California Law Review

VOL. 80 DECEMBER 1992 NO. 6

A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading

James Boyle

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In this Article, Professor Boyle undertakes an analysis of the law's treatment of information across four apparently disparate realms: copyright, genetic information, blackmail, and insider trading. He argues that questions of information regulation, commodification, and access are shaped by two neglected processes of interpretive construction. First, such issues are often decided by pigeonholing them into implicitly contradictory stereotypes of "public" or "private" information. These conflicting stereotypes have their roots in basic assumptions about politics, the market, and privacy in a liberal state. Second, Professor Boyle argues that tension between these stereotypes is often apparently resolved by the use of a seductive image: the romantic author whose original, transformative genius justifies private property and fuels public debate. Thus, conventional wisdom, courts, and even economic analysts are more likely to favor granting prop-

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 Professor of Law, Washington College of Law, The American University. LL.B. 1980, Glasgow University; LL.M. 1981, S.J.D. 1986, Harvard University. This Article was written while I was a Visiting Professor at Boston University Law School and Harvard Law School. The research funds of those schools supplied valuable assistance.

As befits a piece that questions the notion of authorship and originality, this one is marked by fundamental intellectual debts. Four articles have been particularly influential: Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*; Duncan Kennedy, *The Structure of Blackstone's Commentaries*; Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*; and Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author."* I have also been influenced by the work of Rosemary Coombe, and by the prodigious and sophisticated oeuvre of Wendy Gordon. This Article draws on a theory of authorship and its relevance to property, romance, and interpretation that I first laid out in *The Search for an Author: Shakespeare and the Framers*. Earlier versions of this Article were presented at the 1991 Case-Western Conference on Intellectual Property and the Construction of Authorship, and at faculty colloquia at Harvard Law School and Boston University Law School. I would like to thank all of the participants for helping me to refine my ideas. Colleagues at Harvard Law School, American University, and Boston University were generous with their time. I have benefitted particularly from comments by Frank Michelman, Fred Schauer, Terry Fisher, Howell Jackson, Terry Martin, David Carlson, Mark Hager, Jack Beermann, Joe Singer, Rudy Peritz, Mark Rose, Margreta de Grazia, Steven Shavell, Louis Kaplow, Bob Bone, and David Seipp. William Alford's work on intellectual property in China was also extremely helpful. Anne Hollander, Gerry Moohr, and the rest of the participants in the Modern Legal Theory Seminar also helped me to refine my ideas. Jae Won Kim, Jennifer Ritter, David Dantzic, and Beth Silberman researched expertly. Above and beyond these other debts, however, this piece only exists because of a conversation carried on over the last eight years with my polymath colleague, Peter Jaszi. It is to him that I would like to dedicate it.

erty rights in information when the controller of this information can convincingly be ascribed the qualities of originality, creativity, and individuality, the defining attributes of romantic authorship. This is possible in the copyright domain and for manipulators, if not sources, of genetic information. Blackmailers and insider traders cannot so readily be fitted into the romantic author mold, and are classified instead as transgressors against, respectively, the "private" and "public" stereotypes of information. The Article concludes by assessing the impact of the implicit stereotypes on the politics of the "information age." Professor Boyle argues that an emphasis upon the ideology of authorship could be as important to an information society as the notions of freedom of contract and wage labor were to an earlier, industrialized society. This ideology of authorship, Professor Boyle contends, with its tendency to devalue the claims of sources and of audience, has the potential for strong detrimental effects on the political and economic structure of the "information age."

INTRODUCTION

It is hard, nowadays, to find a piece of futurology that *doesn't* say we are entering an information age. Yet there have been few systematic critical studies of the rhetorical, ideological, political, and, ultimately, legal structures through which we deal with information.[1] At the same

1. Among legal scholars, only the economic analysts of law have seemed interested in dealing holistically with information, rather than with the doctrinal categories into which law has traditionally divided it. The two most striking examples of the holistic approach are Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information,* 1981 SUP. CT. REV. 309, and Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information,* 9 J. LEGAL STUD. 683 (1980). In a manner reminiscent of legal realist scholarship, these studies suggest that doctrinal divisions may obscure the need for enlightened policymaking. Easterbrook, for example, is concerned that, "[i]f the Court puts information cases in securities law or evidence law pigeonholes, it may overlook the need to consider the way in which the incentive to produce information and the demands of current use conflict." Easterbrook, *supra,* at 314. While I agree with the impulse to treat information holistically, my goals are rather different. Later in this Article, I argue that despite its holistic treatment of information, the law and economics literature is beset by a number of conceptual "baseline" and Hohfeldian errors, and that it presents an ideology of "authorial" incentive as if it were not ideology, but empirical fact. *See infra* Part IV.

Nonlawyers have come close to my concerns here. Kim L. Scheppelle's book *Legal Secrets* gives a thoughtful contractarian analysis of secrets in cases related mainly to fraud, privacy, and professional requirements of confidentiality. In the process she offers a critique of Chicago-style law and economics and an interesting defense of egalitarian informational ethics. KIM L. SCHEPPELLE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW (1988). Literary critics have also contributed to the issue. In a recent book, Susan Stewart offers a fascinating analysis of the intersection of law and a range of "crimes of writing"—forgery, literary imposture, pornography, and graffiti—and the relevance of this intersection to notions of subjectivity and authenticity. SUSAN STEWART, CRIMES OF WRITING: PROBLEMS IN THE CONTAINMENT OF REPRESENTATION (1991). Bernard Edelman's *Le Droit Saisit par la Photographie* (published in English as BERNARD EDELMAN, OWNERSHIP OF THE IMAGE (1979)) goes in the other direction, giving an Althusserian analysis of law through an examination of intellectual property law relating to photographs. In the process he raises some of the problems of objectification, originality, and commodification that I deal with here. Finally, in a forthcoming work, Mark Rose offers an excellent analysis of the historical connections between "authorship" and copyright in England. MARK ROSE, AUTHORS AND

time, the area of legal doctrine that acknowledges that its main concern is information—conventionally defined intellectual property—is marked by severe disagreements over the most fundamental propositions. For example, within copyright there are continuing disputes over a wide range of basic issues—the classification of something as idea or expression, the definition of "fact works," and the dilemma of how to treat computer programs being some of the more obvious.[2] Areas outside intellectual property, although superficially commonsensical, are also beset by basic conceptual puzzles. Blackmail and insider trading both represent proscribed forms of trading in information that, when defined in abstract terms, seem to conform exactly to moral and legal norms accepted elsewhere in society. In the former case, why should private individuals be forbidden to make private agreements regarding the dissemination of privately held information? Insider trading is even more puzzling. Markets are built on structured inequality. Why should we not let people trade from a position of advantage in information, just as we let them trade from a position of advantage in wealth? Finally, if we look at the legal treatment of genetic information—which, with electronic information, may define the international economy of the immediate future[3]—we find a morass of formalism, circular arguments, and incoherent theories of property.

Taking these puzzles as its raw material, this Article attempts to develop a theory of law and information. Its aim is not to produce a formula for resolving all problems, but rather to show the themes repeated in, and the possibilities suppressed by, our current treatment of information issues. In particular, the Article argues that questions of information regulation, commodification, and access are shaped by the intersection of two neglected processes of interpretive construction. First, such questions are often decided by an uncritical process of pigeonholing into a number of stereotypes of "public" or "private" information. These stereotypes have their roots in relatively basic assump-

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OWNERS: THE INVENTION OF COPYRIGHT (forthcoming 1993). Rose's work has both parallels to and differences from Woodmansee's pioneering article on the same issues in Germany, *see* Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STUD. 425 (1984), and my discussion of the valences of an ideology of authorship for interpretation and entitlement, *see* James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers,* 37 AM. U. L. REV. 625 (1988). For a critical comparison of our approaches, see David Saunders & Ian Hunter, *Lessons from the "Literatory": How to Historicise Authorship,* 17 CRITICAL INQUIRY 479, 491-500 (1991).

2. *See* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 464 ("At present, the surface patterning American copyright law is in apparent disarray. Judges and writers can not agree on the most basic propositions."); Jessica Litman, *The Public Domain,* 39 EMORY L.J. 965, 998 (1990) ("[T]here is ample precedent deciding almost every copyright issue in almost every conceivable direction.").

