JAMES BOYLE

Shamans, Software, and Spleens

LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY

Harvard University Press
Cambridge, Massachusetts
London, England 1996

purposes, usually free of charge. This exchange of scientific materials, which still is relatively free and efficient, will surely be compromised if each cell sample becomes the potential subject matter of a lawsuit." This argument is convincing. We cannot bring property rights into this world of research; they would only slow down discovery. Convincing, that is, until one reads in the very next column, the court's conclusion that "the theory of liability that Moore urges us to endorse threatens to destroy the economic incentive to conduct important medical research."[23] On the one hand, property rights given to those whose bodies can be mined for valuable genetic information will hamstring research because property is inimical to the free exchange of information. On the other hand, property rights *must* be given to those who do the mining, because property is an essential incentive to research. Do these assertions contradict each other? Do they tell us anything about the doctrinal chaos of copyright or the anomalies of blackmail and insider trading? Is there a reason that the court is willing to give Moore an entitlement to "decisional," but not to *genetic*, information? Finally, does the decision give us any logical or ideological hints about the future legal regime covering biotechnology? I would say that the answer to each question is yes.

I have presented four puzzles. My claim is that each one is best understood as a conflict over the use of information and that the conflict is structured by a recurring pattern of contradictions. It is to that pattern I now turn.

CHAPTER 3

The Public and Private Realms

> The state as a state abolishes *private property* (i.e. man decrees by *political* means the *abolition* of private property) when it abolishes the *property qualification* for electors and representatives, as has been done in many of the North American States ... The *property qualification* is the last *political* form in which property is recognized. But the political suppression of private property not only does not abolish private property; it actually presupposes its existence. The state abolishes, after its fashion, the distinctions established by *birth, social rank, education, occupation,* when it decrees that birth, social rank, education, occupation are *non-political* distinctions; when it proclaims, without regard to these distinctions, that every member of society is an *equal* partner in popular sovereignty ... But the state, none the less, allows private property, education, and occupation to manifest their *particular* nature. Far from abolishing these *effective* differences, it only exists so far as they are presupposed; it is conscious of being a *political state* and it manifests its *universality* only in opposition to these elements.[1]

There are many reasons to doubt the prescience of Karl Marx, quoted above, as a theorist of the modern liberal state. But any American lawyer would have to acknowledge that he got one thing right; the centrality of the public-private distinction to any understanding of the legal system. The liberal state depends on the idea of equality. That, after all, is one of the key differences between the

liberal and the feudal idea of politics. Liberalism mandates an end to status distinctions in politics. There can be no restriction of the franchise to a particular social class, no weighting of the votes of the nobility. Thus we have equality, but only inside the public sphere. Citizens are equal, but only in their capacities as citizens, not as private individuals. Each is guaranteed an equal vote, but not equal influence. We draw a line around certain activities—voting, appearing in court, and so on—and guarantee equality within this realm. Outside that line is the private sphere, the world of civil society. It is the private sphere which contains all the real differences between people—differences of wealth, power, education, birth, and social rank. It is this process of conceptual division that allows us to use the language of egalitarianism to defend a society marked precisely by a highly stratified distribution of wealth or power.[2]

The real dilemma of liberal state theory is that it must exalt the virtues of egalitarianism, of each person's voice counting equally and, at the same time, confine that egalitarianism to the public sphere. Our vision of society must be a vision of two separate spheres, with two different governing principles, two theories of justice, and even two different *personae* to go with them. As Marx describes it, the process sounds almost like a kind of religious schizophrenia. "Where the political state has attained to its full development, man leads, not only in thought, in consciousness, but in *reality*, in *life*, a double existence—celestial and terrestrial. He lives in the *political community*, where he regards himself as a *communal being*, and in *civil society* where he acts simply as a *private individual*, treats other men as a means, degrades himself to the role of mere means, and becomes the plaything of alien powers."[3]

The law is implicated in every stage of this process.[4] First of all, the law draws, and in a more complex way depends upon, the line between public and private. The central fear of the liberal political vision is that unrestrained state power will invade the private sphere. And yet the only force available to police the state *is* the state. The rule of law appears to be the answer to this dilemma. By policing the lines between public and private and between citizens and other citizens, the law offers us the hope of a world which is neither the totalitarian state nor the state of nature. In this sense, both the *role* of law and the *rule* of law depend on the public-private division.

On a more mundane level, both lawyers and citizens perceive issues through the lens of the public-private distinction. Controversial political and moral issues often resolve themselves into questions of *placement* in either the public or the private realm.[5] Access to medical professionals, for example, is in the private sphere. It depends upon my resources, my wealth. There is no constitutional guarantee to equal health care, or even minimum health care. Access to legal professionals, however, is at least partly in the public sphere. When I am accused in a serious criminal trial, I have the right to an attorney *whether or not* my private resources will let me pay for one.[6] This example suggests one last important point: our conception of justice differs depending on whether we are dealing with public law or private law. Suppose a driver negligently knocks over a pedestrian and the pedestrian sues. What kind of damages will he get? The answer depends on the condition of the pedestrian *before* the accident. If the victim is poor, homeless, and out of work, the law is likely to put him back in exactly that position. Tort damages, after all, are compensatory. We aim to restore the *status quo ante*. If the victim is a $200,000-a-year investment banker, then the injurer is likely to find himself paying out a lot more, in lost wages among other things. Yet when we turn from private law to public law, to criminal law, the picture changes completely. Should the law punish an assault against an investment banker more seriously than an offense against a homeless person? Our sensibilities are outraged at the thought (even if we suspect that in practice this may frequently be the reality). In the private sphere our ideal of justice is, broadly speaking, to make the parties whole, to restore them to the position they were in before the wrongful act. Obviously, this means treating differently situated people differently. In public law, on the other hand, we aim for equality.[7]

One of the claims of this book is that disputes about property rights in information resolve themselves, in part, into disputes about whether the issue "is" in the public or the private realm. This rhetoric of geographic placement suggests that we are engaged in a factual inquiry about the location of a preexisting entity within a well-charted and well-settled terrain. Nothing could be further from the truth. In fact, the process is one of contentious moral and political decision making about the distribution of wealth, power, and information. The supposedly settled landscape is in fact an ever-changing scene which folds back onto itself like a Möbius strip. The market,

for example, is on the public side of the divide when we are talking about commercial exploitation of private information about families, but is on the private side in its dealings with the government over the Freedom of Information Act. If a geography metaphor is appropriate at all, the most likely cartographers would be Dali, Magritte, and Escher.

Because there is, in fact, no intelligible geography of public and private, I suggest that our decisions should focus on a different set of criteria. The first is egalitarian—having to do with the relative powerlessness of the group seeking information access or protection. The second is the familiar radical republican goal of creating and reinforcing a vigorous public sphere of democracy and debate.[8] These two criteria are not neutral or descriptive—they represent a value choice. They do not algorithmically "resolve" the questions I put forward here or banish contradictions from the field of law about information. In fact, apart from the normative attractiveness of the ideas of egalitarianism and democracy, all that could be said for the proposed criteria is that they are conducive to treating all questions of information regulation holistically and that they restate the boundaries of the argument in a way which, for a while, might produce a more fruitful exchange than the hackneyed language of public and private. In the Conclusion, I try to assess the extent to which these values are supported or undermined by our current rhetoric of information regulation. Now, having introduced the public-private split, let me turn to the second part of this conceptual background, the particular role of information.

.....

Information plays a central, if not a defining, role in both the public and the private worlds of the liberal political vision. If we are talking about the private world of the family and the home, we define these institutions partly in terms of their right to close their doors to the outside world, shutting off intercourse and controlling the flow of information, particularly information going *out*. "How many times a week do you make love? Do you sleep in the nude? Do the people in your household pick their noses or vote Republican?" The response, if not obscene, is likely to contain the words "that's private"; indeed the very word "privacy" is most commonly defined in informational terms.[9] The right to withhold information is also, as Judge

Frank Easterbrook points out, one of the main forms of protection given to private citizens facing an accusing state.[10] Fourth and Fifth Amendment protections are the classic cases, but the lawyer-client privilege is also a good example.

As I pointed out a moment ago, we also think of the market as "private"—at least when it is counterposed against the state. We talk of private enterprise, the private sector, privatization—again conjuring up the idea of justified freedom from intervention. And when we turn to microeconomic theory, information is again a defining feature. The analytical structure of microeconomics includes "perfect information"—meaning free, complete, instantaneous, and universally available—as one of the defining features of the *structure* of the perfect market. But the perfect market must also treat information in a second way: as a good *within* the perfect market, something that will not be produced without incentives—costly incentives. This dual—and contradictory—incarnation of information reappears in the *actual* market. Our search for efficiency pushes us toward ever freer and less costly information flow at the same time as our understanding of incentives necessary for production tells us that information must be costly, partial, and deliberately restricted in its availability. When I discuss information economics, this apparent paradox will be of central importance.

