MALA CHATTERJEE

RESEARCH AGENDA

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My research interests, legally and philosophically, concern information. In particular, I explore the philosophical questions – both normative and conceptual in nature – surrounding legal systems that structure our relationships with and rights in information, broadly construed. This includes questions of intellectual property, technology, privacy/defamation, and speech. I am especially interested in questions arising in virtue of the law's need to consistently adapt to a changing world, and which thus force us to return to first principles in order to determine how the future of law should look.

My interdisciplinary training and experience in ***philosophy*** (BA, Stanford University; PhD, NYU Department of Philosophy, expected 2021), ***law*** (JD, *summa cum laude* as Furman Academic Scholar, NYU School of Law; law clerk for the Honorable Robert D. Sack on the 2nd Circuit Court of Appeals; research assistantships with NYU Law faculty; and summer work with Durie Tangri LLP and Davis Polk & Wardwell LLP), and ***information/technology*** (undergraduate work at Stanford University in symbolic systems; graduate work in information/technology law and ethics; and fellowships at NYU School of Law's Engelberg Center for Innovation Law & Policy and Yale Law School's Information Society Project) make me uniquely well-positioned to pursue this research agenda.

My current projects fall into three categories**: 1)** ***Intellectual Property & Lockean Theory****;* **2)** ***Normative & Conceptual Analyses of Information****;* and **3)** ***The Intersection of Technology, Philosophy, and Law***. I elaborate on each – as well as the projects classified therein – in the following sections.

INTELLECTUAL PROPERTY & LOCKEAN THEORY:

Though there is centuries of philosophical literature exploring theories of property, philosophers have remained largely absent in theorizing on intellectual property. But the metaphysical differences between physical and intellectual objects – such as that the latter but not the former is *non-rivalrous* and *non-excludable* – raise a distinct class of philosophical questions with normative implications of their own, and such that philosophical work on property rights cannot simply be unreflectively applied to the case of intellectual property. Thus, in a series of projects, I explore this distinct class of questions and implications within the framework of what is likely the most well-known (and controversial) philosophical theory of property rights: Lockean labor theory. In so doing, I 1) outline a number of important and surprising normative distinctions between copyrights, patent rights, and property rights, and 2) ultimately defend what I call a Lockean theory of copyright alone, one that avoids problems faced by such a theory of property or patents, and which requires existing copyright doctrine to be revised in a number of ways. I summarize these projects below.

1. ***Lockean Copyright vs. Lockean Property,*** 11 JOURNAL OF LEGAL ANALYSIS (forthcoming 2019) (peer reviewed).

John Locke's labor theory of property remains the most persistent and well-known of property theories; but it has also been repeatedly and compellingly challenged by philosophers for hundreds of years. Nonetheless, in recent decades, a number of legal scholars have sought to connect Lockean theory to the question of what justifies intellectual property rights, all while largely ignoring these philosophical critiques, or their implications when applied to intellectual rather than physical objects. Philosophers, on the other hand – though they have spent centuries theorizing about property - have remained almost entirely absent in the debate surrounding intellectual property's theoretical foundations. Those philosophers who have criticized Lockean property theory have thus not asked whether the otherwise resilient Lockean intuition might be salvaged in the domain of copyright, or whether a Lockean theory of the latter might avoid the problems faced by Lockean property while retaining the theory's intuitive appeal. The normative questions surrounding Lockean copyright theory, though increasingly of scholarly interest, thereby remain largely unanswered by the existing efforts of scholars.