3. Those with a taste for ambiguous dystopias may care to look at *Neuromancer,* which offers a fictional vision of a world organized around the trade, control, and theft of genetic and electronic information. WILLIAM GIBSON, NEUROMANCER (1984).

tions about property, society, and privacy in a liberal state. Second, the tensions among and between these stereotypes are often lessened by an appeal to a particular (and particularly romantic) image of information production—the author who produces originality *ex nihilo* and thus should be rewarded with honor and property rights. The Article argues that the contradictions, assumptions, and lacunae of these two processes are an important part of any study of the current law of information, or the future social arrangements of the information society.

A note on method may be in order. The first half of this Article—with its concentration on the doctrinal and argumentative patterns generated by the apparent contradiction of "information property"—bears a certain resemblance to the structuralist legal theories of the early 1980s. Like the authors of those articles, I claim that understanding a particular set of tensions allows us to see patterns in otherwise diverse doctrinal developments, to relate legal issues to basic conflicts of political vision, to anticipate the structure of the rhetoric on both sides of any issue, and to see the moral and political inconsistencies in the way that we deal with information. This may sound suspiciously like overblown claims to have discovered the "fundamental contradiction" or even the driving wheel of history. My goal is rather different.

Structuralist and determinist accounts of social forces generally argue that one area of social life—the means and relations of production, the mediation of the fundamental tension between self and others, or the patterns of childrearing—is the *real* determinant of history. All else is chimera and superstructure. The claims I make here are much more modest. At most, I am trying to lay out the normative topography, the geography of assumptions within which issues are framed, possibilities foreclosed, and so on. This geography *matters* because it excludes some options from consideration (excludes them even from being seen, perhaps) or prompts a hasty leap to judgment, or because it is one of the many forces shaping the terrain of political struggle. But the ideas and ideologies I am describing are neither so deeply rooted in the culture that they can never be criticized, nor so determinate that they dictate only one solution: the process is neither a giant conspiracy nor a deterministic and inevitable deep structure of thought.

The second theme of this Article is its critique of romantic authorship. I claim that a series of concepts associated with the romantic notion of the "author" is offered as a device to mediate, defer, or apparently resolve the internal tensions of regulating information. Most of the time, courts accept the author gambit, even if the "author" is plainly recombining elements mined free of charge from the public sphere (or even the private body). My examples of this pattern come from copyright doctrine and the law of property in genetic information. Occasionally, however, for reasons apparently related to the pattern of tensions

between public and private spheres, the author gambit is declined, and the putative "authors" are instead told they cannot profit from their use of information. Blackmail and insider trading are the two examples given here: both of these would seem like classic market transactions, were it not for the fact that they concern information and thus conjure up all the contradictions and tensions which beset the treatment of information in liberal social theory. The doctrine of blackmail defends the image of the private sphere by protecting an individual's subjectively defined "private" information from commodification in the marketplace. The prohibition of insider trading protects the image of the public sphere by imposing the ideas of formal equality on market transactions precisely because they concern *information,* rather than some other form of power or wealth. My thesis is strengthened by the fact that insider trading seems from scholarly reaction to lie particularly close to the line. Indeed, the acknowledged pioneer-critic of insider trading law relied heavily on the rhetoric of authorial, entrepreneurial genius to support decriminalization.[4] Perhaps insider traders can be authors after all.

This aspect of the Article, and particularly its discussion of the social construction of authorship, is reminiscent of poststructuralist criticism. My conclusion—with its reliance on both economic analysis and literary criticism, and with its attempt to imagine the effects of a transposition of the traditions of nineteenth century liberalism to the social relations of an information society—could fashionably be styled as postmodernist. Thus, for those who are interested, this Article presents a kind of layer cake of the intellectual methods of the last fifteen years. There was a reason behind this methodological eclecticism. My hope is that this piece will be seen as an example of constructive engagement between the main schools of legal scholarship, prompting economic analysts to consider the interpretive construction that grounds their theories, devotees of law and literature to look beyond the text to the structure of incentives through which the text was created, and critical legal scholars to take seriously their professed commitment to decoding the social construction of reality in a way that produces practical suggestions for change. Nevertheless, I have tried as far as possible to make sure that familiarity with these academic movements is not necessary to understand the central arguments presented here.

The structure of the Article replicates that of this introduction. In Part I, I set up the four subjects mentioned in the title of the Article. My aim is to treat them as academic conundrums worthy of solution in their own right and as case studies that help us to lay the groundwork for a theory of law and information.

In Parts II and III, I argue that the doctrinal disputes and confu-

4. *See infra* text accompanying notes 224-40.

sions in all of these areas can be usefully understood as reflections of a set of basic tensions—in particular the tensions between public and private, speech and property, formal equality and *restitutio in integrum.* These tensions are especially painful because speech, debate, and the exchange of information are so important to the liberal vision of politics and economics and to the construction of the public and private realms.

In Part IV, I turn to the area of information economics. The uncertainties and tensions in conventional legal and political discourse about information, combined with the obvious analytical importance of concepts such as incentives to production and barriers to exchange, make information issues seem particularly susceptible to economic analysis. Legal scholars now routinely turn to microeconomic concepts, whether of "the public goods problems of intellectual property" or the attributes of an "efficient capital market," to resolve problems in the production, generation, commodification, or use of information. Is this reliance on economic analysis warranted? Drawing on the recent theoretical literature and on the structure of tensions described in this Article, I argue that information economics is paradoxical or at least aporetic.[5] Consequently, it provides no real surcease from the difficulties of liberal state theory or from the indeterminate topography of "public" and "private."

Sometimes economists treat information as just another product, something that must be commodified if producers are to be given an incentive to produce it. At other times, they treat it as part of the structure of the market: infinite, perfect, and circulating without let or hindrance. I argue that contemporary microeconomics offers only the most intuitive basis for evaluating which "aspect" of information is fundamental to the analysis. Yet it also offers no convincing way of reconciling the competing "aspects" into a uniquely correct ordering of preferences or structure of tradeoffs. Any attempted reconciliation ends in paradox, a fact noted by at least one prominent pair of economists.[6] In fact, information presents almost the same kind of difficulties for neoclassical eco-

5. *Aporia*—and its adjectival form, aporetic—means literally, "in a state of doubt." Philosophers and political theorists have differed about the appropriateness of using the term "paradox" or "contradiction" to describe some of the situations I lay out in this Article. My claim is that information can (and must) be defined both as a commodity, the production and distribution of which can be analyzed within the model, and as a constituent part of the model itself. *Aporia* seemed the most appropriate word to use because whether one chooses to see this as a basic theoretical fault line, or a mere quibble that can be solved by changing the level and focus of the analysis, the nature of information is "in a state of doubt," and the outcome of any particular economic analysis will be profoundly different depending on which aspect is chosen. Because *aporia* might be an unfamiliar word to those who love neither classical rhetoric nor German idealist philosophy, I use the word "paradox" interchangeably. Unless specified otherwise, it is this double, and thus doubtful, quality of information to which I am referring. Other well-known paradoxes have similar structure—for example, the barber of Seville, who is both "a man" and "the barber," so if the barber shaves all the men who do not shave themselves . . . ? For an explanation of the paradox created by the idea of an informationally efficient market, see *infra* text accompanying notes 69-77.

6. *See infra* text accompanying note 83.

nomics that rent did for classical economics: it is the problem case in which the basic assumptions of the discipline come into conflict with each other.

Although some economic analyses acknowledge the indeterminacies involved in choosing which aspect of information to highlight, most are silent on the issue. In fact, such analyses are frequently "grounded" on a subtextual, and probably unconscious, appeal to a particular vision of information production—the stereotype of the romantic author which I referred to earlier. Consequently, I argue that although economics *frames* some of the issues of information regulation well, the perception that it is capable of routinely *settling* those issues is a false one, a false one with important consequences.

In Part V I argue that, within the legal system, the concept of property traditionally bears the burden of resolving the tensions between public and private, but that it does so in ways that merely restate those tensions. Thus, when we turn to a field that can best be described as *property in information,* we have a set of contradictions that is literally redoubled.