Finally, in the public world of politics—which is defined in the liberal vision by the information-centered ideas of debate, exchange, and decision—the free flow of information is a prerequisite for atomistic citizens first to form and then to communicate their subjective preferences in the great marketplace of ideas. At the same time, the availability of information to citizens is thought to be as important a check on governmental activity as that provided by the rule of law, a point made most famously by James Madison: "A popular Government, without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both. Knowledge will ever govern ignorance; And people who mean to be their own Governors must arm themselves with the power which knowledge gives."[11]

So far I have argued that information, loosely defined, is central to our conception of the family, the market, and the democracy. I claimed that there are tensions "between spheres" in the roles we expect information to play. Thus, for example, it is conventionally

accepted that the public interest in a sphere of vigorous debate and discussion often clashes with the demands of personal privacy, while claims to own information in the market mix uneasily with the values of the First Amendment.[12] I also have claimed that, within spheres, information is often conceived of in apparently conflicting ways. Looking at the market through the lens of microeconomics, we find that information is both an analytical prerequisite for the model and a commodity to be traded under the model. In First Amendment theory, analysts sometimes talk as if information exchange had its own inevitable tilt toward democratic values and the good life ("the cure for bad speech is more speech"); at other times they present the First Amendment as the jewel in the crown of liberalism, drawing its nobility precisely from the fact that it is value-neutral as to content. ("I loathe what you say but would die for your right to say it.")

To some it might seem that these contradictions are actually the result of the broad definition of information that I have adopted here. An objector might argue that it is only with the broad definition that commodification seems to conflict with the perfect market, copyright with the First Amendment, and so on. With the use of sensible subdivisions—into copyright issues, First Amendment issues, privacy issues, insider trading issues, commodification issues, efficient capital market issues—these problems would disappear, or at least lose their salience. I am unconvinced by this argument. Given my vision of language and definition, however, I can imagine no "proof" of my method, except its ability to work in a way that the reader finds useful.

Others might ask for reasons. *Why* do we think such different things about information? Part of the answer seems to be that what we have is an overlay of two sets of conflicts. First, there is the matrix of conflicts between the theories of justice that we apply to the family, the market, and the democracy. This could be thought of as the geographical question; in which realm, which paradigm of justice, does this particular question of information control belong? But this matrix is overlaid by another set of conflicts; how should we conceive of information? This could be called the question of *characterization.*

Information is conceived of as both *finite* and *infinite,* product and process. As an infinite good, information seems to be that magical thing: a gift that can be given without making the giver any poorer. I explain Pythagoras' theorem to you, or teach you how to work out

the area of the circle. Afterward, I seem no poorer *in the sense that* we both have the knowledge. This is the positive side of the public goods dilemma. The same unit of the good apparently satisfies the needs of an infinite number of consumers. Perhaps this is one of the reasons that in moments of high moral or ideological conflict, we often reach for a solution that involves giving the parties more information. Is the experimental drug dangerous, the factory unhealthy? Is the cost of this refrigerator—sold on disadvantageous terms to recent immigrants—unusually high? Does a purchaser of this investment run a risk more serious than the glowing prospectus would indicate? In each case our tendency is to believe that mandatory information transfer is the answer. We *make* the drug manufacturer, employer, renter, or investment company disclose details they might not wish to disclose, details that would cost the other party a lot to find out. *If* we are thinking of information as a resource that is infinite in this sense, then the distribution of wealth does not seem to have been changed when parties are forced to transfer information. What has really happened is that one party has been forced to transfer a valuable resource to the other. When that resource is money, we think "socialism." When the resource is information, it just seems "fair."

Yet there are occasions when courts and scholars switch perspectives. From being an infinite resource, a good that may be given infinitely without impoverishing the giver, information is reconceived as a finite good, whose production and distribution are subject to the same economic laws as any other commodity. Mandatory information transfer is suddenly viewed as an inefficient forced exchange, rather than a baseline for informed decision making. In economic terms, the positive side of the costlessness of information—that the same unit of the good can satisfy many consumers at little or no additional cost—suddenly becomes the foundation of the public goods problem. Without an ability to commodify, to exclude others and to make information costly, producers will have no incentive to make more information.[13] In political terms, the uncontentious idea that citizens should be able to make informed decisions is suddenly recast as a coercive transfer of property from one individual to another without compensation.

Until now, I have described information's various roles separately and in a rather static and synchronic way. But the historical importance of the connection *between* information, the market, and liberal

democracy should not be underestimated. In fact, the writers of the Scottish Enlightenment believed that commerce was desirable largely because it would force people from widely separated areas to talk to each other, to obtain information about the beliefs and practices of others, and inexorably to question the basis for their own. Thus the invisible hand would subject social practices and traditions to the test of reason. *Doux commerce* would be the crucible in which superstition and myth were burnt away and the rationalism of the Enlightenment brought to the provinces. In later years, Scottish philosophers changed their minds and began to worry that commerce would produce enormous disparities in wealth and power (including power over information) and that these disparities would subvert the republican form of government. Sadly, although this change of heart had some sympathizers in the United States, it never received the same attention as the original optimistic message.[14] One of the implicit claims of this book is that it should have.

.....

It is time to sum up. If the concept of information has potentially conflicting roles to play in family, market, and state and if information itself is sometimes conceived of as infinite and sometimes as finite, how are social problems involving information decided? A lot of the time, the answer is, "By drawing lines." We "type" certain situations or conflicts as "public" or "private" and then act as if we have solved the problem. Unfortunately, we have merely restated it: the notion of "private" can be defined largely by the idea of the justified ability to withhold information, but the same word, with its connotations of "that-with-which-we-cannot-interfere," can conjure up the freedom of the market from state intervention. The fact that we think of the private sphere as encompassing both the market (vis à vis the state) and the family (vis à vis the market *and* the state) produces a Laocoon of ideological and rhetorical contradictions.[15]

For example, many consumers do not wish biographical details, provided to a retailer for another purpose, to be traded in the flourishing direct marketing industry. They might argue that this information was "private" and that the state should step in to prevent the companies involved from passing it on, compiling it into larger databases, or whatever. Others might want the state to protect the private sphere of home and family from information coming in from the outside. The telemarketing phone call interrupting the family dinner is the most frequently used example. In both cases, the classification "private" is supposed to trigger, or at least justify, state protection. Yet the owners of the databases would protest the unfairness of the public world of the state interfering in a *private* disposition of *private* property—in this case, mailing lists or databases of consumer information. The telemarketers might say the same thing. Yet, because information is involved rather some other form of property, they would probably also claim that the issue is one which should be settled by appeal to the constitutional norms that govern the *public* realm.[16] In other words, they might argue both that the government should not interfere because this was a (fundamentally private) activity in the market, and that the government should not interfere because this was a (fundamentally public) matter of free speech—and equal protection, for that matter.[17]

When I first wrote this chapter, I intended these as purely hypothetical examples. Since then, Senator Ernest Hollings introduced and the Congress passed a bill that outlaws most autodialers.[18] "Calling autodialers an 'outrageous invasion' of people's homes, Senator Hollings said 'privacy rights outweigh any concerns about the free speech of the marketing companies.' " The Portland, Oregon, American Civil Liberties Union (ACLU) disagrees. One of their lawyers, Charles Hinkle, is "representing a small business against an Oregon law banning the commercial use of autodialers." His arguments? The ban would interfere with free speech and would violate the constitutional commitment to equality in public life—in this case the equal protection clause—since it distinguishes between commercial and noncommercial speech.[19]

On top of these issues—which present classic examples of what I called "the question of geography"—we have the additional issues raised by the question of characterization. Should we adopt the finite or the infinite vision of information? Are people really "taking" anything from you when they learn of your address, or your consumption patterns, and sell those facts to a thousand databases? You still have all the "goods" that you had before—except, of course, that peculiar good that exists in the *negation* or restriction of information.

If there really was an intelligible geography of public and private and a unitary concept of information, then we might hold out the hope that one set of claims could be proved to be "true" and the

other "false." But since the legal realists, that hope has seemed a chimerical one.

The story cannot end here, however. One of the themes of this book is that the implicit frameworks within which the regulation of information is discussed are contradictory—or at least aporetic—and indeterminate in application. As far as the rhetoric of public and private goes, that seems an unexceptionable conclusion.[20] And since that rhetoric dominates popular discussion of information issues, a large part of the groundwork for my theoretical discussion is devoted to the multiple ways in which liberalism portrays information as central to both public and private realms. It is hard to read a public debate on any issue involving information without coming to the conclusion that a great deal of it is an exercise in line drawing or typing, increasingly isolated from the moral and political ideals the lines are supposed to represent. Perhaps this is the best we can do. But then again, perhaps not.

So much for public debate. Is scholarship any different? Increasingly, scholarly discussions of information issues are turning away from liberal constitutionalism and rights theory and toward the language of microeconomics.[21] Whether the issue is copyright,[22] patent,[23] insider trading,[24] blackmail,[25] or simply "valuable information,"[26] some of the most ambitious recent scholarship is informed by some kind of economic approach. A cruder form of economic analysis also surfaces in the discussion of public policy. The developed world has recently engaged in a ferocious intellectual land grab, backed by trade sanctions, and has used the economic need for intellectual property protection as its primary—and supposedly objective—justification. The idea is an attractive one. Yet microeconomics provides no surcease from the paradoxes of information. Those paradoxes are just as central to the discipline of economics as they are to liberal state theory.

CHAPTER 4

Information Economics

In economics, once again, information plays many roles. The analytical structure of microeconomics includes "perfect information"—meaning free, complete, instantaneous, and universally available—as one of the defining features of the perfect market.[1] At the same time, both the perfect and the *actual* market structure of contemporary society depend on information being a commodity—that is to say being costly, partial, and deliberately restricted in its availability. Our concern with market efficiency pushes us toward information flows that are costless, general, and fast. Our concern with incentives for the producers of information pushes us in exactly the opposite direction—toward temporary monopolies that delay the release of information, limit its availability, and raise its price.

When I first wrote on this subject, I tried to summarize the problems of information economics in a single sentence. "Perfect information is a defining conceptual element of the analytical structure used to analyze markets driven by the absence of information in which imperfect information itself is a commodity."[2] I even offered an analogy. Imagine a theology that postulates ubiquitous God-given manna—food from heaven—in its vision of the heavenly city, but otherwise assumes that virtue and hard work are both maximized under conditions of scarcity. Now use that theology to provide the basic theoretical structure for a practical discussion of the ethics of

To some, this judgment may seem strange in light of my claims that information economics is beset by a basic paradox or aporia. If the discipline is truly paradoxical, isn't it useless—no matter how chastened its conclusions? The answer, I think, is that economics is only useless if one makes particular positivist and scientistic assumptions about the kind of knowledge a theory has to provide in order to qualify as "a theory." Admittedly, both professional economists and economic analysts of law—not merely those from the Chicago School—sound in their more expansive moments as if they subscribe to those scientistic assumptions. But that is no reason for the rest of us to do so. Neoclassical price theory is a way of thinking which enriches our understanding of the world. Like all theoretical systems, it has blind spots and moments of formal "undecidability." Used with an awareness of its paradoxes and its blind spots, an awareness of the unconscious process of interpretive construction that conceals its indeterminacy, it would nevertheless be a valuable theoretical tool. Seen this way, economics would be a spur to concentrate on incentives and information flow, to worry about perverse motivations and unintended consequences. It would, in short, be more a rough-and-ready set of analytical techniques and checklists than a Newtonian science.

Whether or not this is the economics we should have, it is not the economics we have at the moment. With a few significant exceptions, we have an economics more like my pessimistic picture: an aporetic discipline which, as I hope to show in the rest of this book, often conceals its indeterminacy through romance. To understand the origins of that romance, we must first look at the liberal conception of property.

CHAPTER 5

Intellectual Property and the Liberal State

Like information, property plays a vital role in liberal state theory. That role imposes certain conflicting requirements on the concept of property itself.[1] Legal realism, Lockean political theory, critical legal thought, and law and economics have all stressed—each in its own vocabulary—the idea that property is perhaps the most important mechanism we use in our attempt to reconcile our desire for freedom and our desire for security.[2] How can we be free and yet secure from other people's freedom, secure and yet free to do what we want to do?[3] The most obvious way to deal with this apparent contradiction is to conceive rights of security "in a manner that both makes them appear to be absolute and negates the proposition that they restrict the legitimate freedom of action of others. Thus if we define liberty as free actions that do not affect others at all, and rights as absolute protections from harm, the contradiction vanishes."[4] The traditional Blackstonian definition of property does just that. But there are irresoluble conceptual tensions in any such formulation, a point which has considerable relevance to intellectual property law, as we will see later. Kenneth Vandevelde states the problem in the following way:

> At the beginning of the nineteenth century, property was ideally defined as absolute dominion over things. Exceptions to this definition suffused

property law: instances in which the law declared property to exist even though no "thing" was involved or the owner's dominion over the thing was not absolute. Each of these exceptions, however, was explained away. Where no "thing" existed, one was fictionalized. Where dominion was not absolute, limitations could be camouflaged by resorting to fictions, or rationalized as inherent in the nature of the thing or the owner . . . As the nineteenth century progressed, increased exceptions to both the physicalist and the absolutist elements of Blackstone's conception of property were incorporated into the law . . . This dephysicalization was a development that threatened to place the entire corpus of American law in the category of property. Such conceptual imperialism created severe problems for the courts. First, if every valuable interest constituted property, then practically any act would result in either a trespass on or a taking of, someone's property, especially if property was still regarded as absolute. Second, once property had swallowed the rest of American law, its meaningfulness as a separate category would disappear. On the other hand, if certain valuable interests were not considered property, finding and justifying the criteria for separating property from non-property would be difficult.[5]

To the extent that there was a replacement for this Blackstonian conception, it was the familiar "bundle of rights" notion of modern property law, a vulgarization of Wesley Hohfeld's analytic scheme of jural correlates and opposites, loosely justified by a rough and ready utilitarianism and applied in widely varying ways to legal interests of every kind. The euphonious case of LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul Ry. is used in many a first-year law school class to illustrate the conceptual shift.[6] Could a flax maker be found guilty of contributory negligence for piling his stacks of flax too close to the tracks? The majority bridled at the very thought. The flax maker was piling his flax on his own property, after all. "The rights of one man in the use of his property cannot be limited by the wrongs of another . . . The legal conception of property is of rights. When you attempt to limit them by wrongs, you venture a solecism." Though the majority's circular reasoning carried the day, it is Oliver Wendell Holmes's (partial) concurrence that pointed to the future.[7] Rather than imagining an absolute sphere of rights surrounding the property lines like a glass bubble, Holmes was happy to remove the flax-piling entitlement from the bundle of property rights for whatever swathe of the property was "so near to the track as to be in danger from a prudently managed engine." He also directed a few sanguine, if

vaguely crocodilian, comments toward the majority on the subject of their concern about the apparent relativism of his concept of property: "I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized. Negligence is all degree—that of the defendant here degree of the nicest sort; and between the variations according to distance that I suppose to exist and the simple universality of the rules in the Twelve Tables or the Leges Barbarorum, there lies the culture of two thousand years."[8]

Presumably, the majority consoled itself with the fact that its concern with absolutism and universality was two thousand years out of date. In any event, the writing was on the wall. Property was no longer conceived of as absolute, no longer a guaranteed trump against the interests of the majority or the state, no longer related to any physical thing. Indeed, so thoroughly had the conception been relativized that courts were willing to admit that there could be property rights restricted to particular interests, to be asserted against one person, rather than another, and only in some situations and moments. But if this is the case, where is our shield against other people or the state? If the flax-piling entitlement can be stripped from seventy yards of the LeRoy Fibre Company merely because there would be utilitarian benefits to letting the railroad run unmolested, then why not from one hundred yards, or from the whole thing? Instead of an absolute, unchanging, and universal shield against the world, property is now merely a bundle of assorted entitlements that changes from moment to moment as the balance of utilities changes. It seems that the modern concept of property has given us a system that works on the day-to-day level, but only at the price of giving up the very role that property was supposed to play in the liberal vision.

Thus when we turn to *intellectual* property, an area which throughout its history has been less able to rely on the physicalist and absolutist fictions which kept the traditional concept of property going, we will see an attempt not only to clothe a newly invented romantic author in robes of juridical protection, but to struggle with, mediate, or repress one of the central contradictions in the liberal world view. This, then, is the redoubled contradiction of which I spoke earlier. If it is to protect the legitimacy and intellectual suasion of the liberal world view, intellectual property law (and indeed, all law that deals with information) must accomplish a number of tasks simultane-

ously. It must provide a conceptual apparatus which appears to mediate the various tensions associated with the role of information in liberal society. Thus, for example, it must give some convincing explanation as to why a person who recombines informational material from the public sphere is not merely engaging in the private appropriation of public wealth. It must explain how it is that we can motivate individuals—who are sometimes postulated to be essentially self-serving, and sometimes to be noble, idealistic souls—to produce information. If the answer is, "by giving them property rights," it must also explain why this will not diminish the common pool, or public domain, so greatly that a net decrease in the production of information will result. (Think of overfishing.) It must reassure us that a realm of guarded privacy will be carved out for the private sphere and at the same time explain how it is that we can have a vigorous sphere of public debate and ample information about a potentially oppressive state. It must do all of this within a vision of justice that expects formal equality within the public sphere, but respect for existing disparities in wealth, status, and power in the private. And all of these things must be accomplished while we are using a concept of property which must avoid the conceptual impossibilities of the physicalist, absolutist conception, but which at the same time is not too obviously relativist, partial, and utilitarian.