Going against the state of legal and philosophical discourse and bridging an important dialectical gap between the two, the present Article defends the view that a Lockean copyright theory is in fact far more plausible than the Lockean theory of property, for it avoids the most devastating objections that Locke's property theory has been faced with. In other words, this Article demonstrates that theorists who reject Lockean property theory must nevertheless take Lockean copyright theory seriously, as well as that those who accept Lockean property theory should pay more attention to Lockean copyright than they have to date. In so doing, this Article also demonstrates the doctrinal and practical significance of this theoretical conclusion: for if a Lockean copyright emerges as favorable, then it perhaps has profound and surprising implications for our thinking about the design of copyright law, in particular by requiring copyright grants to be far more limited than they presently are under U.S. law. The Article outlines and defends three such possible revisionary doctrinal implications: namely, a) that transformative fair use is to be regarded as a robust limitation on copyrights rather than an affirmative defense to claims of infringement; b) that the derivative right is to be abolished; and c) that the moral right of integrity is to be abolished. It thereby demonstrates how the philosophical questions surrounding copyright theory and Lockean rights importantly bear on the correct scope and structure of copyright doctrine, such that they warrant more careful exploration than either legal scholars or philosophers have given them.

2. ***Intellectual Property, Independent Creation, and the Lockean Commons,*** under review.

Copyright and patent law – granting rights in very different kinds of entities, but nonetheless lumped together as "intellectual property" – are almost universally regarded as having the same theoretical underpinnings. The philosophical significance of the differences between these two areas of law thus remain almost entirely unexplored. Just one example of this tendency to theoretically unify copyrights and patents is Seana Shiffrin's *Lockean Arguments for Private Intellectual Property*, which challenges Lockean theories of IP rights. But this article argues that Shiffrin's challenge succeeds in the context of patents but not copyrights, due to significant differences between the two; and in so doing, it unearths and disentangles the philosophical implications of these distinctions between copyrights and patents – and, indeed, of distinctions within the "copyright" and "patent" bundles of rights themselves – including their numerous revisionary implications for existing law from the perspective of the Lockean framework. The article thus calls attention to intellectual property's under-explored philosophical complexity, as

well as the doctrinal and practical stakes of the questions it raises, so that we begin considering them far more carefully than they have yet been.

3. **THE FRUITS OF AUTHORSHIP: A THEORY OF COPYRIGHT**, philosophy PhD dissertation; 90,000-word monograph; book proposal in progress.

My largest current project – which culminates and expands upon the work of both of the prior articles on intellectual property and Lockean theory – is my philosophy PhD dissertation. This dissertation presents a positive philosophical analysis and normative theory of copyright law. Therein, I outline the metaphysical differences between *creative works* on the one hand versus *property* and *innovation* on the other – as well as the unique normative status of *expression*, and resultant relationship between creative works and their authors – in order to use the Lockean framework in constructing and defending a rights-based theory of copyright that 1) nonetheless avoids all the devastating objections that Locke's theory of property has been faced with, 2) dissociates copyright theory from both property and patent theory (in contrast to the received view among U.S. legal scholars that copyright and patent have the same theoretical basis), and 3) offers a more compelling justification for copyright law than any of the dominant alternative theories of copyright (including utilitarian, Kantian, and Hegelian such theories). In so doing, this dissertation presents a novel theory of authorship itself, engaging with objections raised against so-called "romantic" pictures of authorship and arguing that all such objections are either wholly compatible with my own account or ultimately indefensible. Finally, the dissertation outlines the revisionary doctrinal implications of the defended copyright theory, showcasing numerous ways in which it would require copyright law to be both more and less protective of authors than it presently is in the U.S. – due to the theory's *egalitarian* rather than utilitarian structure, as well as the *non-economic* nature of the right itself – and so as to assure that the rights of earlier authors do not impede on the rights of subsequent ones.

I have substantially completed this dissertation under the advisement of legal philosophers Liam Murphy, Jeremy Waldron, and Samuel Scheffler, as well as intellectual property scholars Jeanne Fromer, Chris Sprigman, Barton Beebe, and Scott Hemphill. I am presently in the process of writing a book proposal for the project, which constitutes one of few book-length philosophical examinations of the foundations of copyright law yet written, and to be submitted to academic presses in the near future.

NORMATIVE & CONCEPTUAL ANALYSES OF INFORMATION:

My second set of projects involve philosophical analyses – both conceptual/metaphysical and normative – of the information entities governed by our legal systems. In particular, my present explorations consider the subject matter of copyrights, patents, trademarks, rights of publicity, privacy, defamation, free speech, trade secrets, and more, and yielding and outlining implications for each of these systems of law.

4. ***Conceptual Separability as Conceivability: A Philosophical Analysis of the Useful Articles Doctrine*****,** 93 NYU LAW REVIEW 558 (2018) (note).

My first exploration into the nature of intellectual objects and its implications for the law, this note articulated and defended a philosophical analysis of copyright law's useful articles

doctrine. The useful articles doctrine – which determines the copyrightability (or lack thereof) intellectual objects with *both* "expressive" and "functional" aspects – plays an invaluable role in defining the limits of copyright's domain and the boundary between copyright's and patent's subject matter. In particular, it requires that useful articles' pictorial, graphic, or sculptural elements are only copyrightable to the extent that they are "conceptually separable" from the utilitarian aspects of the article. But this notion "conceptual separability" has proved to be difficult to analyze, and the Supreme Court's effort to define it in *Star Athletica, L.L.C. v. Varsity Brands, Inc.* is widely regarded as unsatisfying. Instead, this note puts forth a novel test for conceptual separability, one that draws inspiration from the philosopher's idea of conceivability. The test is the question: "When you conceive of the relevant useful article as lacking the design element in question, is the article you imagine functionally identical to the actual article?" If the answer to this question is yes, then the design element is conceptually separable from the article's utilitarian aspects; if not, then the element has failed the test, and it is not entitled to copyright protection. The note explores why this novel proposal avoids many of the pitfalls of existing tests (including the Court's own in *Star Athletica*), why it best achieves the aims of the useful articles doctrine, and what questions remain once the challenge of conceptual separability has been resolved. This project was a first step in exploring the copyright/patent division of labor and the nature of – and differences between – distinct categories of intellectual objects that the law seeks to track, and which I have continued to explore in subsequent works.

5. ***Understanding Intellectual Property: Expression, Innovation, & Individuation,*** in progress.

Underlying the fundamental structure of intellectual property law – and, particularly, the division between copyright and patent law – are a number of implicit and substantive philosophical assumptions: namely, a) that creative works (the subjects of copyrights) and innovations (the subjects of patents), understood as *abstract* objects, really exist and are created by humans (or, at least, we should pretend that this is the case); b) that distinct particular creative works and innovations can be determinately *individuated* from each other, thereby being subjects of distinct legal rights; and c) that the categories "creative works" and "innovations" are importantly different, therefore warranting different legal regimes: copyright on the one hand, and patent on the other. This project defends a thesis substantiating and unifying these three assumptions, one with further implications for the structure of intellectual property law: namely, the thesis that creative works are *author*-individuated, whereas innovations are *function*-individuated. In other words, I defend the view that two acts of authorship cannot result in the same creative work (only "structurally identical" works), but two acts of invention can result in the same innovation. I then explicate the conceptual and normative upshots of this thesis for the law, such as for the domain of copyrightable and patentable subject matter, and what it means for different theories of what justifies intellectual property rights.

6. ***The Extended Self: A Framework for Information Rights***, in progress.

American jurisprudence notoriously struggles with making sense of – and, thereby, with protecting – a number of *non-economic harms*. This has significant and disconcerting implications for legal systems governing rights in and surrounding information, such as copyrights, trademarks, rights of publicity, privacy, and defamation, and especially in light of American law's

countervailing commitment to freedom of speech. In particular, it means that we are far more willing to "suppress speech", as it were, in contexts where the harm alleged is *commercial*. For example, copyright holders are permitted to exercise their copyright to obtain licensing fees or lost profits, but often not in order to prevent the work's unauthorized dissemination, even when it contains deeply personal content; celebrities with market power can prevent and recover from unauthorized uses of their persona under right of publicity laws, while private individuals struggle to do the same, or to even vindicate privacy or reputational interests in the face of First Amendment expansion; and trademark law protects the brand identities of corporations, particularly ones with already "strong" brands and markets, while private individuals do not enjoy analogous rights of attribution/against misattribution except in certain limited contexts. In each case and beyond, then, we can see that the law is far more willing to posit the existence and violation of an information right – and to protect the right accordingly – when it is best understood as right of *property* or *economic* in nature. This raises questions both of a) why the law declines to take many such non-economic information interests as seriously as an explanatory matter, and b) whether (and when) the law is justified in doing so as a normative matter.

This project argues that this state of law is in part due to its lack of an appropriate conceptual framework for adjudicating between information rights-holders and free speech rights-holders. Instead – building on the case of harms to one's *body,* which is one of few non-economic harms that American courts easily recognize, as well as drawing inspiration from philosophical work on the *extended mind*, which challenges the "arbitrary" divide between one's brain and that which one uses to enhance or "extend" it (e.g. cognition-enhancing technologies) – this project constructs a framework for information rights I call the *extended self.* In other words, it argues that – for many of the aforementioned information rights – we ought to move away from the existing and implicit property conception that focuses principally on economic value, and instead toward a conception of information as an extension of the self, therefore capable of enduring harms more analogous to bodily ones than economic ones. After motivating and normatively defending the conceptual framework, I canvass numerous information entities – "private personas", "public personas", "reputations", "attributions", "expression", "data", and more – as well as the rights surrounding them, analyzing whether and how they are to be understood within the extended self framework. I then use the framework to consider questions of the nature and scope of these information rights, such as ones relating to *alienability/transferability* of rights and *posthumous* rights. I next connect the extended self framework (and its limitations) to making sense of the law's differential treatment of so-called "functional" versus "non-functional" intellectual objects, as seen in intellectual property law. Finally, taking inspiration from the "use" vs. "mention" distinction of analytic philosophy, I speak to the question of how to understand this framework for information rights when adjudicating conflicts between the extended self and the countervailing rights of free speech.

TECHNOLOGY, PHILOSOPHY, AND LAW:

The final category of my current projects explores philosophical issues arising in adapting the law to new technologies, in virtue of how technological advancement can force us to rethink our fundamental normative and conceptual categories. Specifically, I explore whether (and when) replacing human actors and decision-makers with non-human technologies raises genuinely new challenges for the law versus merely bringing under-appreciated yet existing challenges to light. In other words, I am interested in the questions of when our laws need to be reconsidered *for*

technology versus when our laws *for humans* needed to be reconsidered all along, and that it simply took technological advancement for us to realize as much.

7. ***Minds, Machines, and the Law: The Case of Volition in Copyright Law,*** 119 COLUMBIA LAW REVIEW (2019) (with Jeanne Fromer).

The increasing prevalence of ever-sophisticated technology permits machines to stand in for or augment humans in a growing number of contexts. The questions of whether, when, and how the so-called actions of machines can and should result in legal liability thus will also become more practically pressing. One important set of questions that the law will inevitably need to confront is whether machines can have *mental states*, or---at least---something sufficiently like mental states for the purposes of the law. This is because a wide number of areas of law have explicit or implicit mental state requirements for the incurrence of legal liability. Thus, in these contexts, whether machines can incur legal liability turns on whether a machine operates with a requisite mental state. Consider the example of copyright law. Given the long history of mechanical copying, courts have already faced the question of whether machine copying can qualify as having the mental states required for liability. They have often answered with a resounding, unconditional "no." But this Essay seeks to challenge any generalization that machines cannot operate with a mental state in the eyes of the law. Taking lessons from philosophical thinking about minds and machines---in particular, the conceptual distinction between "conscious" and "functional" properties of the mind---this Essay uses copyright's volitional-act requirement as a case study to demonstrate that certain legal mental state requirements might seek to track only the functional properties of the states in question, even ones which can certainly be possessed by machines. This Essay concludes by considering how to move toward a more general framework for evaluating a machine's mental state for legal purposes.

8. ***What's So Bad About Perfect Prediction?***, in progress (with Erick Sam).

There is a continuously growing literature on big data and predictive technologies, particularly criticizing the increasing use of such technologies by government decision-makers, such as in the context of predicting likelihood of recidivism in order to determine bail. But this literature overwhelmingly focuses on concerns with the *accuracy* of such predictive technologies, or their reliance on flawed or biased data. Instead, this Article explores a distinct philosophical question that these technologies raise: namely, even *if we could* overcome the problems of inaccurate data – instead developing near-perfect predictors of individual conduct – is a world with perfect prediction normatively desirable? Or are there instead deep reasons that the majority of us would be viscerally averse to the world of *Minority Report* that are worthy of scholarly vindication? The Article thus examines possible objections to such imagined "accurate" technologies, particularly in the hands of the government – ones ranging from considerations of free will, autonomy, liberty, privacy, and desert, as well as ones both consequentialist and non-consequentialist in nature – exploring whether they emerge as important critiques lost in the present focus on accuracy or instead falter as irrationally technophobic aversions once faced with philosophical scrutiny. It then demonstrates the practical and doctrinal importance of this thought experiment: for, if it turns out that the goal of society should *not* be to simply incentivize the development of increasingly accurate predictive technologies but to instead change the course of such technologies entirely, then scholars' current policy proposals focusing overwhelmingly on

accuracy will inevitably fall short. Finally, it explores how alternative policy proposals sensitive to this distinct set of philosophical concerns – indeed, if any of them emerges as convincing – might look.

9. ***Minds, Machines, and the Law: Toward a General Theory***, early stages (with Erick Sam).

Picking up the broader questions raised by the case study explored in my article *Minds, Machines, and the Law: The Case of Volition in Copyright Law*, I hope in this article to articulate a general theory of when the law's mental state requirements should be interpreted as requiring *human* mental states (either in virtue of requiring human consciousness or human-level functionality) versus the states possessed by machine "actors". In particular, this article will explore the thesis that the law ought to be interested in conscious, human-level properties of an actors' mental states when it seeks to treat the actor herself as a rights-holder (such as copyright authorship) or an autonomous and responsible agent (such as criminal punishment); but in contexts in which the law is seeking simply to protect the rights or interests of others from the actor (such as copyright infringement), functionality might be all that matters, and not necessarily human-level functionality. The article will then apply the defended framework to a variety of legal contexts a) with mental state requirements for liability and b) where technological advancement is likely to result in even more machine "actors", thereby offering guidance for how the law should adapt to an increasingly technology-filled world.

10. ***Artificial Authors***, early stages.

This early-stage project will arguably be a culmination of much of my other work in the all three aforementioned categories: for it will draw on my ideas on the nature of *authorship* and *authorial rights,* the nature of *creative works* themselves, and the nature of *machine "actors"* in the eyes of the law. More specifically, I hope to give a taxonomy of technology's augmentation, simulation, and perhaps even genuine replication of authorship – analogizing to the more familiar phenomena of joint/collective, corporate, and "work for hire" authorship – thereby disentangling the philosophical questions that arise once we move away from the "individual human author" and their implications for copyright doctrine. I will argue that artificial authorship requires us to reckon with these underexplored philosophical questions surrounding copyright, particularly due to the tension between an entirely 'output-based' conception of copyright law versus one recognizing the so-called *expressive rights* of *expressive beings* in this context. I then hope to give a preliminary account of what it is for an entity to qualify as such a being with such rights, and to thereby defend a theory of how copyright law should view the spectrum of artificial authorship.