In Part VI, I test the above hypothesis by turning to the first of my puzzles or case studies, the structure of copyright doctrine. I trace the parallel evolution of the romantic idea of authorship—a notion that would have been alien to Shakespeare—and the development of the concept of intellectual property. My argument is that copyright offers a vitally important mediating strategy, a constellation of rhetorical, conceptual, and thematic ideas that seems to resolve the tensions I have described so far. That constellation is formed by the figure of the romantic author, the theme of "original creation," and the distinction between "idea" and "expression." It apparently provides a basis for partial and limited property rights without raising the specter of property as merely a utilitarian, revocable state grant, it justifies the giving of entitlements according to a labor theory of property without spreading those entitlements too widely, and it resolves the tension between public and private by giving the idea to the public world and the property right in expression to the writer.[7] By appealing to a particular notion of progress and of creation, the idea of "originality" downplays debts to language, culture, and genre and thus justifies the granting of limited monopolies, even monopolies centered around information.

The next two Parts explore the way in which the commodification of

7. This constellation of ideas appears to resolve so many of the paradoxes in the regulation of information that one finds it in other areas of information regulation—even ones far removed from literary creation. A particularly fascinating manifestation of this trend lies in the fact that many economists and economic analysts of law seem just as fascinated by the romantic vision of authorship as their econophobic precursors. One reason for this unlikely state of affairs could be that an unconscious reliance on the idea of romantic authorship conceals the *aporias* of information economics, even from the analysts themselves.

information raises different problems depending on whether the situation is typed as a "private" one or a "public" one. In the case of blackmail, discussed in Part VII, the ability to control information—alone out of all other social resources—seems to be central to our conception of personality. In the case of insider trading, discussed in Part VIII, we see information advantages, unlike other advantages in wealth or power, as subject to the norm of equality. In both cases, I argue that if we look at information holistically rather than within its narrower doctrinal boxes, these two longtime subjects of scholarly dispute can be explained if not actually resolved. In both, a refusal to commodify information is justified in part by an intuitive act of "typing" into realms of publicness or privateness, each with its own ideas about justice and its own theories of entitlement.

The mediating role of the author is also relevant to at least one of these two subjects. Blackmail offers us no convincing author figure on whom to pin a property right. But in insider trading, an area where decriminalization has been seriously suggested and defended, things are rather different. At the end of Part VIII I show that the germinal argument for the decriminalization of insider trading actually relies on an eerily perfect invocation of the rhetoric of the romantic author or, in this case, the romantic entrepreneur. This argument defines the entrepreneur in terms of originality, in terms of the creative destruction of settled arrangements. By this view, insider trading is a limited monopoly in information that rewards the entrepreneur for his or her efforts and thus ensures further entrepreneurial acts. Just as with copyright, society is purportedly compensated by the advances and contributions that the great genius throws off. In the face of such an essential contribution to human progress, what's a little monopoly here and there?

More generally, I claim that examination of insider trading scholarship and case law gives evidence of both of the processes this Article describes: the typing of information issues into "public" and "private" and the attractiveness of the author concept as a device to reconcile, or at least obscure, our conflicting notions about information.

The final puzzle, discussed in Part IX, comes from *Moore v. Regents of the University of California,*[8] a case that concerns ownership and control of genetic information. The *Moore* case presents, in miniature, each of the conflicts referred to in this Article: the clash between a vision of property rights as absolute or relative, between the public and private characterization of information, between the market and "privacy," and between natural rights and the rights of creative labor. My analysis attempts to show the consequences, for "sources" such as Mr. Moore, of an entitlement regime built around the notion of romantic authorship.

8. 793 P.2d 479 (Cal. 1990), *cert. denied,* 111 S. Ct. 1388 (1991).

In the Conclusion, I make three arguments. First, the Article demonstrates a particular method of "resolving" questions of information regulation by typing the issue into one of a series of contradictory visions of information. Second, despite Michel Foucault, postmodernism, and the death of the novel, the romantic vision of authorship is more important today than it was to Fichte and Krause, Pope and Macaulay. The facility with which the romantic vision appears to resolve the tensions I describe in this Article is one of the keys to its success or failure. Sometimes the romantic vision may be "right." Yet its ahistorical claims of universality and its overblown claims about the incentives necessary to production, to say nothing of its overweening romanticism, make it a dangerous template for the regulation of information. Using a string of examples, ranging from software development to the manufacture of pharmaceuticals, I argue that the romantic vision blinds us to the pragmatic, moral, and distributive claims of both "sources" and audience.

The final Section of the Conclusion is more speculative. Above and beyond my attempt to reorient long-running academic debates over copyright, blackmail, insider trading, and genetic information, this Article has a broader goal. It seems reasonable to assume that we are moving into a world that will increasingly be structured around the collection, manipulation, and use of information. At least at first, that world will be discussed, debated, and regulated using ideas about information that come from a society in which information had a rather different set of relationships to economic power and the rhetoric of entitlement. Consequently, the final Section of the Conclusion reflects on what the "information world" could, and should, look like.

One of our greatest cultural legacies is a collection of intellectual tools that help us to understand both the appeal and the limitations of the rhetoric of entitlement produced by a society like ours. Thus, we have a rich tradition of intellectual commentary on the production and distribution of tangible objects and on the consequences of the division between capital and labor, between ownership and control, between public and private. This commentary has produced conceptual tools such as the labor theory of value, the Pigouvian analysis of externalities, and the critique of the public/private split. Such tools have profound limitations and analytical shortcomings, but they do help us to uncover that which is suppressed or rendered invisible by the overwhelming familiarity of our social arrangements. The final Section of the Article attempts to imagine some of the equivalent tools for the *information* society.

One final note about method may be in order. My subject in this Article is "information." Elsewhere I have explained my rejection of the essentialist vision of language[9] and the disciplinary ideas associated with

9. James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought,* 133 U. PA. L. REV. 685 (1985).

it.[10] I see this Article as a continuation of that work, rather than as a renunciation of it. If I am not claiming that there is some preexisting, essential component that ties together every "information" issue "properly so-called,"[11] then what holds the examples used in this study together? My attitude towards definition in this Article has been pragmatic, in the looser sense of that term. With Felix Cohen, I believe that a "definition . . . is *useful* or *useless*. . . . [It] is useful if it insures against risks of confusion more serious than any that the definition itself contains."[12]

In this Article, I have focused on the communication and manipulation and trade of knowledge—whether found in RNA, typeface, programmer's code, or blackmailer's photographs—and on the parties who are seen as the rightful owners, controllers, or audiences of that knowledge. This has led me into cognate issues presented by copyright law, even though *Pierre Menard: True Author of Don Quixote* and *The Name of the Rose* are not normally seen as "information."[13] Bringing these disparate areas together does have its advantages. Each of these areas involves situations in which tangible control of a single *res* is not enough. The same compromising photograph in a blackmailer's hands, piece of software, best-selling novel, or genetic program plugged into a vat of gene-spliced *E. coli* can be used to produce an infinite number of copies. In each, it is the message rather than the medium that is central to the analysis. In each, one is forced to confront the division and disaggregation of the property concept, and so on.

To some, this approach may seem doubtful. Professional economists have concentrated on "innovation" rather than "information"—particularly in coverage of intellectual property, but occasionally even in their coverage of such issues as insider trading. I chose quite deliberately to move away from this literature and to use a broad and open definition

10. James Boyle, *Ideals and Things: International Legal Scholarship and the Prison-House of Language*, 26 HARV. INT'L L.J. 327 (1985) [hereinafter Boyle, *Ideals and Things*]; James Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism*, 135 U. PA. L. REV. 383 (1987) [hereinafter Boyle, *Thomas Hobbes*].

11. *See* 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 167 (Robert Campbell ed., 5th ed., London, John Murray 1885).

12. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 835-36 (1935).

13. Patent law offers just as rich a field for analysis. I excluded it partly because of exhaustion and lack of space, but also because of a tentative judgment that it depends on a similar conceptual structure to that of copyright law. Both areas apply a notion of "originality" that suppresses the importance of culture, language, and scientific community. Both exhibit the same structural pattern of internal binary division, although the content of the divisions is not identical. (Consider the copyright protection of expression, not idea, and the patentability of function, not form.) In each case, it is the *manifestation* of the appropriate kind of genius that receives protection, while the remainder is given to the public realm. My own background leads me to use the idea of romantic authorship as the organizing concept. I leave open the question of whether a similar analysis could be performed using the idea of the "inventor."

of information as my organizing concept. In part, this choice stems from the belief that there are interesting things to be said about both levels of generality, and that information was the conceptual box into which my particular theoretical interests fit most neatly. My choice also stems from the fact that the studies that concentrate on "innovation" are destined to repeat the paradigm of the original transformative genius, rather than subjecting it to critical assessment in each of the new contexts in which it is deployed.[14] By themselves, of course, these explanatory remarks could not *justify* my choices. In the end, it will be the work created from the materials thus assembled that either justifies or discredits the criteria of inclusion. For epistemological reasons, if for no others, the proof of this pudding *is* in the eating.

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14. Some writers seem to assume that production, whether industrial or literary, is marked by two distinct forms—one representing imitative, organic, normal science, the other transformative, original innovation. This is as true of Schumpeter as it is of Wordsworth. *See* JOSEPH A. SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT (Redvers Opie trans., Oxford University Press 1961) (1934). I am heartened to find that one of the most empirically detailed and historically sensitive *economic* studies of technology and innovation echoes my dissatisfaction with this conclusion. Paul David explains that he has found it much more useful to conceive of innovation in terms of modification of particular existing processes rather than in terms of sweeping industry-wide transformation.

> [T]he economist's now conventional conceptualization of technological innovation as a change of a neoclassical production function—an alteration of relationships between inputs and output across the entire array of known techniques—has turned out to be less helpful than one might wish. On more than one occasion, regrettably, it has led historical discussions of invention and diffusion into paradox and confusion.

PAUL A. DAVID, TECHNICAL CHOICE, INNOVATION AND ECONOMIC GROWTH: ESSAYS ON AMERICAN AND BRITISH EXPERIENCE IN THE NINETEENTH CENTURY 2 (1975). David's conclusion is that

> a deeper understanding of the conditions affecting the speed and ultimate extent of an innovation's diffusion is to be obtained only by explicitly analyzing the specific choice of technique problem [sic] which its advent would have presented to objectively dissimilar members of the relevant (historical) population of potential adopters.
>
> . . . Doing so, however, calls sharply into question the penchant historians of technology have displayed for separating their task into two distinct undertakings: writing the 'history of common practices' and the 'history of inventions,' and supposing that it will prove useful to continue to pursue each enterprise rather independently of the other.

Id. at 5. In this Article, I stress that the fixation on authors, inventors, and entrepreneurs tends to obscure the importance of continuity, indebtedness, and evolution and to overemphasize that of transformation, originality, and revolution. Having claimed that this vision of creation undervalues genre, tradition, and source, I point out that it also ignores the contradictory roles that information is expected to play—even within the world of microeconomics. Consequently, I argue that one cannot draw the kind of general conclusions that most economists and historians have drawn about the relationship of any particular kind of information, *or* innovation, to some abstract legal form. For obvious reasons, my use of the larger conceptual category of information facilitates this argument considerably. David's account, with its stress on dissimilar circumstances, particular empirical evidence, and the intimate relationship between the "innovation" and the practices it modifies, seems to me to support at least part of this effort.

I
FOUR PUZZLES

A. Copyright

Nothing is more familiar to the student of intellectual property than the claim that it is an area of unusual conceptual difficulties. We even have judicial authority for the proposition that copyright approaches "nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent."[15] At first sight the current state of copyright doctrine would appear to justify that conclusion. The newcomer to the field is quickly dazzled by the apparently basic questions that surface even in relatively mundane cases. What is the distinction between idea and expression?[16] Are the page numbers in the West Law Reports or the alphabetical compilations of names in a telephone directory actually copyrightable?[17] What are the criteria for deciding such cases: The originality of the work? The amount of labor that has gone into it?[18] The potential loss to the original compiler, or potential profit to the copying

15. Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901).

16. "Nobody has ever been able to fix that boundary, and nobody ever can." Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (Hand, J.); *see also* Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (Hand, J.) ("Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' "). The more fundamental question, however, is not *how* to draw the distinction between idea and expression, but *why* to draw it.

> 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.

Litman, *supra* note 2, at 999 (footnotes omitted). At a later point, I will argue that the contradictory ideological structure described in these pages is the most plausible explanation for the copyright's reliance on the idea-expression dichotomy. *See infra* Part VI.

17. *See* L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations,* 36 UCLA L. REV. 719, 720-28 (1989) (recounting a district court's willingness to grant, and a circuit court's willingness to affirm, a preliminary injunction against the use of West page numbers by Mead Data Central's LEXIS service). *But see* Feist Publications v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1297 (1991) (holding that telephone white pages are not entitled to copyright protection and that use of them does not constitute infringement).

18. *See* Justin Hughes, *The Philosophy of Intellectual Property,* 77 GEO. L.J. 287 (1988) (investigating the two "grand" theories for intellectual property—labor and personality); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession,* 51 OHIO ST. L.J. 517 (1990) (advocating the restoration of copyright law's natural law heritage, in part through an investigation of the rights an author should be granted for her labor).

party, or to society?[19] Can anyone own "facts"?[20] Does a computer program such as "Windows" infringe the copyright of the Apple operating system if it has a similar "look" or "feel," regardless of whether that look or feel is produced by lines of computer code that in no way resemble the original work?[21] What is the extent of the "fair use" exception to copyright?[22] How far does the "public domain" extend and how are we to conceive of it?[23] The list of questions could be extended almost infinitely. Indeed, in a comment on the state of "fact works" doctrine that could well be applied to the whole field of copyright, one scholar put the point succinctly: "[T]here is ample precedent deciding almost every copyright issue in almost every conceivable direction."[24] Is there something particular about intellectual property that explains this apparent doctrinal chaos?

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19. Wendy J. Gordon, *Towards a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship,* 57 U. CHI. L. REV. 1009, 1037-49 (1990) (book review).

20. "The most notable features of present-day copyright doctrine relating to 'fact works' are its incoherence and instability." Peter Jaszi, *Fact Works and All That—A (Slightly) Structuralist Overview, in* FUNDAMENTALS OF INTELLECTUAL PROPERTY LAW PRACTICE BEFORE AGENCIES, COURTS AND IN CORPORATIONS 348, 348 (1987).

21. A federal district judge granted a preliminary ruling in favor of Apple. *Apple Suit Advances,* L.A. TIMES, Mar. 7, 1991, at D2.

22. For example, the Supreme Court refused to allow *The Nation* to copy excerpts of President Ford's autobiography despite the fact that news reporting is mentioned as one of the statutory exemplars of the fair use exception. "The promise of copyright would be an empty one if it could be avoided by merely dubbing the infringement a fair use 'news report' of the book." Harper and Row, Publishers v. Nation Enters., 471 U.S. 539, 557 (1985). If the reporting of excerpts of an ex-president's memoirs by a news magazine is seen merely as an *assertion* of "news reporting," then what counts as actual news reporting, sufficient to meet the fair use test? For a magisterial study of fair use law, which actually discusses both the utilitarian and the utopian goals that copyright law ought to promote, see William W. Fisher III, *Reconstructing the Fair Use Doctrine,* 101 HARV. L. REV. 1659, 1661-95 (1988). Fisher is more sanguine about the *Nation* case.

Later in this Article, I argue that even the defenders of an expansive fair use doctrine have paid insufficient attention to the role of this doctrine in constructing the public domain—that is, in providing or disseminating the raw material out of which future intellectual creations may be built. *See, e.g.,* Litman, *supra* note 2. Landes and Posner are, by contrast, very careful to mention this aspect of copyright doctrine and seem to agree that its importance is underrated—a phenomenon for which they offer no particular explanation. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law,* 18 J. LEGAL STUD. 325, 357-61 (1989).

23. *See* Litman, *supra* note 2, at 968, 999 (arguing that "justifications for the public domain become least satisfactory at the most fundamental level" and proposing that public domain should be understood "not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use"). Occasionally, judges seem willing to recognize this side of the public domain although they generally "balance" their commentary by a tip of the hat to the idea of original genius.

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use[s] much which was well known and used before.... No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection.

Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436).

24. Litman, *supra* note 2, at 998.

B. Blackmail

Why is blackmail illegal? The crime is defined as an "[u]nlawful demand of money or property under threat to do bodily harm, to injure property, to accuse of crime, or to expose disgraceful defects."[25] It is easy to understand that the demand of money is unlawful when the accompanying threats are of bodily harm or property damage. After all, these threats themselves are illegal on other grounds. It is also possible to explain why you cannot demand money as the price of refraining from accusing someone of a crime. But what about the case where a private individual asks another private individual for money as the price of not revealing legally obtained information about activities perfectly legal in themselves: "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." After all, in this case it would be perfectly legal to carry through with the threat. Clearly the person being blackmailed does not wish to pay, but then many of us do not wish to pay when others ask money from us, telling us that if we do not comply with their demands they will carry out some legal and unpleasant course of action. How is blackmail different from a baseball team "demanding" concessions from a city and local residents (in the form of tax reductions and parking spaces, for example) under threat of moving the team to another city? It begs the question to say that the baseball team has a right to do so, whereas the blackmailer does not. That, after all, is exactly the point we are supposed to be explaining.

Scholars have been drawn to blackmail like wasps to a picnic. Landes and Posner, Goodhart, Nozick, Coase, and Epstein have all suggested explanations[26]—none terribly convincing. The commodification of this kind of information is generally reviled and legally prohibited, yet no one has explained why.[27] *Is* there a reason?

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25. BLACK'S LAW DICTIONARY 170 (6th ed. 1990).

26. *See* ARTHUR L. GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 175-89 (1931); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 84-86 (1974); Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail,* 74 VA. L. REV. 655 (1988) (examining blackmail from an economic perspective and focusing in particular on the British response to blackmail); Richard A. Epstein, *Blackmail, Inc.,* 50 U. CHI. L. REV. 553 (1983) (arguing that blackmail should be illegal not so much because it is inherently coercive but rather because it necessarily leads to, and is inseparable in reality from, fraud, peculations, and other forms of illegality); William M. Landes & Richard A. Posner, *The Private Enforcement of Law,* 4 J. LEGAL STUD. 1, 42-44 (1975) (articulating and defending an economic model in which law is enforced by private entities and applying this model to blackmail).

27. James Lindgren, *Unraveling the Paradox of Blackmail,* 84 COLUM. L. REV. 670, 671 (1984). Lindgren's own explanation concerns third party rights, and I will discuss it later. *See infra* text accompanying notes 164-67.

C. Insider Trading

Securities law sometimes prohibits certain individuals from trading in securities on the basis of material nonpublic information. All scholars seem to agree that, despite widespread popular support for sanctions against insider trading, the reasons for such sanctions are hard to identify. In fact, a recent article *supporting* the prohibition of insider trading started with the following startling admission: "American jurisprudence abhors insider trading with a fervor reserved for those who scoff at motherhood, apple pie, and baseball. *The commonly stated reasons for this reaction to insider trading are many and unpersuasive. The case law barely suggests why insider trading is harmful.*"[28] Needless to say, those arguing *against* the criminalization of insider trading are even less charitable towards the reasons offered. In the ubiquitously cited work on the subject, Henry Manne argued that prior to 1910 no one had ever publicly questioned the morality of insider trading.[29] Further, he claimed that since that time no one has explained why insider trading is morally or economically wrong.[30]

At first blush, it seems that Professor Manne has a point. Our society distributes wealth through a market system built on inequality of economic power and normally exalts an individual who is able to convert some temporary advantage in knowledge or economic power into a position of market advantage. Why not here? And why is it that, just as with blackmail, so many people share the sense that insider trading is wrong but find it hard to explain the reason?

D. Spleens

So far, I have given three brief and general descriptions of areas of doctrine. My last example is longer and comes from a single case,[31] the rhetoric and reasoning of which is so extraordinarily revealing that it

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28. James D. Cox, *Insider Trading and Contracting: A Critical Response to the "Chicago School,"* 1986 DUKE L.J. 628, 628 (emphasis added) (footnote omitted). For assessments even more critical, see Harold Demsetz, *Perfect Competition, Regulation, and the Stock Market, in* ECONOMIC POLICY AND THE REGULATION OF CORPORATE SECURITIES 1, 11-16 (Henry G. Manne ed., 1969); J.A.C. Hetherington, *Insider Trading and the Logic of the Law,* 1967 WIS. L. REV. 720; 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).

29. HENRY G. MANNE, INSIDER TRADING AND THE STOCK MARKET 1 (1966) ("Prior to the year 1910 no one had ever publicly questioned the morality of corporate officers, directors, and employees trading in the shares of corporations.").

30. Most of the commonly cited scholarly critiques of insider trading, Manne claimed, were "largely statements of conclusions." *Id.* at 5. The congressional hearings of 1933 and 1934 were no better: "[T]o say that the practice was vicious or unscrupulous was . . . not a reasoned answer. Worse than that, the emotional tone of the arguments probably intimidated anyone who tried to defend the practice or even make cogent inquiries." *Id.* at 10.

31. Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990), *cert. denied*, 111 S. Ct. 1388 (1991).

deserves extended consideration.[32] In 1976 John Moore started treatment for hairy-cell leukemia at the UCLA Medical Center. His doctors quickly became aware that some of his blood products and components were potentially of great commercial value. They performed many tests without ever telling him of their commercial interest, and took samples of every conceivable bodily fluid, including sperm, blood, and bone marrow aspirate. Eventually, they also removed Mr. Moore's spleen, a procedure for which there was an independent medical reason, but only after having first made arrangements to have sections of the spleen taken to a research unit. In 1981 a cell line established from Mr. Moore's T-lymphocytes was patented by the University of California, with Mr. Moore's doctors listed as the inventors. At no time during this process was Mr. Moore told anything about the commercial exploitation of his genetic material. The likely commercial value of the cell line is impossible to predict exactly, but there were "reports in biotechnology industry periodicals predicting a potential market of approximately $3.01 Billion Dollars by the year 1990 for a whole range of [such lymphokines] . . . ."[33] There were no estimates in the case for the markets *after* 1990.

This case hinges on issues of information—on at least two levels. On the most obvious level, Mr. Moore was not told about his doctors' financial interest in exploiting his genetic material, an interest that might well have conflicted with the demands of responsible medical care. Dealing with this issue, the Supreme Court of California had no difficulty in ruling that Mr. Moore had stated a cause of action for breach of fiduciary duty or lack of informed consent. After all, he had been denied information in which he had a legitimate interest and which the doctors had a corresponding duty to provide.

On a slightly more abstract level, this case concerned the ownership and control of another kind of information, genetic information. T-lymphocytes are white blood cells that have, coded into their genetic material, "blueprints" or "programs" for the production of lymphokines, proteins that regulate the immune system. If these genetic "programs"

32. And I am not the only one to think so. *See, e.g.*, Bernard Edelman, *L'Homme Aux Cellules D'Or*, 34 RECUEIL DALLOZ SIREY 225 (1989); Bernard Edelman, *Le Recherche Biomedicale Dans L'Economie De Marche*, 30 RECUEIL DALLOZ SIREY 203 (1991); John J. Howard, *Biotechnology, Patients' Rights, and the* Moore *Case*, 44 FOOD DRUG COSM. L.J. 331 (1989); Patricia A. Martin & Martin L. Lagod, *Biotechnology and the Commercial Use of Human Cells: Toward an Organic View of Life and Technology*, 5 SANTA CLARA COMPUTER & HIGH TECH. L.J. 211 (1989); Thomas P. Dillon, Note, *Source Compensation for Tissues and Cells Used in Biotechnical Research: Why a Source Shouldn't Share in the Profits*, 64 NOTRE DAME L. REV. 628 (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 ST. L.J. 499 (1990). 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 COLUM. L. REV. 528 (1990).

33. *Moore*, 793 P.2d at 482 (quoting plaintiff's complaint).

from the T-lymphocytes can be isolated, they can then be used to manufacture large amounts of the valuable lymphokine through a variety of recombinant DNA processes. For example, whole vats full of bacteria can be "told" to manufacture the particular lymphokine just as a computer word processing file can issue the same commands to any compatible printer. The key issue in the case was whether Mr. Moore owned the genetic information coded into his cells, or indeed, whether he owned the cells from which that information had been extracted. The court held that he had no property rights in either.

A fascinating array of reasons is offered for this decision. First, the court appears to believe that Mr. Moore had "abandoned" his cells when he consented to their removal. This argument is hard to square with the rest of the decision, however, where—while ruling on the issue of whether he had stated a cause of action in tort—the court did everything but hold as a matter of law that Mr. Moore had *not* been given sufficient information to consent to the removal.[34] Second, the court argued that the cells were not property anyway because California's genetic material statute "[b]y restricting how excised cells may be used and requiring their eventual destruction . . . eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to 'property' or 'ownership' for purposes of conversion law."[35] By implication, one cannot assume that property rights exist in exotic and highly regulated substances, such as plutonium, which are subject to exactly the same types of regulation. In fact, since almost every kind of property is regulated, what can the court mean?

The court also said that Mr. Moore could not sue under conversion for violation of rights to his cells based on the rights of publicity or privacy. These, the court suggests, are not *really* matters of property law, so Mr. Moore has no remedy in conversion. Thus, though Johnny Carson has an enforceable interest in the phrase "Here's Johnny"[36] (a phrase uttered by someone else), Mr. Moore does not have one in his own DNA.

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34. 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 fundamental to all modern concepts of property, but particularly to intellectual property.

35. *Moore*, 793 P.2d at 492.

36. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 836 (6th Cir. 1983). A disagreeable picture of Mr. Carson emerges from the suit, and one is left wishing that the defendant, who described himself as "The World's Foremost Commodian," *id.* at 833, 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, as he was the one who actually used it. *Id.* at 839 n.5. 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 Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974)).

In any event, the court argues that since everyone's genetic material contains information for the manufacture of lymphokines, the particular genetic material is "no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin."[37]

Finally, in perhaps its most interesting twist, the opinion concluded that Mr. Moore could not be given a property right in his genetic material because to do so might hinder research. To back up this argument the court painted a vivid picture of a vigorous, thriving public realm. Communally organized, altruistically motivated, and unhampered by nasty property claims, the world of research is moving dynamically towards new discoveries: "At present, human cell lines are routinely copied and distributed to other researchers for experimental 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."[38] This argument is a convincing one: property rights in the world of research would only slow down discovery. Convincing, that is, until one reads in the very next column that "the theory of liability that Moore urges us to endorse threatens to destroy the economic incentive to conduct important medical research."[39] 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 one another? 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 Mr. 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.

37. *Moore,* 793 P.2d at 490. The court claims that "[b]y definition, a gene responsible for producing a protein found in more than 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 in this Article, the court's concern with "originality" and "uniqueness" will be compared 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 Mr. Moore's spleen was not unique, whereas the doctor's research products were. *See infra* Section IX.C.

38. *Moore,* 793 P.2d at 495 (footnotes omitted).

39. *Id.*

II
PUBLIC AND PRIVATE IN THE LIBERAL STATE

> [T]he 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 private property is recognized.
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> 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, 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.[40]

There are many reasons to doubt Karl Marx's prescience as a theorist of the modern liberal state. But any American lawyer would have to acknowledge that he was right about one thing: 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 that contains all the real differences between people—differences of wealth, power, education, birth, and social rank. This line-drawing allows us to use the language of egalitarianism to defend a society marked precisely by a highly stratified distribution of wealth or power.[41]

The real dilemma of liberal theory is that it must exalt the virtues of

40. Karl Marx, *On the Jewish Question, in* THE MARX-ENGELS READER 24, 31 (Robert C. Tucker ed., 1972).

41. One of Marx's more intriguing suggestions is that the public sphere of the liberal state is attractive because 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

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 different theories of justice, and even two different *personae* to go with them.

> 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 means . . . and becomes the plaything of alien powers.[42]

The law is implicated in every stage of this process.[43] First of all, the law draws, and in a more complex way depends on, 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 that 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 as being questions of *placement* in either the public or private realms.[44] Access to medical professionals,

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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.

42. Marx, *supra* note 40, at 32.

43. This discussion can offer no more than a summary of the basic ideas. It would take an entire article to discuss the full ramifications of the law's role in the public/private distinction. In fact, particularly good ones have already been written on the influence of legal thought on classical economic thought, *see* Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities,* 34 AM. U. L. REV. 939 (1985), on the decline in credibility of the public/private dichotomy, *see* Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction,* 130 U. PA. L. REV. 1349 (1982), on the history and reasons for the continued survival of the distinction, *see* Morton J. Horwitz, *The History of the Public/Private Distinction,* 130 U. PA. L. REV. 1423 (1982), and 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 HARV. L. REV. 1497 (1983). For a discussion of the prominence of the public/private distinction in tort law, see James Boyle, *The Anatomy of a Torts Class,* 34 AM. U. L. REV. 1003, 1023-34 (1985).

44. Marx also thought that law played a vital role in this process, at least with respect to religion.

> 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

for example, is in the private sphere. My access depends on my resources; there is no constitutional guarantee to equal health care, or even to minimal health care. Access to legal professionals, however, is at least partly in the public sphere. When I am tried for a crime that may carry a substantial jail term, I have the right to an attorney whether or not my private resources will let me pay for one.[45]

This example suggests one last important point about the public/private distinction in law: our conception of justice differs depending on whether we are dealing with public law or private law. A driver negligently knocks over a pedestrian. 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. If the victim is a $200,000 a year investment banker, 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, 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 this frequently may be the reality). In the private sphere our ideal of justice is, broadly speaking, *restitutio in integrum.* In public law we aim for equality.[46]

One of the claims of this Article is that every dispute about property rights in information resolves itself into a dispute 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 settled terrain. Nothing could be further from the truth. In fact, the process is one of contentious moral and political decisionmaking about the distribution of wealth,

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> of *differentiation.* . . . It is now only the abstract avowal of an individual folly, a private whim or caprice.

Marx, *supra* note 40, at 33. 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 on the basis of religion or private individuals to purchase better health care or education.

45. Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (establishing, under the Sixth Amendment, a right to counsel for all defendants accused of serious crimes). *See generally* ANTHONY LEWIS, GIDEON'S TRUMPET (1964) (describing details of *Gideon*).

46. The question is even more complicated than this, because the tension is reproduced at each level of the inquiry. *Gideon* is a perfect example of the playing out of this issue in constitutional law. *See* 372 U.S. 335. 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 between formal equality and 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 all have merely 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.

power, and information. The supposedly settled landscape is in fact an ever-changing scene that folds back onto itself like a Möbius strip. The market, for example, is on the public side of the map when we are talking about commercial exploitation of private information about families. As citizens we feel the need to keep the impersonal, public world of commerce out of our private realm of home and hearth. Yet the market is simultaneously on the private side of the line as against the state. When the FDA requires a drug company to reveal details of its internal testing practices, the company lobbyists will probably stress the importance of defending private enterprise against public meddling. If a geography metaphor is appropriate at all, the most likely cartographers would be Dali, Magritte, and Escher.

My own views on information issues are strongly influenced by two goals. The first is egalitarian—having to do with the relative powerlessness of the group seeking access to or protection of information. The second is the familiar radical republican goal of creating and reinforcing a vigorous public sphere of democracy and debate.[47] Yet, for all of the usual postmodern, pragmatist reasons, I would not suggest that we erect these two criteria into a new grand theory. All of the problems of value-choice, contradiction, and indeterminacy of meaning would reappear in the new theory. Thus, I have no criteria that would "replace" the language of public and private, at least no criteria that would algorithmically resolve the questions I put forward here. Why, then, do I spend so much time taking apart that language? My point is that because there is in fact no intelligible geography of public and private, the attempt to resolve issues through a process of line-drawing gives us only an empty exchange of stereotypes, "illusions about which one has forgotten that this is what they are; metaphors which are worn out and without sensuous power; coins which have lost their pictures and now matter only as metal, no longer as coins."[48] Those illusions, however, have considerable motive power and this Article aims to show where they take us. Even without a grand theory, it may be somewhere we do not want to go.[49]

47. For an excellent discussion of the tensions between these ideas, see Frank Michelman, *Law's Republic,* 97 YALE L.J. 1493 (1988).

48. FRIEDRICH W. NIETZSCHE, THE PORTABLE NIETZSCHE 47 (Walter Kaufman ed. & trans., 1982).

49. For the methodological and epistemological argument behind this position, see Boyle, *supra* note 9. For an elegant critique of (*inter alia*) my approach, see Pierre Schlag, *The Problem of the Subject,* 69 TEX. L. REV. 1627 (1991). To me it seems that Professor Schlag develops an epistemological and ontological argument that epistemological and ontological reasoning can provide no basis for normative arguments, and then uses that same kind of reasoning to conclude, in a strikingly normative manner, that we *should not* argue normatively. *See generally* James Boyle, *Is Subjectivity Possible? The Post-Modern Subject in Legal Theory,* 62 U. COLO. L. REV. 489 (1991). This seems like a fourfold contradiction. Understandably enough, Professor Schlag disagrees with this assessment. Pierre Schlag, *Foreword: Postmodernism and Law,* 62 U. COLO. L. REV. 439, 449-51 (1991) (pointing out the apparent contradiction in placing postmodernism in the service of a traditional ethical program and claiming that a romanticized ethical subject reappears in the wake of

Now, having introduced the public/private split, let us turn to the second part of this conceptual background, the particular role of information.

III
INFORMATION IN THE LIBERAL STATE

Information plays a central, if not defining, role in both the public and the private worlds of the liberal political vision. When we talk about the private world of the family and the home, we define these institutions partly by the idea of an entitlement to withhold information—privacy.[50] The right to withhold information is also one of the main forms of protection given to private citizens facing an accusing state. Fourth and Fifth Amendment protections are the classic cases, but the attorney-client privilege is also a good example.

In the private world of the market, 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 perfect market. At the same time, the *actual* market structure of contemporary society depends on information *itself* being a commodity—costly, partial, and deliberately restricted in its availability. When I discuss information economics,[51] this 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 to form and then communicate their preferences in the great marketplace of ideas. At the same time, a citizen's access to information is thought to be as important a check on governmental activity as that provided by the rule of law. This point was 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 forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[52]

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the deconstructive project); Pierre Schlag, *Normative and Nowhere to Go,* 43 STAN. L. REV. 167 (1990).

50. Admittedly, conventional privacy doctrine covers a great deal more than the right to withhold information. 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) (upholding federal regulations banning use of Title X funds by medical clinics that advise clients about the availability of and means of obtaining abortions), and that control over private *information* is a vital part of the contemporary conception—whether legal or lay—of privacy.

51. *See infra* Part IV.

52. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* THE COMPLETE MADISON 337, 337 (Saul K. Padover ed., 1953).

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. For example, the public interest in a sphere of vigorous debate and discussion often clashes with the demands of personal privacy. In contrast, claims to own certain information in the market mix uneasily with the values of the First Amendment.[53] 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 towards 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").[54]

Some might ask for explanations: Why do we think such different things about information? This is a vital question, and I am not sure that I can answer it satisfactorily. Part of the answer seems to be that the matrix of conflicts between the theories of justice that we apply to the family, the market, and democracy is overlaid by another set of conflicts caused by the fact that information is conceived of as both *finite* and *infinite,* as both 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 a circle. Afterwards, 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

53. *See, e.g.,* Harper & Row, Publishers v. Nation Enters., 471 U.S. 539 (1985) (holding that the Copyright Act bars unauthorized use of quotations from a public figure's manuscript); *see also* Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue,* 69 TEX. L. REV. 1853 (1991); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393 (1989).

54. Some might believe that these contradictions result from the broad definition of information that I have adopted in this piece: nothing forces us to adopt the broad definition, and it is only with the broad definition that commodification seems to conflict with the perfect market, copyright with the First Amendment. With the use of sensible subdivisions—into copyright issues, First Amendment issues, privacy issues, insider trading issues, commodification issues, efficient capital market issues, and so on—these problems would disappear, or at least lose their salience. I am unconvinced by this argument, and I find support for my disbelief in the recurring problems that I pointed out within the law and rhetoric of copyright, blackmail, and insider trading. Given my vision of language and definition, however, I can imagine no "proof" of my method, save its usefulness to the reader.

reach for a solution that involves giving the parties more information. 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. Yet there are occasions when courts and scholars switch perspectives. Far 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. Suddenly it becomes necessary to give producers an incentive to produce more information. Mandatory information transfer is suddenly viewed as an inefficient, forced exchange that undermines the incentives necessary to produce more information.[55]

So far, 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. Perhaps the most familiar version of the relationship comes originally from the philosophers of the Scottish Enlightenment: 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. This message was extraordinarily influential on the political theorists of the early American republic.[56] In later years, both in Scotland and in the United States, the message changed. Increasingly, both the Scots and the American republicans began to worry that commerce would produce enormous disparities in wealth and power (including power over information) and that these disparities would be subversive of the republican form of government.[57] Sadly, this change of emphasis never received the same attention as the original optimistic message.[58]

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55. Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts,* 7 J. LEGAL STUD. 1, 9-32 (1978) (arguing that forced disclosure of deliberately acquired information is undesirable because it impedes production of information at socially desirable levels); Saul Levmore, *Securities and Secrets: Insider Trading and the Law of Contracts,* 68 VA. L. REV. 117 (1982) (arguing against a disclose-or-abstain rule in insider trading on grounds of both fairness and efficiency).

56. *See, e.g.,* GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE (1978).

57. *See* Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870-1910, in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51 (Gerard W. Gawalt ed., 1984).

58. Two hundred years later, Horkheimer and 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. MAX HORKHEIMER & THEODOR W. ADORNO, DIALECTIC OF ENGLIGHTENMENT 28 (John Cumming trans., 1990).

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? Much 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. As I pointed out earlier, the notion of "private" is defined in one common understanding largely by the idea of the justified ability to withhold information. Yet the same word, with its connotations of "that-with-which-we-cannot-interfere," conjures 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 Laocoön of ideological and rhetorical contradictions.[59]

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 is "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 as "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 involving mailing lists or databases of consumer information. The telemarketers might say the same thing, but they would probably also claim that—since information, rather than some other form of property is involved—the issue is one which should be settled by appeal to the constitutional norms that govern the public realm.[60] In other words, they might argue both that the government should not interfere because this is a private activity in the market and that the government should

59. *See* Olsen, *supra* note 43.

60. When I first wrote this passage, I had intended these as purely hypothetical examples. Since that time, Congress enacted the Telephone Consumer Protection Act, originally introduced by Senator Hollings, which outlaws most autodialers. Pub. L. No. 101-243, 105 Stat. 2394 (1991) (to be codified at 47 U.S.C. § 227). Much debate preceded the law's passage. "Calling autodialers an 'outrageous invasion' of people's homes, Sen. Hollings said privacy rights outweigh concerns about the free speech of marketing companies." Edmund L. Andrews, *Curtailing the Telephone Robots,* N.Y. TIMES, Oct. 30, 1991, at D1, D24. The Portland, Oregon, ACLU disagreed. One of their lawyers, Mr. Charles Hinkle, is "representing a small business against an Oregon law banning the commercial use of autodialers." *Id.* at D24. 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 non-commercial speech. *Id.*

not interfere because this is a public issue of free speech—and equal protection, for that matter.[61]

If there really were an intelligible geography of public and private, and a unitary concept of information, then we might hold up the hope that one set of claims could be proved to be "true" and the other "false." But since the era of the legal realists, that hope has seemed chimerical.

The story cannot end here, however. One of the themes of this Article 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.[62] Since that rhetoric dominates popular discussion of information, I explored at some length the multiple ways in which liberalism portrays information as central to both public and private realms. It is hard to read public debates 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 are turning away from liberal constitutionalism and rights theory and towards the language of

61. 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, *cf.* Munn v. Illinois, 94 U.S. 113 (1876) (upholding a state statute that regulated grain storage charges on public interest grounds), and would demand state intervention to prevent public debate from being ceded to a satrapy of private interests. The television station would portray such intervention as an illegitimate public interference with private property. Similarly, 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? The list of similar questions goes on. On top of these issues lie the conflicts between the vision of information as both finite and infinite. Is someone 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.

62. Although the academic literature is relatively silent regarding the conflicting requirements that liberal state theory puts on information, most academics would admit, I think, that the language of public-ness and private-ness is relatively useless for resolving *any* important issue. I do not mean to say that it is meaningless to talk of "public" and "private" issues. On 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 U. PA. L. REV. 1429, 1430-31 (1982) (discussing the malleability of terms like public and private but noting their prominence in the discourse of political disagreement). But although they are vital terms with which to express normative conclusions, they are poor guides to analysis or decisionmaking. 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.

microeconomics.[63] Whether the issue is copyright,[64] patent,[65] insider trading,[66] blackmail,[67] or simply "valuable information,"[68] some of the most ambitious recent scholarship employs some kind of economic approach. Yet, microeconomics provides no surcease from the paradoxes of information. As I will try to show in the next Part, those paradoxes are just as central to the discipline of economics as they are to liberal political theory.

63. SCHEPPELLE, *supra* note 1, provides an excellent contractarian critique of this tendency. *See also* ECONOMIC IMPERIALISM: THE ECONOMIC APPROACH APPLIED OUTSIDE THE FIELD OF ECONOMICS (Gerard Radnitzky & Peter Bernholz eds., 1987).

64. *See, e.g.*, Landes & Posner, *supra* note 22, at 325 (applying economic models to determine the extent to which "copyright law can be explained as a means for promoting efficient allocation of resources"); John S. Wiley, Jr., *Copyright at the School of Patent*, 58 U. CHI. L. REV. 119 (1991) (arguing that although copyright and patent law serve essentially the same goals—justice for creators and efficiency for consumers—patent law is logically coherent while copyright law is not); *see also* Fisher, *supra* note 22 (proposing reformation of the fair use doctrine in particular and using economic analysis to support his proposal).

65. *See, e.g.*, George Bittlingmayer, *Property Rights, Progress, and the Aircraft Patent Agreement*, 31 J.L. & ECON. 227 (1988) (discussing difficulties of allowing property rights in ideas and using the Aircraft Patent Agreement as an illustration); Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 118 (1990) (arguing that patent law should treat physical and intellectual property identically, because "[r]ights to exclude are not monopolies just because the property involved is an intangible rather than something you can walk across or hold in your hand"); Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813 (1984) (discussing conflicts between patent and antitrust law and the resulting paradoxes); Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977) (arguing that the patent system is desirable because it increases output of resources used for technological innovation).

66. In insider trading scholarship, it would be briefer to cite those articles that do not rely on economic analysis. However, the following list may give some indication of the breadth of approaches subsumed under the heading. *See, e.g.*, MANNE, *supra* note 29 (examining generally the parameters of the insider trading problem, traditional legal solutions, and arguments for and against prohibiting the activity); Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857 (1983) (arguing that insider trading might be allowed in some cases as an efficient way to compensate corporate managers); William J. Carney, *Signalling and Causation in Insider Trading*, 36 CATH. U. L. REV. 863 (1987) (arguing the opposition to insider trading may be unfounded because such activity causes very little harm); Cox, *supra* note 28 (arguing for continued regulation of insider trading and criticizing arguments that such trading is justified because it increases allocative efficiency); Christopher P. Saari, Note, *The Efficient Capital Market Hypothesis, Economic Theory and the Regulation of the Securities Industry*, 29 STAN. L. REV. 1031 (1977) (arguing that empirical findings underlying efficient capital market theory cast doubt on the SEC's assumption that stricter prohibitions on insider trading are the best means of protecting investors).

67. *See, e.g.*, Coase, *supra* note 26; Epstein, *supra* note 26; Landes & Posner, *supra* note 26, at 42-43.

68. *See, e.g.*, Easterbrook, *supra* note 1 (discussing the Supreme Court's treatment of discrete doctrinal areas of information law and attempting to unify them within a broader theory of property rights in information); Kitch, *supra* note 1 (using price and finance theory to analyze welfare consequences of law on ownership of information by firms and employees).

IV
THE ECONOMICS OF INFORMATION

As usual, information has not one role, but many. The analytical structure of microeconomics includes the concept of "perfect" information—meaning free, complete, instantaneous, and universally available—as one of the defining features of the perfect market.[69] At the same time, the *actual* market structure of contemporary society depends on information being a commodity—costly, partial, and deliberately restricted in its availability. To put it briefly, *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 is actually a commodity.*[70] If an analogy is needed, 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 as the basis for a practical discussion of the ethics of food shortages.[71]

This basic theoretical *aporia*[72] explains the weakness of much economic analysis of information regimes. My point is not that the reality is more complicated than the abstraction. That would be a critique of all abstractions, and abstractions are necessary to life. My claim is that information is a problem case for that specific set of abstractions we call economic theory, that it can and must be represented within the theory in two conflicting ways, and that certain concrete problems follow as a result. Some economists believe that these problems can be solved by

69. 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 "[i]ndividuals 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 AM. ECON. REV. 561, 561 (1971) (assessing private and social value in a perfect market of technological information and discussing implications of these values for the patent system); *see also* Peter A. Diamond, *The Role of a Stock Market in a General Equilibrium Model with Technological Uncertainty,* 57 AM. ECON. REV. 759 (1967) (explaining how the stock market deals with technological uncertainty). *But see* Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets,* 70 AM. ECON. REV. 393 (1980) (arguing that informationally efficient markets are impossible because either prices would perfectly reflect the available information about the market, denying compensation to those who spend resources to obtain such information, and thus undermining the incentive to produce, or would introduce an extra cost into the price so that it no longer reflected perfectly the available information).

70. Having always wanted to imitate my ancestor and attach my name to a Law, I would like to call this Boyle's Paradox. Somehow, I doubt that the name will catch on.

71. Actually, the analogy underestimates the point, as the discussion will show in a moment. In any event, like microeconomics, religions are replete with mediating devices between the ideal and the actual. Consider, for example, how the conflict between an ideal vision of a perfectly merciful God and the actual reality of starving children, is mediated through a variety of conceptual devices including "original sin" and "God moves in mysterious ways." The economic ideas discussed in this section have more esoteric names, but the basic function is similar.

72. *See supra* note 5.

changing the level of analysis—from perfect to imperfect markets, from imperfect information as commodity to imperfect information as transaction cost to perfect information as component of the analytical structure—just as Russell and Whitehead believed that they could banish paradoxes from mathematics by segregating the component parts of the paradox on different levels of analysis. Gödel's Theorem convinced mathematicians of the impossibility of getting rid of this pattern of circularity, recursive definition, and self-swallowing analysis. Sadly, with some notable exceptions that I shall discuss in a moment, economists seem to have avoided any comparable moment of professional modesty.[73]

The first manifestation of this paradox in information economics is the fact that the requirements of "motivation" and those of "efficiency" seem contradictory.[74] For example, if markets are to be efficient, the

73. For some qualified exceptions to this statement, see JACQUES H. DRÉZE, *A Paradox in Information Theory*, *in* ESSAYS ON ECONOMIC DECISIONS UNDER UNCERTAINTY 105 (1987) (arguing that the value of information can be negative as well as positive); Torben M. Andersen, *Some Implications of the Efficient Capital Market Hypothesis*, 6 J. POST KEYNESIAN ECON. 281 (1983-1984) (arguing that the concept of information does not have any well-defined meaning in efficient capital market); Grossman & Stiglitz, *supra* note 69. The classic article calling for a more rigorous treatment of information was George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961). According to Stigler, "One should hardly have to tell academicians that information is a valuable resource: knowledge *is* power. And yet it occupies a slum dwelling in the town of economics. Mostly it is ignored . . . ." *Id.* at 213. Reading the economic literature on information, one is tempted to believe that there was a reason for the marginalization of information noted by Stigler: information plays the same role for neoclassical economics that rent did for classical economics. It is the problem case in which the internal tensions of the discipline come to the surface.

74. Many economists do not see a paradox here because microeconomics is, after all, the study of trade-offs. As I will show in a moment, economic analysts of law tend to start by thinking of information as a commodity and then to introduce the free circulation of information as a countervailing factor that needs to be "balanced" against the need to commodify. *See* Landes & Posner, *supra* note 22, at 326 ("Copyright protection . . . trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place.").

Actually, except for the fact that it ignores the distributional side of things, this is not a bad formulation in that it tends to recast every issue as an ad hoc balancing act, depending on highly contextual and specific local factors. Yet by downplaying the extent to which this "balancing act" diminishes the scientific pretensions of the pure version of the theory, economic analysis attempts to keep its credibility while maintaining the illusion of rigor. Professional economists employ this tone of certainty less often than practitioners of "law and economics." *Compare id.* at 333 ("*In principle*, there is a level of copyright protection that balances these two competing interests optimally . . . . We shall see . . . that various doctrines of copyright law, such as the distinction between idea and expression and the fair use doctrine, can be understood as *attempts* to promote economic efficiency . . . .") (emphasis added) *with* