational autonomy" assumed in (political) liberalism, specifically the moral power of having the capacity to form and revise a conception of the good.⁵ As I will discuss presently, a more detailed conception of this ability which includes reference to an ability to reflectively accept such a conception in light of one's history and social surroundings is crucial for capturing the core of this idea as it is used in normative theory.

It sometimes makes some sense to ask about the autonomy of particular aspects of the person – what is usually called "local" autonomy. Indeed, many ways of characterizing that

³ Although he does not couch his conception of liberalism in terms of autonomy, Dworkin's view can be understood as in this category: see R. Dworkin, 2000: 237-84.

⁴ The phrase "self-authenticating" comes from Rawls (2001, 23).

⁵ See Rawls 1993, 72-81. What Rawls calls "rational autonomy", however, is what is assumed about representatives in the original position, and it is contrasted with "full autonomy" of citizens of a well-ordered society governed by principles of justice.

trait make it readily applicable to specific factors.⁶ But often it will not be possible to determine whether conditions defining autonomy are met for particular choices, or it will not be important to measure whether specific ranges of acts are autonomous separately from the agent in her entirety. For if we view autonomy as the status marker for entrance into collective deliberations in general, and the interests of gaining, maintaining and exercising autonomy as the interests represented in designing procedures for such processes, then it will be the autonomy of the person as such that is at issue.

So what matters for the social role that autonomy plays in the contexts just outlined is that the person is autonomous relative to her basic, orienting values and motivations, factors that pervasively and fundamentally motivates and guides action. That is, the fundamental structure of normative commitments and pattern of judgment is what must be “one’s own” in order for the person to be autonomous in the sense that matters here. This refers to those commitments and frameworks of judgment that ground a broad range of decisions, tastes, and actions for the agent. So while autonomy in the sense being considered here is, in a sense, local, it relates to those basic elements of our personality that are the most pervasive in guiding our deliberation, choices and actions over time. It will therefore not be untoward to call a *person* heteronomous when she lacks autonomy relative to her basic value orientation.

Attention is given to personal history in this model in ways not often emphasized in discussions of the concept.⁷ I cannot say much to defend that element here, though it rests on a conception of the self that sees both memory and considerations of one’s past (as well as reference to the future) as crucial to one’s practical identity. Models of the self that are meant to function in political principles must make room for the way in which the diachronic nature of agency figures centrally in the meaning and import of our practical identities. Being committed, for example, to certain cultural values cannot be understood without seeing that commitment as tied with an understanding of the history of my culture, or at least to *my* understanding of that history. Such considerations relate also to religious values as well as personal commitments and relations. What I claim, then, is that the capacity to reflectively

⁶ For discussion, see G. Dworkin 1990, 13-17. Diana Meyers discusses a similar point under the guise of “episodic” versus “programmatically” autonomy. See Meyers 1990, 48-49. For a view similar to the position I take in the text, see Friedman 2003, Chapter 1.

⁷ My own version of the historical approach is worked out in Christman 2009; others who take an historical approach include Mele (1991) and Fischer and Ravizza 1998.

accept one's fundamental value commitments is an ongoing ability, exercisable over time and in light of a past history of such acceptance.⁸

Moreover, as philosophers of human action such as Michael Bratman and others have argued, human agency must be understood as operating through *plans* and *projects* (rather than independent discreet choices) whose function operates over time and with the aid of memory and diachronically interconnected decisions (see Bratman 1987, 2007). This requirement, that autonomy involves self-acceptance over time, also helps secure what has been called the "agential status" of autonomous choices -- the validity-conferring nature of the judgments that autonomous action involve.

To sum up, then, autonomy as I conceive it involves the capacity to reflectively accept one's fundamental value commitments as part of a temporally extended personal narrative in light of one's social and material conditions. This last phrase -- "in light of one's...conditions" -- refers to the fact that while autonomy is often contrasted with negative conceptions of freedom, and so involves internal capacities to think and judge rather than opportunities to *act*, one can nevertheless lose one's autonomy because of ongoing social conditions that prevent the full acceptance of one's value commitments over time. Some theorists have argued, in fact, that autonomy should contain specific *social* or *relational* conditions which pick out this requirement. My claim here, in contrast, is not that particular social relations are conceptually required for autonomy to obtain, but insofar as individual persons define themselves and their projects in social terms, then certain social conditions will contingently be needed for autonomy to develop and be maintained. I return to this issue below.

Autonomy-related *interests*, then, range over those conditions that allow for the development and maintenance of autonomy so-conceived. Of course basic necessities such as health, housing, education and so on will be required for the normal development of autonomy.⁹ Similarly, interests connected with the ability to reflect upon and judge one's values and alternatives to them will be similarly underwritten. Some theorists add that a minimal array of valuable *options* are required for autonomy as well, so that one has choices of life plans against which one can embrace one as one's own (Raz 1986, e.g.). I agree with

⁸ I argue, for example, that those who suffer severe anterograde amnesia -- who have lost the ability to form or retrieve long-term memories, lack a "narrative" sense of self. The distinct hindrances that such a condition places on a person -- her ability to sustain relationships for example -- connect directly to this loss. See Christman 2009, chapter 5.

⁹ These interests can be mapped onto Amartya Sen's conception of basic capabilities, in particular those connected with what he calls agency freedom. See Sen 1992 and 2001.

this view, but I reject the implication in some views that an array of open options can be objectively determined theoretically, rather than simply be a function of what will be needed by an individual given her other values and commitments.¹⁰

That is not to say, of course, that in order to be autonomous one must be *successful* in carrying out the life narrative directed by one's core values. Rather, one loses one's autonomy when sustained alienation from the conditions of one's life over a continuous period, given one's fundamental value commitments, is experienced. When the social and material conditions of one's existence (and/or the public policies and social practices of one's government or co-citizens) are such that one is not seen as a self-authenticating source of valid claims (to repeat Rawls's phrase), then one loses status as an autonomous agent.¹¹

This is also not to say that autonomy-based claims to any particular rights are absolute or even generally overriding. Many life pursuit inherently involve harm or risk, and so restriction or prohibition may well be justified even if restrictions on autonomy are involved.¹² Restrictions or prohibitions that make basic autonomy impossible or which severely restrict the range of autonomous judgment and choice should have to meet a high bar of justificatory scrutiny. For when basic autonomy is impossible for an agent or agents, they will not enjoy the status of equal participant (actually or potentially) in democratic structures. But this is also to say that respect for individual autonomy is not, by itself, definitive of basic justice; principles such as equality of status (or equal concern and respect) will also be fundamental in liberal democratic regimes.¹³

If this broad outline of individual autonomy is acceptable, it implies that agents are being denied autonomy (or full respect for autonomy) when conditions are such that they are not able to develop or sustain the reflective self-acceptance so described. If oppressive social conditions systematically denigrate or suppress any expression of values by which a person

¹⁰ Raz's view appears to have this implication (see Raz, 1986, 373-78), though he denies it (*ibid*, 410-11). See also Oshana 2006, 84-86.

¹¹ This formulation elides the question of whether social *recognition* of one's status as a competent, reflective agent is (conceptually) necessary for autonomy, rather than contingently required for the internal self-acceptance I set out. This raises the issue of whether autonomy is fundamentally a "relational" rather than an individualistic concept, a question touched upon earlier. For discussion, see Oshana 2006 and Christman 2009 chapter 7.

¹² At this point it becomes obvious that the conception of autonomy at work here is one that attempts to be "value neutral" in that it does not require, as part of its defining conditions, that one's basic value commitments be morally acceptable. For discussion of this issue, see Christman 2009 chapter 7.

¹³ Rawls, for example, lists a sense of justice as the second moral power assumed in the model of the citizen living under liberal principles. See Rawls 2002.

defines herself and practical identity, then autonomy is being denied. In order to see further how legal rules might facilitate or restrict the enjoyment of autonomy so conceived, including autonomy vis a vis membership in cultural groups, we must say more about the factors that explain the value of autonomy.

The Value of Autonomy

Some theorists see autonomy or freedom as a universal value applicable across cultural lines, an objectively determined ideal that grounds liberal theory. Writers such as Kymlicka (1989) and Raz (1986), among others, have been read this way.¹⁴ Many see the basic capabilities associated with autonomy as universally required for a decent life, along with other basic needs (see Nussbaum 2001, 4-14).

Now many have balked at the idea that autonomy as it is conceived in the context of liberal democratic theory is a value across cultural horizons (see Gray 1993, Larmore 1996). An alternative approach, however, is to hold at bay the question of whether self-government, so conceived, is valuable for all persons in all cultures (or, to put it differently, an essential constituent in any flourishing life),¹⁵ and to claim that autonomy must be posited as a *political* value for regimes of a particular type, namely liberal democracies. That is, autonomy of citizens is claimed to be a fundamental value commitment in democratic structures and inherits the overall value that those structures represent.

The view of democratic justice I envision here, then, rests on an argumentative structure along the following lines: selves are, in variable ways that will be discussed below, socially constituted; this means that values are defined in terms of interaction with others, meaning that our abilities to pursue valued ends are both defined and constrained by the social dynamics in which we engage in those pursuits. Political structures and other institutions of power shape and codify those dynamics in broad and robust ways. That power is justified only if it can be seen as harmonizing with our own judgments, our perspectives about what is valuable to pursue given the fact that we live among people with contrasting values and who (like us) are products of the contingencies of history, both their own and

¹⁴ Though Kymlicka talks more of “freedom” than autonomy it is clear he refers to the concept we are discussing here – see Kymlicka 1989, 1995. Cf. also Richards 1991.

¹⁵ For discussion see Haworth 1986, Gray, 1993.

society's.¹⁶ The legitimacy of these social processes must rest, then, on the way they are controlled and produced, and only if citizen's perspectives and interests are properly represented in those processes will that legitimacy be attained.¹⁷

So only if the principles that guide and shape (and justify) those power structures that shape our social existence rest on the value of autonomous citizens will they gain the legitimacy that just institutions require. For these reasons, people's autonomy should be promoted and protected in the operations of legitimate democratic institutions.

This kind of protection will require, then, a mode of collective deliberation that allows citizen input into the processes that yield social conditions that shape those citizens' prospects. If not actual participation and deliberation, practices of these institutions must include elements that effectively represent those citizens' interests and judgments and, as an extension of this, the power to object when policies conflict with their deepest self-understandings. Democratic deliberation, then, also requires participants' abilities to reflectively endorse, indeed publically defend, the points of view, values, interests, and opinions that are the inputs to such deliberative processes (the "outputs" of which are social principles and policies). This provides further reason for the presupposition that the autonomous person is able to reflectively grasp and present her values and perspective. This accords them the kind of representational authority over those points of view but also necessitates their capacity to reflect on their values as part of the dynamic of social interchange that produces collectively justified principles. So autonomy as competent, reflective self-acceptance is central to this understanding of justice and politics.¹⁸

Such an approach to the value of autonomy is clearly posited against the backdrop of a closed and singular political regime. Below I will discuss its applicability in global, transnational contexts (in which discussions of the kinds of IP in question here take place). For now, I merely lay out the foundation for the value of autonomy as a presupposition in the collective determination of the values and opportunities of social life, a determination which, in stable democracies, is or ought to be governed by formal systems of popular sovereignty.¹⁹

¹⁶ This claim can be understood to be supported by Rawls's observations about what he called "the burdens of judgment." See Rawls 1993, 54-58. This overview of an argument connecting autonomy with collective decision making and social determination of value is inspired by Rousseau but finds contemporary resonance in work by Joshua Cohen (1996, 2002).

¹⁷ For discussion of the terms of legitimacy in this context, see Rawls 1993, Lecture IV and Habermass 1996.

¹⁸ The ideas in this section are taken in part from Christman 2009, chapter 10.

¹⁹ For a discussion of how IP rules can contribute directly to democratic practices, see Netanel 1996.

In general, then, the value of autonomy can be acknowledged as a cornerstone of basic rights and freedoms fundamental to the dignity and respect we owe to each other, either on the scale of *human* rights (and so carrying a universalist cast) or rights and freedoms operative in democratic structures.

However, to build connections between autonomy considerations, so conceived, and questions of what rights protections should be afforded for groups and communities of the sort we will discuss relative to intellectual property, we must look further at the nature of the “self” at work in the model of autonomy and self-government.

III. INDIVIDUAL AUTONOMY AND THE SOCIAL SELF

In traditional liberal theory, autonomy has been seen as a value for individuals *as such*, in that it has been understood to be important for the person in developing and exercising her conception of value apart from social ties and any particular communal membership. This implication, however, is now famously rejected by both critics and defenders of liberal theory, and approaches to autonomy have been expanded to take into account the communal and social nature of many value endeavors and practical identities.²⁰

Of course, seeing autonomy as an individual capacity – and hence seeing the rights and protections required by it as attaching to individuals – is perfectly compatible with acknowledging that agents themselves must be seen as *socially constituted*. In fact, I will argue below that support for certain social structures and relations will be necessary to support autonomy (in ways that have implications for property law), but that will be based on the contingent claim that such relations are necessary for certain *selves* to maintain their own autonomy, *as individuals*. In order to see this, we must look more closely at the idea that the “self” of self-government is fundamentally relational in its identifying conditions.²¹

As I mentioned, the “self” in this discussion represents the model of the person whose perspective serves as the ground for legitimacy of political institutions under the broad assumptions of popular sovereignty, and whose projected interests determine the general content of social good that provides the *telos* for the principles that guide such institutions (for example, as in a constitution). To say that such a self is “socially constituted” is to refer

²⁰ For the claim that standard liberal conceptions of justice detach the autonomous person from communal ties, see Sandel 1982. For a response see Kymlicka 1989; cf. also Taylor 1991.

²¹ For overviews of these issues, see Barclay 2000, Sher 1997, Wong 1988, and Crittenden 1992.

to ways in which relations to other persons, traditions, institutions, practices and so on are an ineliminable part of the defining conditions of such a subject. 22

It will be useful, however, to at least list the different dimensions along which this sociality can be understood to operate. As a broad metaphysical thesis, for example, the social model of the self includes the specification that dynamic relations external to the (physical) person are essential to an established subjectivity of any sort. Hegelian models of the development of subjectivity by way of the interplay of desire and recognition exemplify such an approach. Such views are metaphysical in the sense of determining at an ontological level the essential elements of personhood, without which a self would not maintain a stable identity.

This Hegelian model has also produced more naturalized versions as well, where dynamics of recognition and the construction of the self-concept are seen as contingent elements of (say) modern selves, rather than ontological conditions of the person as such.²³ Here also the view is that fundamental to the structure of our self concept is the interpersonal interaction with significant others whose recognition of our subjectivity, under a description that captures our most (psychologically) fundamental commitments and values, is central to our self-understanding.

Additionally, models of the social self have been developed by way of a philosophy of language, according to which the discursive structure of thought generally and self-conception in particular is both the product of and shaped by past and present social relations. This approach has been expressed recently by Charles Taylor:

The general feature of human life that I want to evoke is its fundamentally *dialogical* character. We become full human agents, capable of understanding ourselves, and hence of defining an identity through our acquisition of rich human languages of expression. [This is to] take 'language' in the broad sense, covering not only the words we speak but also other modes of expression whereby we define ourselves, including the 'languages' of art, of gesture, of love, and the like. But we are inducted into these exchanges with others. No one acquires the languages needed for self-definition on their own. We are introduced to them through exchanges with others who matter to us -- what George Herbert Mead called 'significant others'.²⁴

²² See Taylor 1979, 157; for discussion of this issue See Kymlicka 1989, 51.

²³ An example of such an approach can be found in Honneth 1995.

²⁴ Taylor 1991, pp. 32-33.

The social element here is clear, though the dynamic by which the language of the self is internalized can vary, and need not mirror the naturalistic social-psychology of Mead. Dynamics of recognition, the structure of communication, the dialectics of self-realization, all describe alternative understandings of *how* socially structured meanings become constructive elements of the self-concept.²⁵

An important issue in all these models concerns the level of *generality* at which the elements of the self – the social elements that are claimed to be internalized in our self-conceptions – are seen to operate. For example, Taylor refers to “languages” in a broad sense of including natural languages like French or English but also larger symbiotic matrices, including artistic, cultural, and habitual conveyors of meaning. What matters here is whether those systems of meaning referred to are so broad that there is no conceivable standpoint outside of them (for example, language of any sort *per se*), or a more specific, organized system which interacts with competing matrices in cultural encounters, carrying with it specific value perspectives.

Also, models of the social self that refer to the internalization of symbolic forms such as languages allow for the possibility that the meanings attached to the components of those forms are subject to public determination and revision. Insofar as linguistic elements are internalized to form a social self-concept, as these models imply, and linguistic systems bear meaning as a function of public consideration (patterns of speech acts, official dictionaries, public discussion of meaning and connotation), then social selves will be constituted by revisable, and publicly discussed elements.

In seeing the languages that constitute our self concepts as more than merely natural languages but the broad array of semiotic expressions of meaning, we can note the close connection between such a “dialogic” conception of the self and cultural practices, symbols, and rituals. Self-understanding, on this view, establishes itself in terms defined by value systems that, in turn, gain their meaning by way of shared practices, memory, tradition, and horizons of value. Cultural forms in particular, in most cases, will be the prominent mode by which such symbol systems find their meaning.²⁶

We must also keep in mind synchronic versus diachronic contrasts here. Clearly it is one thing to point out how relations with significant others, mediated by language, causally

²⁵ These alternative views are reflected in the work of Honneth (1996), Habermas (1996), and Hegel respectively. And of course there is overlap among them as well.

²⁶ For an anthropological analysis of this issue, see Holland, et. al. 1998, chapter 8.

produces (adult) selves, but it is quite another to say that we, here and now, are who we are (essentially) by virtue of current and ongoing external relations. This latter point is the crucial one, because it raises another (and indeed also separate) question about what social structures must be maintained, and how, in order for selves to continue to exist, act, flourish, and so on. Language is a clear and much discussed example, where having significant numbers of co-speakers of a language is essential to a person's maintaining her identity and sense of herself.

Finally, it bears mentioning that approaches to the social constitution of the self often downplay the body as a site of interpersonal self-structure. Many have argued in fact that conceptions of self and autonomy, especially those arising from the Cartesian tradition of locating the essence of the self in the thinking "I", have systematically downplayed our embodied identities and the ways that bodily comportment, expression, and identity ground the self as much as if not more than our cognitive and reflective functioning.²⁷ The social inscriptions that mark bodies as of this or that kind, as well templates of interpretation for this or that bodily gesture, mode of comportment, appearance, and so on, show how social dynamics form and construct the bodies that are ourselves in traceable ways.²⁸

A fuller survey of the varieties of the social self thesis would include other dimensions along which this social structuring takes place. Some examples include: what object-relations theory tells us about sub-conscious internalization of the source of care in processes of psychological self-development; the way that emotions reflect both interpersonal relations of care and vulnerability as well as publicly structured expectations; the manner in which values and commitments that define the self depend on social meanings, roles, traditions, and other structures; and so on. It should be clear, though, how this understanding of the social self relates to the model of autonomy set out above. Insofar as social practices, rituals, public expressions, and shared beliefs are constitutively related to the person's conception of herself, then to be self-governing is for those practices, etc., to be allowed to flourish (or at least survive). A person lacks autonomy if she is unable to reflectively accept her core value orientation in the midst of social conditions that do not reflect its

²⁷ See, e.g., Meyers 2005. This, of course, echoes concerns by feminists and other theorists who emphasize bodily identity in conceptualizing the subject. See, e.g., Butler 1990.

²⁸ I should note, however, that emphasizing the body in this way as the locus of the self may well have to give way to the importance of reflective evaluation of aspects of our embodiment insofar as self-representation occurs in contexts of interpersonal exchange/

meaningfulness, or at least social conditions that allow for the acknowledgment of the value it has for her.²⁹

We will return to this idea when discussing IP claims for cultural groups. To set the stage for such a discussion, however, it will be necessary to make clear the nature of property claims in general and their relation to autonomy interests in particular, a task to which we turn next.

IV. AUTONOMY AND THE COMPLEXITY OF OWNERSHIP

It is hardly necessary here to reiterate the ways that any property claim includes some subset of the standard Hohfeldian bundle of rights, liberties, powers, and so on, associated with what has been called “full liberal ownership.”³⁰ Such incidents include rights to use, possess, manage, alienate, and rights to income from transfers. IP rules, of course, include limited monopoly rights to use, alienate, sell the idea or expression (or trade mark, etc.) in question. In all such cases, there is a variable array of legal rights, liberties, powers, liabilities and immunities that attach to ownership claims.

In earlier work I analyzed the concept of ownership in terms of the interests the different elements of the typical property rights package tend to protect.³¹ I suggested that some rights in the cluster that typically defines ownership are particularly closely tied to the ability of persons to guide their lives in predictable ways and to maintain levels of control and reasonable expectations needed to make plans, pursue values, and independently coordinate with others (associated with what I labeled “autonomy interests”). Rights to possess, use, modify, alienate and destroy one’s holdings cluster together to express an owner’s ability to

²⁹ A poignant case of such a loss can be seen in a recent study by Jonathan Lear who discusses the case of the last great chief of the Crow Indian tribe in the U.S., one Plenty Coups, who said of the, by then past, way of life of his tribe: “...when the buffalo went away the hearts of my people fell to the ground... After this nothing happened.” Lear interprets this as expressing a complete loss of moral orientation, a loss of meaningfulness in the core terms of evaluation and value in Plenty Coups’ practical identity, so that his sense of history and progress came to an end (“After this nothing happened”) (Lear 2008). What the story implies is that when social practices central to one’s sense of moral value, and the ritualistic, religious, and cultural expressions of the values inherent in those practices, have been eradicated, then one cannot, as an individual, continue to find and follow a conception of the good as one’s own. Protecting a collective sense of shared value and social practice, then, will often be required for the ongoing enjoyment of individual autonomy for members of such social groups.

³⁰ For analysis, see Honore 1961, Becker 1981, Waldron 1988, Munzer 1990, and Christman 1994a.

³¹ Christman 1994a Part III; for development and clarification of this view, see Christman 1994b

manage her life independently, the value of which, I claimed, connects directly to individual autonomy. I called such rights *control rights*.

On the other hand, the rights to transfer and retain goods received in that transfer, at rates set by the voluntary actions of the traders given constraints of the market, I labeled *income rights*. I claimed that such rights are not directly tied to one's autonomy except instrumentally, in that income simply allows one further choice about future use and purchases. But the interests in question are strictly competitive, in that for any given flow of income, one's interest is the same as any other person's, for income generally is in the form of currency or capital. This is not to say that interests in income are negligible or should be ignored, but only that there is no autonomy-related interest to any *particular* bit of income any more than any other. Subject to diminishing marginal returns, one simply has an interest in more of it rather than less.

The fundamental claim being defended here is that in the bundle of rights, liberties, powers, liabilities, and so on associated with ownership in various social settings, some elements tend much more closely and directly to enable the person to exercise autonomy and self-direction than do others. The latter include rights to transfer and receive income from trades subject to surrounding regulation, market conditions, and a variety of other factors. These rights protect general welfare interests that at best instrumentally promote autonomy, but only insofar as they increase holdings overall.

Control rights, by contrast, connect the person or persons to *particular* goods, space, and resources.³² The possession and exercise of such rights have been shown to have psychological affects tied to senses of self-efficacy, self-definition, and self-expression. In addition to affording persons with control over their environment and hence enabling them to coordinate plans and pursue goals, control rights over certain kinds of goods also can serve an expressive and symbolic function for persons. Some social psychological research has attempted to establish a systematic connection between possession and one's sense of self.³³ Others have argued that certain kinds of possessions express and constitute a person's concept of herself, her memories, and her values, while other sorts of goods are purely fungible and are valued solely for their market value. As Margaret Jane Radin has put this

³² It should be noted that one has control rights over one's money, though the interests protected in that case are also purely instrumental in the way just described (except for coin collectors).

³³ See, e.g., Furby 1991. It should be noted that this relation is not unwavering and indeed may vary with such things as gender and age: see Dittmar 1991.

point: this “perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement.”³⁴

While Radin makes this distinction in terms of different kinds of things one can own, I am here stressing the different interests protected by separate clusters of property rights in general, independent of the object of such rights.³⁵ What I am suggesting here is that the control rights one enjoys over material goods, especially certain types of goods that are closely connected to the exercise and enjoyment of one’s basic values, tends to strongly correlate with interests in self-definition, self-control, and the other conditions central to the idea of autonomy. We can put the idea this way: when it comes to controlling an asset, it will often make sense to claim “I need to control this asset to maintain my autonomy”, while it will not make sense to claim “I need income from *this* asset to maintain my autonomy.” In the latter case, one may well need income *per se*, but not from any particular holding, but in many cases controlling a particular good or asset will be crucial for developing and/or maintaining autonomy.

The upshot of this analysis is, generally, to shift the burden of justification for income rights – which in large part involves setting policy concerning market regulations, taxation, wage and price controls, etc. – to questions concerning overall consequences and distributive effects. I make no defense of any particular approach to those issues, except to say that concern for autonomy does not reach them, except indirectly, by way of ownership claims.³⁶ We will see that this has interesting implications for the evaluation of IP claims in some cases, a topic to which we should now turn.

V. AUTONOMY AND INTELLECTUAL PROPERTY

Understanding IP claims through the lens of the value of autonomy cuts across two traditional approaches to the justification of IP: Lockean natural rights arguments and Hegelian claims based on positive freedom and self-expression.³⁷ The connection between

³⁴ Radin 1982, 1993.

³⁵ For discussion of Radin’s views, see Munzer 1994 and 1999.

³⁶ The view described in this section has been further defended in Christman 1994b. Criticisms of it can be found in Attas 2006.

³⁷ For an overview of approaches to IP see Fisher 2001; discussion of Lockean justifications for property generally can be found in Munzer 1990, Becker 1981, Christman 1994a, and Waldron 1988. For critical discussions of Lockean approaches to IP, see Gordon 1989, Attas 2008, and Shiffrin 2001.

Lockean rights and autonomy may not be so obvious, and I can only gesture at it here, but it rests in the view that what makes the particular rights typically listed in natural rights views *cohere* is that they are needed to protect the individual integrity of the person and her ability to lead an independent and worthwhile life. Nozick puts the point this way: In answering the question of why the particular view of rights as absolute side constraints he favors should be adopted, he answers:

I conjecture that the answer is connected with that elusive and difficult notion: the meaning of life. A person's shaping his life in accordance with some overall plan is his way of giving meaning to his life; only a being with a capacity to so shape his life can have or strive for meaningful life. (Nozick 1974, 50)

This capacity to shape a life in accordance with an overall plan is strikingly similar to the idea of autonomy I describe here, though there is no requirement in my view that the acceptance of one's basic value commitments underwrite an "overall *plan*" or that they are seen by the person as shaped *by her*: they may merely be accepted gladly as objectively right or given by God or the like.

In a Hegelian register, theorists have argued that the fundamental interest we have in making our will effective in the world involves the expansion of our subjectivity to encompass what is external to us, the ability to make objects our own in a manner guided by reason (see Taylor 1979). The relation between Hegel's notion of *Geist*, positive freedom, and autonomy will have to remain impressionistic here, but I think it can be safely suggested that the capacity to reflectively accept one's value framework as a guide to one's choices and judgments – one's movement through the world – is a very close cousin of Hegelian freedom.³⁸

In both cases, it is relevant to ask how the interests connected with individual autonomy could be used to evaluate certain IP rules. The question becomes, then, are IP rights required for persons to continue to reflectively accept the fundamental values that guide their lives without alienation, given the social condition in which those values are pursued.

One clear manner in which claims such as copyright protection and other forms of IP might be necessary to guard autonomy interests are when monopoly rights over use and dissemination are necessary to protect the author or artist's *identification with the product*,

³⁸ For discussion of the core notion of positive freedom see, e.g., Christman 2005.

when, in turn, such identification is central to the value of the creative enterprise for the author.³⁹ Often when the life project and guiding values of a person's life are intertwined with certain forms of expression – Picasso's paintings, Wagner's operas, Joni Mitchell's music – simple requirements of source acknowledgment may not be enough. Unless the artist maintains control over the form of expression the person's life work ceases to have the form he or she invested into it.

I will not pursue avenues of this sort here. Rather, I will now turn to arguments for IP that are parallel to these considerations, namely ones that locate the autonomy interests that motivate calls for such legal claims in the cultural practices of communities.

IP Claims for Cultural Products

In order to give some further flesh to the normative skeleton sketched here linking autonomy interests with IP claims, I will now consider one attempt to follow this very path concerning indigenous groups to IP over traditional knowledge and artistry. In this way, we can see in broad terms both the promise and the limitations of such normative strategies.

The phenomenon of expropriation of locally developed technological and artistic knowledge is both widespread and controversial. Indigenous communities in particular have often been the target of such allegedly exploitative extraction of intellectual and artistic products, from plant strains used by pharmaceutical companies to musical and artistic forms to DNA sequences.⁴⁰ For example, Tsosie discusses claims by Native American groups to use legal remedies to control the use and dissemination of traditional tribal symbols, rituals, artifacts and stories. As she points out, "amendments to the Indian Arts and Crafts Act attempt to prevent non-Indians [in the U.S.] from marketing copies of Native art forms (such as Navajo rugs or 'squash blossom' necklaces) as 'Indian art.'" (Tsosie 2002, 299)

A variety of harms can be delineated that ensue from external appropriation of indigenous art and knowledge, but it is relevant here to specify the connection that must be drawn between claims for IP protections and autonomy interests. As I have argued, it must be claimed that without the establishment of the rights package in question, the ongoing

³⁹ As Rubinfeld puts it regarding free expression, "art is protected because it is the apogee of self-expression and self-determination. Expressing oneself in 'writing, pictures and music' can be central to 'a mature person's' 'autonomous self-determination.'" (Rubinfeld 2002, 33-34, quoting David A.J. Richards, "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment", 123 *U. Pa. L. Rev.* 45, 62 (1974).)

⁴⁰ For general discussion, see, e.g., Greaves 1995, and Pogge 2002, chapter 9.

ability of members of communities of this sort to reflectively accept (without alienation) the value framework that guides their lives and meaningfully pursue those values in the current social setting will be substantially denied. The reference to culture, then, relates to the claim that without the legal protections, the cultural practices that allow the meaningful pursuit of basic values would be eradicated or severely denigrated, making, in turn, the reflective acceptance of the life narrative defined by those basic values severely curtailed.

To trace out the import of such an approach, let us look at one sustained attempt to follow it. Stenson and Gray have developed what they call an “autonomy-based justification” for IP claims on the part of indigenous communities over traditional knowledge, technologies, art forms and geographical indicators. They describe how such resources have, notoriously, been systematically expropriated by richer and more powerful corporate and state actors in cases where originating communities have been left poorly compensated and where the identification of the community with the products they produced is often removed or completely decimated of its cultural meaning.⁴¹

Now Stenson and Gray reject Lockean “entitlement” arguments for IP over traditional knowledge by indigenous groups on the grounds that, among other things, product designs and artifacts and traditional knowledge generally, is not the product of single individuals laboring on previously unowned material, a requirement of Lockean justifications. Rather they are communal products developed incrementally and cooperatively over generations.

They turn, then, to autonomy, and make use of Kymlicka’s claim that respect for autonomy requires provisions that help maintain cultural practices. As Kymlicka argues:

Liberals should be concerned with the fate of cultural structures, not because they have some moral status of their own, but because it’s only through having a rich and secure cultural structure that people can become aware, in a vivid way, of the options available to them, and intelligently examine their value.” (Kymlicka 1995, 165)

Respect for the ability of individuals who define their values with reference to cultural identity requires, they argue, legal provisions that allow for the continued flourishing of cultural practices.

⁴¹ See, for example, Greaves 1995. Stenson and Gray quote Greaves: “When a Hopi man or woman walks down a Tuscon street and sees the mythic symbol, handed down from the elders, adorning a tourist’s jogging shorts, culture dies a little...” (185). See also Raustiala and Munzer 2007.

Before turning to the connection they make between this argument and IP, let me comment on the difference between Kymlicka's approach to cultural protection and the one drawn out in this paper. In his argument, Kymlicka describes what he calls a "societal culture" which is meant to exemplify the connection between group practices and individuals' self-concept. A "societal culture," says Kymlicka, is "synonymous with 'a nation' or 'a people' – that is, as an intergenerational community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and history" (Kymlicka 1995, 18). Such cultures, Kymlicka argues give meaning to the choices and goods the pursuit of which autonomous agency (freedom) is worth protecting. On this view, freedom is valuable because it is a component of the person's pursuit of the good. Insofar as one's societal culture forms a community that defines and gives meaning to such goods, then protecting the social forms that comprise the value of those pursuits is therefore intertwined with valuing autonomy.

Now others have claimed that the strategy pursued by Kymlicka cannot support the devotion of resources to any *particular* culture, since on his analysis autonomy merely requires that one have a choice among goods in general. Insofar as freedom means being able to step back from any particular commitment and revise it in the face of social possibilities, and there are several cultural avenues and traditions I could choose in my society other than the one I grew up with (let us imagine), there is no autonomy-based argument for the survival of *my* culture in particular.⁴²

The difference is subtle but, I think, important. On the view of autonomy sketched earlier, the requirement that steps be taken to protect cultures is tied to the social nature of the *self*, not to the context of valuable choices that such selves make and, on the liberal view, should be allowed to make.⁴³ As I spelled out in Section III, the connection between autonomy and culture does not rest on the ways that culture enriches the particular goods that people might pursue. Rather it defines the very self that engages in those pursuits themselves. The locus of agency by which we conceive and pursue our conception of the good is itself, on this view, constructed in cultural and social terms. Conditions that deny cultural forms in ways that do not allow adaptation and evolution of our self-concept do not merely rob us of a

⁴² For discussion, see Taylor 1991, Appiah 2005, 123. For an attempt to spell out criteria of social identity based on self-esteem, see Copp 2002.

⁴³ Difference with Kymlicka on this point, and more generally with various attempts by defenders of liberal theory to take into account the importance of culture in principles of justice, are discussed in Christman 2009.

particularly weighty good that we might pursue, it rather robs us of our ability to autonomously pursue values at all.⁴⁴

Returning to Stenson and Gray, they claim that concern for the protection of culture as a way of respecting autonomy supports the granting of IP rights by virtue of a three-step argument: First, cultural creations (it is claimed) are an integral part of a community's identity, and IP protections over such goods are "essential to protect individual members' capacities to lead meaningful lives." (*ibid*, 186) Second, the kinds of traditional knowledge in question – plant varieties, genetic resources, botanical knowledge, and so on – are themselves cultural creations. Third IP rights that are needed to protect the cultural identities of such communities include rights "to possession (exclusion of non-members), use and management: the right (in some circumstances) to receive an income (that is, to rent or sell rights of usage to nonmembers); and the absence of terms (the rights are in perpetuity)." But they do not include the right to alienate (sell off altogether) or the right to destroy." (186-7). This last provision is based, among other things, on the community's obligation to future generations to sustain the culture itself and to maintain control over those knowledges that help define it.

My response to this approach is to endorse the (potential) connection made between control over design and expression and other forms of intellectual products and the survival of culture that allows for the meaningful existence of individual members. Indeed, I would support this step by way of the claims about autonomy and the social self made earlier. However, it is unclear why the elements of ownership Stenson and Gray mention are specifically justified under an autonomy-based approach. It must at least be shown that IP rights are the only or best means to provide the control over practices and materials that are central to the survival of the communities in question. But as I have argued, the rights to *income* generated from markets are not generally supported by concern for autonomy, so it is unclear how that is true in this case.

Stenson and Gray argue that sale of licenses and other income-generating uses of IP rights are needed to secure the material supports that many impoverished indigenous cultures need to survive. No doubt this is the case. But that is an argument for the redistribution of income due to the (presumably) unfair economic deprivation experienced by such groups.

⁴⁴ This is to describe the extreme case of the oppressive eradication of cultural forms when people's social identities are firmly fixed within them. This is not, in general, the case even with culturally homogeneous groups, as the effects of global communication as well as internal heterogeneity of cultures themselves, allow for wide latitude within which individuals can find and interpret their own culturally shaped self-understanding. For discussion of this point, see Appiah 2005.

This is an argument from *distributive justice*, not autonomy. In other words, claims that certain disadvantaged groups should be afforded favorable terms in the regulatory schemes that govern the flow of resources could be validly made on grounds of distributive justice without making any use of IP arguments at all.⁴⁵

Stenson and Gray focus specifically on patents over plant varieties and botanical knowledge, and other writers have looked at geographical indicators, copyrights over locally created art and music, and other property-like protections of culturally connected resources.⁴⁶ Often such cases consider relatively impoverished local communities claiming protections against expropriating outsiders. The condition of such communities brings to bear considerations of global maldistribution of wealth and, with it, powers over specific bargaining agreements as well as international organizations and treaty negotiations that fix the terms of specific deals. This raises important questions about inequality and global distributive justice that IP rules could possibly be an effective instrument to facilitate. However, for the particular IP claims to find support in *autonomy* considerations, in particular ones which tie individual autonomy to cultural membership and practices in the ways I have outlined, then the argument comes up short I claim.

More generally, the following suggest themselves as requirements for making an autonomy-based claim for IP rights on the part of communities:

1. The items (designs, expressions, geographical indicators, and so on) that are the subject of IP claims must be strongly and centrally expressive of the identity and practices of cultural communities.
2. Individual members of such communities must see such practices in ways that define their own sense of self.⁴⁷

⁴⁵ This suggests, but does not strictly imply, that the argument I make here entails that IP rules should not be seen as a species of property law in the end at all, but rather a branch of regulatory policy more generally. For defense of this view of IP, see Ghosh 2008. I remain non-committal on this point, however.

⁴⁶ See, e.g. Sunder 2006 and Raustiala and Munzer, 2007.

⁴⁷ An issue that is glossed over here, but which this provision speaks to, is whether cultural practices must be seen as sedimented and homogeneous, as well as whether community leaders fairly represent the broad cultural interests of their members. The requirement state here, that members' identities must be tied to the cultural practices in question, puts tremendous weight on leaders to adequately represent their constituents. For discussion, see Sunder 2006, 323ff; I discuss this issue in general in Christman 2009, chapter 9.

3. Invocation of IP rights is required for the practices to continue in ways that allow members to avoid being alienated from the fundamental value orientations that guide their lives (to maintain their individual autonomy).

In my comments about material property, in particular the distinction between control and income interests, I have cast some doubt about the direct connection between autonomy and income rights, in that claims to income flows, while generally beneficial in ways that raise questions of distributive fairness, are not directly required by the exercise of autonomy in general. For IP claims, the question is whether provisions for the possession, exclusive use, and alienation rights must be tied to claims over incomes (from licensing agreements, etc.) that typically come with IP rights packages. My suggestion is that income levels in agreements over licensing fees should be determined by consideration of overall social effects, including distributive effects, rather than the autonomy-based claims of their creators. The basis of this claim is the view that market-determined prices and bargaining position in competing in such markets, are not simple extensions of the autonomous actions of creators or possessors but depend on numerous factors external to their control, such as barriers to entry faced by others, transaction costs, externalities and other market imperfections.

A brief intuitive argument may help to motivate this last point. Imagine that a small tribe in a developing country claimed and was awarded patents on medically valuable plants, say, and such plants became crucial to the development of a life-saving treatment much in demand in the rest of the world. Consider next that the licensing agreements negotiated by the tribe's leaders led to enormous wealth concentration for the tribe over a period of years. If a proposal were then raised that the licensing agreements should be renegotiated so that income flows from the plants should be redirected to, say, other still impoverished indigenous tribes in nearby areas, could an argument then be made that the *culture* and culturally-related autonomy of the members of the enriched tribe was really in peril if the income were reduced or redirected? I doubt that claims of injustice would get much of a hearing in such a case, at least not one based on the autonomy interests of the first group.

Of course, claims to the income from trade or licensing of IP may well be inseparable from the value of holding the IP rights themselves. Enjoying monopoly rights on use, for example, may just *mean* controlling, through licensing contracts, the distribution of copies or other instantiations of the protected intellectual product. However, the claim to *market generated income* is not, I am arguing, grounded in the autonomy interests in question. Such a claim must take directly into account the larger distributive effects of its protection and

exercise (and indeed, in the end, be derived from consideration of such effects). Therefore, restrictions on licensing fees in various forms and degrees will in many cases leave untouched the autonomy of the holders of the IP, as long as the use and publication of the product can be controlled by the creator in ways that are consistent with continued autonomy.

But this certainly does not show that IP claims and other agreements favorable to (still) impoverished and vulnerable communities are *not* required to redress historical and ongoing injustices. It is merely to say that such claims and agreements are justified by virtue of broader distributive issues rather than claims of culturally defined autonomy of the originators. Exploitation of indigenous groups is clearly unjust, and granting either IP protections or (in the other direction) compulsory licensing rights may well be the best remedy for such injustice. But the remedy is not, I submit based on autonomy *per se*.

VI. CONCLUSION

It is true that various writers have mentioned autonomy in their discussions of IP claims (though to my knowledge none have explicated that notion in exactly the manner presented here). For example, Sunder conducts a detailed analysis of what could be called a “socio-cultural” account of IP arguments, where attention is paid to the need to protect the integrity of cultural production and to guard against vulnerability to various forms of exploitation (Sunder 2006). In that analysis, Sunder acknowledges that “we develop our autonomous selves through and within a cultural discourse” (*ibid*, 320). It is further recognized that that cultural misrepresentation is a form of dispossession with grave consequences for individual and communal well being (*ibid*, 322).

This has much in common with the approach taken here (though I note, in passing, that in the list of values that should be promoted by IP law, Sunder lists “autonomy” *separately* from “culture”. On my view, social considerations concerning cultural integrity and community identity will often be inseparable from questions of self-government.)⁴⁸

One potential limitation to my approach needs to be mentioned: Insofar as respect for autonomy functions as a value framework with which IP claims are evaluated, and controversies over such claims are often transnational in nature (that is, one is referring not merely to domestic statutes but international law), then the framework applies only if

⁴⁸ Putting things this way illustrates how this approach has much in common with what is called the “social relations” approach to the justification of property (a framework embraced also by Sunder). For discussion, see Munzer 2001.

autonomy is seen as a trans-national, if not universal, value. I cast some doubt on that position earlier, or at least I contrasted it with the democracy-based (or, in Rawls's language "political") argument for the value of autonomy. If the skepticism about the universal value of autonomy is widely shared, it might appear that this mode of analysis applied to these areas is wrong-headed from the start.

My only comment is that trans-national negotiation over IP and other trade policies can (and I would claim ought to) take the form of collective deliberation among associations representing affected parties with systems of fair representation in operation. Although such negotiations are often piecemeal and partial, cultural groups can be represented in ways similar to citizen groups in domestic settings. Establishing and maintaining the autonomy of such groups, then, would be called for by way of establishing the legitimacy of such collective decisions and the validity of their outcomes. Therefore, protecting the autonomy of community members will be valuable for reasons analogous to the context of domestic democratic institutions.

What I have attempted here is to offer a relatively detailed explication of the concept of autonomy so that claims of this sort might be fleshed out and further defended. In order for legal claims to gain support for considerations of autonomy by way of concern for cultural values, it must be shown both how individual autonomy connects with those cultural forms and, further, how the legal provisions in questions are necessary to meet those cultural concerns in ways that directly impact autonomy. I tried to argue, specifically, that such defense of IP claims must meet the rather high bar of showing that denial of those kinds of rights would lead to the erosion of cultural practices to an extent threatening to autonomy. Moreover, however, I tried to suggest that autonomy concerns do not reach what for many is the central component of such rights packages, namely monopoly rights to income flows from market transactions. Rather, I argued that attempts to allow impoverished groups to secure rights to resources necessary for their survival raised broader questions of distributive justice, ones which bear on issues other than the autonomy of the group members themselves. And while I underscored the weakness of autonomy arguments used for this purpose, I in no way want to imply that using autonomy to measure the strength of IP claims generally is not useful, as it may very well be, nor that claims of redress by exploited communities of the sort we alluded to here are not without merit, as they surely are. But sorting out which argumentative box a particular set of claims belongs in is often a valuable lesson to be learned in social and legal theory.

This is clearly a work of political philosophy, not legal analysis. I have made no attempt at analyzing or evaluating in any detail current law, nor have I framed the analysis in a way that provides direct recommendations to courts or grounds for critique of past legal decisions. However, I have attempted to provide (at least a prolegomena for) a framework that may help guide normative debate about legal decisions, in particular by arguing that concern for at least one fundamental democratic value – individual autonomy – has implications for property law that may lead in some surprising directions. What I hope to have accomplished, at least, is to carve out a path for the analysis of IP claims based on what for many theorists of liberal democratic thought is a fundamental value. And while that path may get us some way down the road to justifying claims such as IP rights for indigenous peoples in some form, it does not, by itself, get us all the way to traditional rights of patent or copyright (for example) that would carry with them unlimited rights to market income. To support such claims, we must look elsewhere, specifically to considerations of global distributive justice.

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