CHAPTER 6

Copyright and the Invention of Authorship

So far I have argued that, because of the contradictions and tensions described here, there are certain structural pressures on the way that a liberal society deals with information. When we turn to the area of law conventionally recognized as dealing with information—intellectual property law, and in this case copyright law—I claim that we will find a pattern, a conceptual strategy which attempts to resolve the tensions and contradictions in the liberal view of information. On one level, understanding this pattern will help us to make sense (if not coherence) of the otherwise apparently chaotic world of copyright. On another level, I claim that the conceptual strategy developed in copyright is important to understand, because parts of it can also be found in most, if not all, of the areas where we deal with information—even if those areas are conventionally understood to have nothing to do with copyright.

From what I have argued previously, it should be apparent that although intellectual property has long been said to present insuperable conceptual difficulties, it actually presents exactly the same problems as the liberal concept of property generally. It merely does so in a more obvious way and in a way which is given a particular spin by our fascination with information. All systems of property are both rights-oriented and utilitarian, rely on antinomian conceptions of public and private, present insuperable conceptual difficulties when

reduced to mere physicalist relations but when conceived of in a more abstract and technically sophisticated way, immediately begin to dissolve back into the conflicting policies to which they give a temporary and unstable form. In personal or real property, however, one can at least point to a pair of sneakers or a house, say "I own that," and have some sense of confidence that the statement means something. As *LeRoy Fibre* case shows, of course, it is not at all clear that such confidence is justified, but at least property presents itself as an *apparently* coherent feature of social reality, and this is a fact of considerable ideological and political significance. In intellectual property, the response to the claim "I own that" might be "what do you mean?"

As Martha Woodmansee discovered, this point was made with startling clarity in the debates over copyright in Germany in the eighteenth century. Encouraged by an enormous reading public, several apocryphal tales of writers who were household names, yet still living in poverty, and a new, more romantic vision of authorship, writers began to demand greater economic returns from their labors. One obvious strategy was to lobby for some kind of legal right in the text—the right that we would call copyright. To many participants in the debate, the idea was ludicrous. Christian Sigmund Krause, writing in 1783, expressed the point pungently.

> "But the ideas, the content! that which actually constitutes a book! which only the author can sell or communicate!"—Once expressed, it is impossible for it to remain the author's property . . . It is precisely for the purpose of using the ideas that most people buy books—pepper dealers, fishwives, and the like and literary pirates excepted . . . Over and over again it comes back to the same question: I can read the contents of a book, learn, abridge, expand, teach, and translate it, write about it, laugh over it, find fault with it, deride it, use it poorly or well—in short, do with it whatever I will. But the one thing I should be prohibited from doing is copying or reprinting it? . . . A published book is a secret divulged. With what justification would a preacher forbid the printing of his homilies, since he cannot prevent any of his listeners from transcribing his sermons? Would it not be just as ludicrous for a professor to demand that his students refrain from using some new proposition he had taught them as for him to demand the same of book dealers with regard to a new book? *No, no it is too obvious that the concept of intellectual property is useless. My property must be exclusively mine; I must be able to dispose of it and retrieve it unconditionally.* Let someone explain to me how that is possible in the present case. Just let someone try taking back the ideas he has originated once they have been communicated so that they are, as before, nowhere to be found. All the money in the world could not make that possible.[1]

Along with this problem go two other, more fundamental ones. The first is the recurrent question of how we can give property rights in intellectual products and yet still have the inventiveness and free flow of information which liberal social theory demands. I shall return to this question in a moment. The second problem is the more fundamental one. On what grounds should we give the author this kind of unprecedented property right at all, even if the conceptual problems could be overcome? We do not think it is necessary to give car workers residual property rights in the cars that they produce—wage labor is thought to work perfectly well. Surely, an author is merely taking public goods—language, ideas, culture, humor, genre—and converting them to his or her own use? Where is the moral or utilitarian justification for the existence of this property right in the first place? The most obvious answer is that authors are special, but why? And since when?

Even the most cursory historical study reveals that our notion of "authorship" is a concept of relatively recent provenance. Medieval church writers actively disapproved of the elements of originality and creativeness which we think of as an essential component of authorship: "They valued extant old books more highly than any recent elucubrations *and they put the work of the scribe and the copyist above that of the authors.* The real task of the scholar was not the vain excogitation of novelties but a discovery of great old books, their multiplication and the placing of copies where they would be accessible to future generations of readers."[2]

Martha Woodmansee quotes a wonderful definition of "Book" from a mid-eighteenth-century dictionary that merely lists the writer as one mouth among many—"the scholar, . . . the paper-maker, the type-founder and setter, the proof-reader, the publisher and bookbinder, sometimes even the gilder and brass worker"—all of whom are "fed by this branch of manufacture."[3] Other studies show that authors seen as craftsmen—an appellation which Shakespeare might not have rejected—or at their most exalted, as the crossroads where learned tradition met external divine inspiration.[4] But since the tradition was mere craft and the glory of the divine inspiration should

be offered to God rather than to the vessel he had chosen,[5] where was the justification for preferential treatment in the creation of property rights? As authors ceased to think of themselves as either craftsmen, gentlemen,[6] or amanuenses for the Divine spirit, a recognizably different, more romantic vision of authorship began to emerge. At first, it was found mainly in self-serving tracts, but little by little it spread through the culture so that by the middle of the eighteenth century it had come to be seen as a "universal truth about art."[7]

Woodmansee explains how the decline of the craft-inspiration model of writing and the elevation of the romantic author both presented and seemed to solve the question of property rights in intellectual products: "Eighteenth-century theorists departed from this compound model of writing in two significant ways. They minimized the element of craftsmanship (in some instances they simply discarded it) in favor of the element of inspiration, and they internalized the source of that inspiration. That is, inspiration came to be regarded as emanating not from outside or above, but from within the writer himself. 'Inspiration' came to be explicated in terms of *original genius* with the consequence that the inspired work was made peculiarly and distinctively the product—and the property—of the writer."[8]

In this vision, the author was not the journeyman who learned a craft and then hoped to be well paid for it. The romantic author was defined not by the mastery of a prior set of rules, but instead by the transformation of genre, the revision of form. Originality became the watchword of artistry and the warrant for property rights. To see how complete a revision this is, one need only examine Shakespeare's wholesale lifting of plot, scene, and language from other writers, both ancient and contemporary. To an Elizabethan playwright, the phrase "imitation is the sincerest form of flattery" might have seemed entirely without irony. "Not only were Englishmen from 1500 to 1625 without any feeling analogous to the modern attitude toward plagiarism; they even lacked the word until the very end of that period."[9] To the theorists and polemicists of romantic authorship, however, the reproduction of orthodoxy would have been proof they were not the unique and transcendent spirits they imagined themselves to be.

It is the *originality* of the author, the novelty which he or she adds to the raw materials provided by culture and the common pool, which "justifies" the property right and at the same time offers a strategy for resolving the basic conceptual problem pointed out by

Krause—what concept of property would allow the author to retain some property rights in the work but not others? In the German debates, the best answer was provided by the great idealist Fichte. In a manner that is now familiar to lawyers trained in legal realism and Hohfeldian analysis, but that must have seemed remarkable at the time, Fichte disaggregated the concept of property in books. The buyer gets the physical thing and the ideas contained in it. *Precisely because the originality of his spirit was converted into an originality of form,* the author retains the right to the form in which those ideas were expressed: "Each writer must give his own thoughts a certain form, and he can give them no other form than his own because he has no other. But neither can he be willing to hand over this form in making his thoughts public, for no one can *appropriate* his thoughts without thereby *altering their form.* This latter thus remains forever his exclusive property."[10]

A similar theme is struck in American copyright law. In the famous case of Bleistein v. Donaldson Lithographing Company,[11] concerning the copyrightability of a circus poster, Oliver Wendell Holmes was still determined to claim that the work could become the subject of an intellectual property right because it was the original creation of a unique individual spirit. Holmes's opinion shows us both the advantages and the disadvantages of a rhetoric which bases property rights on "originality." As a hook on which to hang a property right, "originality" seems to have at least a promise of formal realizability. It connects nicely to the romantic vision of authorship which I described earlier and to which I will return. It also seems to limit a potentially expansive principle, the principle that those who create may be entitled to retain some legally protected interest in the objects they make—even after those objects have been conveyed through the marketplace. But while the idea that an original spirit conveys its uniqueness to worked matter seems intuitively plausible when applied to Shakespeare[12] or Dante, it has less obvious relevance to a more humdrum act of creation by a less credibly romantic creator—a commercial artist in a shopping mall, say. The tension between the rhetoric of Wordsworth and the reality of suburban corporate capitalism is one that continues to bedevil intellectual property discourse today. In *Bleistein,* this particular original spirit had only managed to rough out a picture of energetic-looking individuals performing unlikely acts on bicycles, but to Holmes the principle was the same.

"The copy is the personal reaction of an individual upon nature. *Personality always contains something unique.* It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright."[13]

This quality of "uniqueness," recognized first in great spirits, then in creative spirits, and finally in advertising executives, expresses itself in originality of form, of expression.[14] Earlier I quoted a passage from Jessica Litman which bears repeating here: "Why is it that copyright does not protect ideas? Some writers have echoed the justification for failing to protect facts by suggesting that ideas have their origin in the public domain. Others have implied that 'mere ideas' may not be worthy of the status of private property. Some authors have suggested that ideas are not protected because of the strictures imposed on copyright by the first amendment. The task of distinguishing ideas from expression in order to explain why private ownership is inappropriate for one but desirable for the other, however, remains elusive."[15]

I would say that we find the answer to this question in the romantic vision of authorship, of the genius whose style forever expresses a single unique persona. The rise of this powerful (and historically contingent) stereotype provided the necessary raw material to fashion some convincing mediation of the tension between the imagery of "public" and "private" in information production.

To sum up, then, if our starting place is the romantic idea of authorship, then the idea/expression division which has so fascinated and puzzled copyright scholars apparently manages, at a stroke, to do four things:

First, it provides a *conceptual basis* for partial, limited property rights, without completely collapsing the notion of property into the idea of a temporary, limited, utilitarian state grant, revocable at will. The property right still seems to be based on something real—on a distinction which sounds formally realizable, even if, on closer analysis, it turns out to be impossible to maintain.

Second, this division provides a *moral and philosophical justification* for fencing in the commons, giving the author property in something built from the resources of the public domain—language, culture, genre, scientific community, or what have you. If one makes originality of spirit the assumed feature of authorship and the touchstone for property rights, one can see the author as creating something entirely *new*—not recombining the resources of the commons.[16] Thus we reassure ourselves both that the grant to the author is justifiable *and* that it will not have the effect of diminishing the commons for *future* creators. After all, if a work of authorship is original—by definition—we believe that it only adds to our cultural supply. With originality first defended and then routinely assumed, intellectual property no longer looks like a zero sum game. There is always "enough and as good" left over—by definition. The distinguished intellectual property scholar Paul Goldstein captures both the power and the inevitable limitations of this view very well. "Copyright, in a word, is about authorship. Copyright is about sustaining the conditions of creativity that enable an individual to craft *out of thin air* an *Appalachian Spring*, a *Sun Also Rises*, a *Citizen Kane*."[17] But of course, even these—remarkable and "original"—works are *not* crafted out of thin air. As Northrop Frye put it in 1957, when Michel Foucault's work on authorship was only a gleam in the eye of the episteme, "Poetry can only be made out of other poems; novels out of other novels. All of this was much clearer before the assimilation of literature to private enterprise."[18]

Third, the idea/expression division circumscribes the ambit of a labor theory of property. At times, it seems that the argument is almost like Locke's labor theory; one gains property by mixing one's labor with an object. But where Locke's theory, if applied to a modern economy, might have a disturbingly socialist ring to it, Fichte's theory bases the property right on the originality of every spirit as expressed through words. Every author gets the right—the writer of the roman à clef as well as Goethe—but because of the concentration on originality of expression, the residual property right is only for the workers of the word and the image, not the workers of the world. Even after that right is extended by analogy to sculpture and painting, software and music, it will still have an attractively circumscribed domain.

Fourth, the idea/expression division resolves (or at least conceals) the *tension between public and private.* In the double life which Marx described, information is both the life blood of the noble disinterested citizens of the public world and a commodity in the private sphere to which we must attach property rights if we wish our self-interested producers to continue to produce. By disaggregating the book into

"idea" and "expression," we can give the idea (and the facts on which it is based) to the public world and the expression to the writer, thus apparently mediating the contradiction between public good and private need (or greed).

Thus the combination of the romantic vision of authorship and the distinction between idea and expression appeared to provide a conceptual basis and a moral justification for intellectual property, to do so in a way which did not threaten to spread dangerous notions of entitlement to other kinds of workers, and to mediate the tension between the schizophrenic halves of the liberal world view. Small wonder that it was a success. Small wonder that, as I hope to show in this book, the language of romantic, original authorship tends to reappear in discussion of subjects far removed from the ones Fichte had in mind. Like insider trading. Or spleens.

A final question remains before I can proceed. Has the structure I have just described been rendered superfluous by economic analysis and public goods theory? An economist might say that the difference between the author and the laborer is that the author is producing a public good and the laborer is (generally) producing a good that can be satisfactorily commodified and alienated using only the traditional lexicon of property. The distinctions drawn from the idea of romantic authorship might appear to be surplus—unnecessary remnants of a conceptualist age.

It is certainly true that there are articles that decry the language of "idea" and "expression" and that offer the prediction that those terms will be used as mere summations of the underlying economic analysis[19]—in the same way that "proximate cause" is used as a way of expressing a conclusion about the desirable reach of liability. But this kind of response mistakes both the popular and the esoteric power of the language of romantic authorship. As the rest of this book will show, the romantic vision of authorship continues to influence public debate on issues of information—far beyond the traditional ambit of intellectual property. I tried to show earlier that the language of economic analysis provides no neat solutions to the problems of information regulation—precisely because economic analysis is marked by the same aporias as the rest of public discourse. In this situation of indeterminacy and contradiction, it is the romantic vision of authorship that frequently structures technical or scholarly economic analysis—providing the vital initial choices that give the analysis its subsequent appearance of determinacy and "commonsense" plausibility. Scholars may criticize the distinctions that flow from the romantic vision, but they should not imagine themselves to be free from its influence. This point will be particularly obvious when we get to the unlikely—and distinctly unromantic—subject of insider trading.

.....

Before I go on, I would like to separate my project here from other critiques of the idea of authorship. Poststructuralist philosophy has produced a fair amount of author bashing. Literary criticism has been particularly hard on the idea of authorial intent. (Cynics would say that this is because the author's intentions are the last threat to the author-ity of the critic as the imperial interpreter of the text. Actually the truth is a little more complex.) Strange as it may seem, I would like to differentiate my project from full-court author bashing. I have no particular stake in the question of whether literary authors are being presented as coherent, omniscient individual subjects; if they are, I wish them well. It's nice work if you can get it. I do not believe that authorship is a patriarchal, phallocentric plot; indeed, I am willing to agree that, as an abstract idea, it has great liberating potential. How could someone of even mildly pinko sensibilities fail to be attracted by a system in which workers get property rights in the objects they create, or by a property system built on originality, where iconoclasm is actually the warrant for ownership? The irony about many of the critics of the author is that they fix on qualities to revile—defiant individuality, transformation, noncommodifiable moral rights—which under a slightly different set of historical and social circumstances they would have been the first to celebrate.

The historical work on the actual development of authorship as both an interpretive construct and a repository for property rights has been much more important to me—indeed, I have tried in a small way to add to it. But nothing in my argument turns on whether authorship is something that law has unwisely borrowed from literature, something that literature has unwisely borrowed from law, or something in between, as seems most likely.

Finally, this book is not written out of hostility or condescension toward the authorial ideal or its adherents. Attachment to the idea of the individual transformative authorship is not a silly "mistake."

First, it has a clear element of existential truth—our experience of authors, inventors, and artists who *do* transform their fields and our world, together with the belief (one I hold deeply myself) that the ability to remake the conditions of individual life and collective existence is to be cherished and rewarded. Second, as a basis for an intellectual property system, it seems to *work*, precisely because it makes a series of wrenching and difficult conflicts disappear—largely by defining them out of existence rather than solving them, however. It is possible to portray the fixation on originality and the neglect of sources and audience as a technical error made by the rational guardians of the legal system or as a deep plot by the multinationals. Instead, my argument has been that we need to see the romantic vision of authorship as the solution to a series of ideological problems. For those who do not like the word "ideology," at least as applied to any group of which *they* might be a part, we could call these problems deep-seated conceptual conflicts in our ideas of property and polity. The romantic idea of authorship is no more a "mistake" than classical economics was a mistake. It is both something more and something less than that. If one is critical of a system built on its presuppositions, one must begin by understanding both its authentic appeal and the deep conceptual itches it manages to scratch. Only then can one begin the critique.

In the next chapter I turn to the question of blackmail. My aim in this book was to pick examples each of which illustrated a different aspect of the structure of information regulation I describe. Copyright offers the idea of romantic authorship as a way of reconciling the demands of private property and the public realm. By contrast, I argue, blackmail presents a situation in which the state *forbids* the commodification of information, precisely because it concerns the private sphere of home, hearth, and personal self-definition.

CHAPTER 7

Blackmail

Blackmail is of academic interest primarily as a proving ground. Each new generation of scholars comes to it, as to some muddy and treacherous test track, to try out their new theories.[1] The test is an apparently simple one: to find out whether their approach will answer the question "why is blackmail illegal?" Before we plunge headlong into the morass, it is worth focusing for a moment on the qualities that make blackmail a problematic case in the first place. When scholars talk about the difficulties of explaining blackmail, they are generally referring to a restricted subsection of the law of blackmail. It is easy to explain attempts to extort money by threats that would be illegal to carry out—to do physical damage, say. It is also easy to explain why a blackmailer cannot ask money as the price of keeping silent about some violation of the law by the victim. The hard case to explain is the situation in which one person asks another person for money as the price of not revealing legally obtained information about activities perfectly legal in themselves. The example I gave earlier was "if you do not pay me $100, I will reveal to your boyfriend the fact that I saw you coming out of another man's house at two o'clock in the morning." The information was legal to acquire and would be legal to reveal; the conduct was legal to engage in; yet it is illegal to demand money for keeping quiet.[2] In Hohfeldian terms, the sale of a privilege has been criminalized but the privilege itself

13. James D. Cox, "Insider Trading and Contracting: A Critical Response to the 'Chicago School,' " 1986 *Duke Law Journal* 628 (emphasis added). For even more critical assessments see also J. A. C. Hetherington, "Insider Trading and the Logic of the Law," 1967 *Wisconsin Law Review* 720; Harold Demsetz, "Perfect Competition, Regulation, and the Stock Market," in *Economic Policy and the Regulation of Corporate Securities*, 11–16 (Henry Manne ed., 1968); Michael Moran, "Insider Trading in the Stock Market: An Empirical Test of Damages to Outsiders" (Center for the Study of American Business, Washington University, Working Paper no. 89, July 1984.)
14. Henry Manne, *Insider Trading and the Stock Market*, 1, 5, 10 (1966).
15. Moore v. The Regents of the University of California, 793 P.2d 479 (Cal. 1990), *cert. denied*, 111 S. Ct. 1388 (1991).
16. And I am not the only one to think so. See, for example, John J. Howard, "Biotechnology, Patients' Rights, and the *Moore* Case," 44 *Food, Drug, and Cosmetics Law Journal* 331 (1989); Patricia A. Martin and Martin L. Lagod, "Biotechnology and the Commercial Use of Human Cells: Toward an Organic View of Life and Technology," 5 *Santa Clara Computer and High Technology Law Journal* 211 (1989); Stephen A. Mortinger, Comment, "Spleen for Sale: Moore v. Regents of the University of California and the Right to Sell Parts of Your Body," 51 *Ohio State Law Review* 499 (1990); Thomas P. Dillon, Note, "Source Compensation for Tissues and Cells Used in Biotechnological Research: Why a Source Shouldn't Share in the Profits," 64 *Notre Dame Law Review* 628 (1989); Bernard Edelman, "L'homme aux cellules d'or," 34 *Recueil Dalloz Sirey* 225 (1989); "Le recherche biomedicale dans l'economie de marche," 30 *Recueil Dalloz Sirey* 203 (1991). For the most brilliantly macabre title in the related literature, see Erik S. Jaffe, Note, " 'She's Got Bette Davis['s] Eyes': Assessing the Nonconsensual Removal of Cadaver Organs under the Takings and Due Process Clauses," 90 *Columbia Law Review* 528 (1990).
17. "Biotechnology; Spleen-Rights" *The Economist*, 30 (August 11, 1990); see also Beverly Merz "Whose Cells Are They, Anyway? Commercial Worth of Human Cell Lines Provokes Ownership Disputes," 33 *American Medical News* (March 23, 1990).
18. It also ignores the possibility that one can give up one stick from the bundle of property rights, but still retain the rest. This is an idea which is fundamental to all modern concepts of property, but particularly to intellectual property.
19. Moore v. Regents, 492.
20. Owners of cars (think of speed limits, HOV regulations, emission, safety, and insurance requirements) should also be disturbed by this kind of comment.

21. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983). A disagreeable picture of Johnny Carson emerges from the suit, and one is left wishing that the defendant, who described himself as "the World's Foremost Commodian," could have taken his place on television. Judge Kennedy, in dissent, attacked the decision because (among other reasons) "[the phrase 'Here's Johnny'] can hardly be said to be a symbol, or synthesis, i.e., a tangible 'expression' of the 'idea' of Johnny Carson the comedian and talk-show host." Id. at 844 (Kennedy, J., dissenting). This formulation—one that might have made even Hegel blanch—shows the power of the idea/expression distinction, even outside its normal ambit. Kennedy also mused that Ed McMahon might have a better claim to the phrase, since he was the one who actually used it. Id. at 839. Nevertheless, Judge Kennedy was willing to admit that a distinctive racing car could be an "expression" of the "idea" of the driver normally associated with it. Id. at 844 (citing Motsenbacher v. R. J. Reynolds Tobacco Co., 498 F.2d 821 [9th Cir. 1974]). At a later point, I will discuss the reasons for making such a distinction.
22. Moore v. Regents, 490. The court claims that "by definition, a gene responsible for producing a protein found in more that one individual will be the same in each." Id. at 490 n.30. One's first reaction is to wonder whether the reasoning here is disingenuous or merely accidentally fallacious. Later on I will compare the court's concern with "originality" and "uniqueness" to the concerns stressed by the romantic notion of authorship. My claim is that such a comparison helps us to understand the court's almost obsessional desire to prove that Moore's spleen was not unique, whereas the doctor's research products were.
23. Id. at 495 (footnotes omitted).

3. The Public and Private Realms

1. Karl Marx, "On the Jewish Question," in *The Marx-Engels Reader*, 31 (Robert Tucker ed., 1972).
2. One of Marx's more intriguing suggestions is that the public sphere owes its attraction to the fact that it is a diminished and distorted form of a truly just, egalitarian society. While the Eastern European state socialist societies never provided anything except a dystopian model of drearily brutal oppression, the concern with the limits of egalitarian justice is an issue that bids fair to obsess liberal societies for the foreseeable future.
3. Marx, "On the Jewish Question," 34.
4. These paragraphs can be no more than a summary of the basic ideas. It would take an entire book to discuss the full ramifications of the public-private distinction. In fact, particularly good studies have already been

written on several aspects of the subject. On the influence of classical legal thought and economics, see Duncan Kennedy, "The Role of Law in Economic Thought: Essays on the Fetishism of Commodities," 34 *American University Law Review* 939 (1985). On the effects of legal realism on the current perception of the public-private split, see Duncan Kennedy, "The Stages of the Decline of the Public/Private Distinction," 130 *University of Pennsylvania Law Review* 1349 (1982), and Morton J. Horwitz, "The History of the Public/Private Distinction," 130 *University of Pennsylvania Law Review* 1423 (1982). On the paradoxes produced by the fact that the market can seem public from the perspective of the family, but private from the perspective of the state, see Frances E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," 96 *Harvard Law Review* 1497 (1983). For a general discussion see James Boyle, "The Anatomy of a Torts Class," 34 *American University Law Review* 1003, 1023–1034 (1985).

5. Marx also thought that law played a vital role in this process. "Man emancipates himself *politically* from religion by expelling it from the sphere of public law to that of private law. Religion is no longer the spirit of the *state*, in which man behaves, albeit in a specific and limited way and in a particular sphere, as a species being, in community with other men. It is no longer the essence of *community*, but the essence of *differentiation*. It is now only the abstract avowal of an individual folly, a private whim or caprice." Marx, "On the Jewish Question," 35. In this sense, the defining feature of the liberal theory of politics is that it moves religion, wealth, and social class from the realm of public law to that of private law. We can no longer condition public office on a particular religion or social class, nor can we allow citizens to buy shorter jail time or purchase exemptions from military service. We can, however, allow private associations to exclude members on the basis of religion, or private individuals to purchase better health care or education.
6. Gideon v. Wainwright, 372 U.S. 335 (1963); Anthony Lewis, *Gideon's Trumpet* (1964).
7. The question is more complicated than this. The tension is reproduced at each level of the inquiry. Gideon v. Wainwright is a perfect example of the playing out of this issue in constitutional law. First, we have to decide whether the norm of equality applies. Our notion of equal justice fairly obviously does include access to legal services and does not include access to medical services. But even if we say that the norm of equality should apply, we have to decide what equality *means*, with the choice normally being presented in terms of formal equality, or substantive equality. In Gideon v. Wainwright equality means substantive equality—the accused has a right to an actual lawyer, not merely to a hypothetical lawyer if he can pay for one. In First Amendment issues, however, we have only a formally equal right to speak—the state is not understood to be constitutionally bound to pay the cost of getting my advertisement into the newspaper.
8. For an excellent discussion of the tensions between these ideas, see Frank Michelman, "Law's Republic," 97 *Yale Law Journal* 1493 (1988).
9. Admittedly, conventional privacy doctrine covers a great deal more. Nevertheless, it seems fair to say that other areas of privacy doctrine are explained partly in informational terms (cf. Rust v. Sullivan, 111 S. Ct. 1759 [1991]) and that control over private *information* is a vital part of the contemporary conception of privacy—whether legal or lay.
10. Frank H. Easterbrook, "Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information," 1981 *Supreme Court Review* 309.
11. Letter from James Madison to W. T. Barry, August 4, 1822, reprinted in *The Complete Madison*, 337 (Saul K. Padover ed., 1953).
12. See, for example, Harper and Row Publishers, Inc. v. Nation Enterprises et. al., 471 U.S. 539 (1985).
13. Anthony T. Kronman, "Mistake, Disclosure, Information, and the Law of Contracts," 7 *Journal of Legal Studies* 1 (1978); Saul Levmore, "Securities and Secrets: Insider Trading and the Law of Contracts," 68 *Virginia Law Review* 117 (1982).
14. Two hundred years later, Max Horkheimer and Theodor Adorno amazed American college students by suggesting—in considerably less graceful language—that, even in capitalism, there was still mythology and iconography. More surprising still, they argued that these new "mythologies" might be all the more secure precisely because of the effect of disparities of power on the type of abundant but nonrandom "information" provided to the public: "In the enlightened world, mythology has entered into the profane. In its blank purity, the reality which has been cleansed of demons and their conceptual descendants assumes the numinous character which the ancient world attributed to demons. Under the title of brute facts, the social injustice from which they [*sic*] proceed is now as assuredly sacred a preserve as the medicine man was sacrosanct by reasons of the protection of his gods . . . Through[out] the countless agencies of mass production and its culture the conventionalized modes of behavior are impressed on the individual as the only natural, respectable and rational ones." Max Horkheimer and Theodor W. Adorno, *Dialectic of Enlightenment*, 28 (1972).
15. Olsen, "The Family and the Market."
16. Edmund Andrews, "Telephone Autodialers under Fire," *New York Times*, D24 (October 30, 1991).
17. The same, familiar tensions play themselves out in the public sphere of

debate. Do private citizens have a right of access to privately held communications media in order to participate in public debate? The citizens would portray the television station as a means of public communication, "tinged with a public interest," as in Munn v. Illinois, 94 U.S. 113 (1876), and would demand state intervention to prevent public debate from being ceded to a satrapy of private interests. The television station would portray the same situation as an illegitimate public interference with private property. Does a person who participates in the public world of politics lose her property right in reputation, a property right normally protected by the imposition of a universal tort duty to refrain from defamation?

18. 47 U.S.C. §227 (Supp. IV 1992).
19. Moser v. Frohnmayer, 845 P.2d 1284 (Or. 1993) (holding that an Oregon state statute which prohibited the use of automatic dialing and announcing devices to solicit the purchase of any realty, goods, or services, was invalid); see also Edmund L. Andrews, "Curtailing the Telephone Robots," *New York Times*, D1, D24 (October 30, 1991); Andrew Binstock, "Curbs on Telemarketing Not Working, Study Says; Many Firms Found to Have No Written Policy," *Washington Post*, F1 (July 15, 1994).
20. Although there is relatively little reference in the academic literature to the conflicting requirements that liberal state theory puts on information, most academics would admit, I think, that the language of publicness and privateness is relatively useless for resolving *any* important issue. By this, I do not mean to say that it is meaningless to talk of "public" and "private" issues—quite the contrary. Those terms are central to public discourse. They are also the accepted way in which competing political beliefs are expressed. (Hence the old saw that conservatives think the market is private and the bedroom is public and liberals think the exact opposite.) Robert H. Mnookin, "The Public/Private Dichotomy: Political Disagreement and Academic Repudiation," 130 *University of Pennsylvania Law Review* 1429 (1982). But although they are vital terms with which to express normative conclusions, they are poor guides to analysis or decision making. When lawyers or state theorists attempt to use them as *operative terms*, the "all-things-to-all-people" quality that makes them so useful in political debate simply produces an endless array of mirror-image arguments of the kind described above.
21. Kim L. Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* (1988), provides an excellent contractarian critique of this tendency. See also *Economic Imperialism: The Economic Approach Applied outside the Field of Economics* (Gerard Radnitzky and Peter Bernholz eds., 1987).
22. William M. Landes and Richard A. Posner, "An Economic Analysis of Copyright Law," 18 *Journal of Legal Studies* 325 (1989); John Shepard Wiley Jr., "Copyright at the School of Patent," 58 *University of Chicago Law Review* 119 (1991). See also William W. Fisher III, "Reconstructing the Fair Use Doctrine," 101 *Harvard Law Review* 1659 (1988).
23. Edmund W. Kitch, "The Nature and Function of the Patent System," 20 *Journal of Law and Economics* 265 (1977); Edmund W. Kitch, "Property Rights in Inventions, Writings, and Marks," 13 *Harvard Journal of Law and Public Policy* 119 (1990); Louis Kaplow, "The Patent-Antitrust Intersection: A Reappraisal," 97 *Harvard Law Review* 1813 (1984); George Bittlingmayer, "Property Rights, Progress, and the Aircraft Patent Agreement," 31 *Journal of Law and Economics* 227 (1988); Frank H. Easterbrook, "Intellectual Property Is Still Property," 13 *Harvard Journal of Law and Public Policy* 108 (1990).
24. In insider trading scholarship, it would be briefer to cite those articles which do not have recourse to economic analysis. But the following list may give some indication of the breadth of approaches subsumed under the heading. Henry Manne, *Insider Trading and the Stock Market*, 1 (1966); William J. Carney, "Signalling and Causation in Insider Trading," 36 *Catholic University Law Review* 863 (1987); Christopher P. Saari, Note, "The Efficient Capital Market Hypothesis, Economic Theory and the Regulation of the Securities Industry," 29 *Stanford Law Review* 1031 (1977); Dennis W. Carlton and Daniel R. Fischel, "The Regulation of Insider Trading Restrictions," 35 *Stanford Law Review* 857 (1983). See also James D. Cox, "Insider Trading and Contracting: A Critical Response to the 'Chicago School,' " 1986 *Duke Law Journal* 628.
25. Ronald Coase, "The 1987 McCorkle Lecture: Blackmail," 74 *Virginia Law Review* 655 (1988); Richard A. Epstein, "Blackmail, Inc.," 50 *University of Chicago Law Review* 553 (1983); William M. Landes and Richard A. Posner, "The Private Enforcement of Law," 4 *Journal of Legal Studies* 1, 42 (1975).
26. Easterbrook, "Insider Trading"; Edmund Kitch, "The Law and Economics of Rights in Valuable Information," 9 *Journal of Legal Studies* 683 (1980).

4. Information Economics

1. For reasons related to the aporia described here, economists have tried to refine the concept of perfect information so as to limit the breadth of the concept. The accepted formulation seems to be that "individuals are unsure only about the size of their *own* commodity endowments and/or about the returns attainable from their own productive investments. They are subject to technological uncertainty rather than market uncertainty." Jack Hirshleifer, "The Private and Social Value of Information and the Reward to Inventive Activity," 61 *American Economic Review* 561

35. My friend Bob Gordon offers the following definition of "economist": "An economist is a person who believes that advertising is a means of conveying information."

5. Intellectual Property and the Liberal State

1. See Frances Philbrick, "Changing Conceptions of Property in Law," 86 *University of Pennsylvania Law Review* 691 (1938); Joseph W. Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld," 1982 *Wisconsin Law Review* 975; Kenneth Vandevelde, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property," 29 *Buffalo Law Review* 325 (1980).
2. To put it in the simplest terms possible, property is a strong barrier against potentially dangerous other people but, at least since the decline of classical legal thought, a weaker barrier against the state. See also Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455 (Mich. 1981); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984). Constitutional rights, by contrast, are generally a stronger barrier against the state but a weak barrier against "private" parties. Or, as one of my colleagues puts it, the full panoply of Constitutional restraints applies to the actions of the dogcatcher in Gary, Indiana, but not to Exxon or General Motors. The best explanation of property as a mediator between freedom and security comes from Singer, "The Legal Rights Debate," and I am indebted to his analysis.
3. See Thomas Hobbes, *Leviathan*, 189–190 (C. B. McPherson ed., 1976); John Stuart Mill, *On Liberty*, 70–85 (1975); James Boyle, "Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism," 135 *University of Pennsylvania Law Review* 383 (1987); Duncan Kennedy, "The Structure of Blackstone's Commentaries," 28 *Buffalo Law Review* 205, 209–221 (1979).
4. Singer, "The Legal Rights Debate," 980.
5. Vandevelde, "The New Property," 328–329.
6. 232 U.S. 340 (1914).
7. If the railroad had a duty not to cause the destruction of only that property kept at a reasonably safe distance from the track, where was the wrong? To put it another way, why isn't the majority venturing a solecism by allowing the "wrong" of the flax stacker (in stacking the flax by the tracks) to limit the "rights" of the railroad company to operate its property?
8. Rust v. Sullivan, 500 U.S. 354 (1991).

6. Copyright and the Invention of Authorship

1. Christian S. Krause, "Uber den Buchernachdruck," 1 *Deutsches Museum* 415–417 (1783), quoted in and translated by Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author,' " 17 *Eighteenth-Century Studies* 425, 443–444 (1984) (emphasis added).
2. Ernst P. Goldschmidt, *Medieval Texts and Their First Appearance in Print*, 112 (1943) (emphasis added).
3. Georg H. Zinck, *Allgemeines Oeconomisches Lexicon* col. 442 (3d ed. n.p. 1753), quoted in Woodmansee, "The Genius and the Copyright," 425.
4. See James Boyle, "The Search for an Author: Shakespeare and the Framers," 37 *American University Law Review* 625, 628–633 (1988).
5. A view which persisted for some time: "Nevertheless, I had to be told about authors. My grandfather told me, tactfully, calmly. He taught the names of those illustrious men. I would recite the list to myself, from Hesiod to Hugo, without a mistake. They were the Saints and Prophets. Charles Schweitzer said he worshipped them. Yet they bothered him. Their obtrusive presence prevented him from attributing the works of Man directly to the Holy Ghost. He therefore felt a secret preference for the anonymous, for the builders who had had the modesty to keep in the background of their cathedrals, for the countless authors of popular songs. He did not mind Shakespeare, whose identity was not established. Nor Homer, for the same reason. Nor a few others, about whom there was no certainty they had existed. As for those who had not wished or who had been unable to efface the traces of their life, he found excuses, provided they were dead." Jean-Paul Sartre, *The Words*, 61–62 (1964).
6. I use the male form deliberately. It is true, that, despite the obstacles placed in their way, a number of women authors established themselves on the literary scene. To say, however, that they participated in the "invention" of romantic authorship, or to claim that such a notion accurately reflected the parts of their own creative practices which they thought most valuable, seems to me to be going too far. In this historical analysis, gender-neutral language might actually obscure understanding. See Sandra M. Gilbert and Susan Gubar, *The Madwoman in the Attic: The Woman Writer and the Nineteenth Century Literary Imagination* (1988); see also Ann Ruggles Gere, *Common Properties of Pleasure: Texts in Nineteenth Century Women's Clubs* 647 (1992); Marlon B. Ross, *The Contours of Masculine Desire: Romanticism and the Rise of Women's Poetry* (1989); Martha Woodmansee, "On the Author Effect: Recovering Collectivity," 10 *Cardozo Arts and Entertainment Law Journal* 279 (1992).
7. For an early but more comprehensive development of these ideas see

Boyle, "Search for an Author." The original hints for this line of thought can be traced back to Michel Foucault, "What Is an Author?" in *Textual Strategies: Perspectives in Post-Structuralist Criticism* (J. Harari ed., 1979). Woodmansee, "The Genius and the Copyright," provided the paradigm for actual research, and her article gives a marvelous account of the "rise" of intellectual property in Germany. For the linkage between romantic authorship and intellectual property in England see Mark Rose, "The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship," 23 *Representations* 51 (1988); see also Mark Rose's *Authors and Owners: The Invention of Copyright* (1993). But see John Feather, "Publishers and Politicians: The Remaking of the Law of Copyright in Britain, 1775–1842; Part II: The Rights of Authors," 25 *Publishing History* 45 (1989). For the same linkage in France, see Carla Hesse, "Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777–1793," 30 *Representations* 109 (1990). And for the United States, see Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of 'Authorship,' " 41 *Duke Law Journal* 455 (1991).

8. Woodmansee, "The Genius and the Copyright," 427.
9. Harold O. White, *Plagiarism and Imitation during the English Renaissance,* 120, 202 (1935).
10. Johann G. Fichte, "Proof of the Illegality of Reprinting: A Rationale and a Parable" (1793), quoted in Woodmansee, "The Genius and the Copyright," 445.
11. 188 U.S. 239 (1903).
12. In fact, of course, Shakespeare engaged regularly in activity that we would call plagiarism but that Elizabethan playwrights saw as perfectly harmless, perhaps even complimentary. Not only does this show the historical contingency of the romantic idea of authorship, but it may even help to explain some of the "heretical" claims that Shakespeare did not write Shakespeare. Most of the heretics use the fact of this supposed plagiarism and their knowledge of the timeless truth of the romantic vision of authorship to prove that someone else, preferably the author of the borrowed lines, must have written the plays. After all, the Immortal Bard would never stoop to copy the works of another. Once again, originality becomes the key.
13. *Bleistein,* at 249–250 (emphasis added).
14. In the language of romantic authorship, uniqueness is by no means the only characteristic of the author. Originality may imply iconoclasm. The romantic author is going beyond the last accepted style, breaking out of the old forms. This introduces an almost Faustian element into the discussion. The author is the maker and destroyer of worlds, the irrepressible spirit of inventiveness whose restless creativity throws off invention after invention. Intellectual property is merely the token awarded to the author by a grateful society.
15. Jessica Litman, "The Public Domain," 39 *Emory Law Journal* 965, 999 (1990) (footnotes omitted); see also David Lange, "Recognizing the Public Domain," 44 *Law and Contemporary Problems* 147 (1981).
16. By focusing on the truly exceptional work one can even ignore the conceptual deflation that occurs in a case like *Bleistein.*
17. Paul Goldstein, "Copyright," 38 *Journal of the Copyright Society of the U.S.A.* 109, 110 (1991) (emphasis added).
18. Northrop Frye, *Anatomy of Criticism,* 96–97 (1957).
19. John Shepard Wiley Jr., "Copyright at the School of Patent," 58 *University of Chicago Law Review* 119 (1991).

7. Blackmail

1. By far the best survey comes from James Lindgren, "Unraveling the Paradox of Blackmail," 84 *Columbia Law Review* 670 (1984). Though I disagree with Lindgren's own explanation of blackmail, his article is an excellent introduction to the field—one to which I am indebted.
2. Lindgren formulates the problem in this way: "I have a legal right to expose or threaten to expose [a] crime or affair, and I have a legal right to seek a job or money, but if I combine these rights it is blackmail." Lindgren, "Unraveling the Paradox," 670–671. Although this is clearly an advance on other formulations, it tends to gloss over the variety of the legally protected interests involved. The legal relationships involved are not actually all "rights," but a mixture of privileges, powers, and immunities. This tendency to reduce all legal relationships to a single "right" concept appears to play a role in undermining Lindgren's own theory. Later in the book, I will argue that there are other cases in which the legal system makes it illegal to commodify various privileges and powers—for example, parents may arrange private adoptions but they may not sell babies to adoptive parents—and that it is in this context that blackmail should be understood.
3. This idea of the tasks of jurisprudence is rendered problematic by the essentialist vision of language on which it rests. See James D. A. Boyle, "Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism," 135 *University of Pennsylvania Law Review* 383 (1987); James Boyle, "Ideals and Things: International Legal Scholarship and the Prison House of Language," 26 *Harvard International Law Journal* 327 (1985). I will argue here that a related problem besets the analysis of blackmail.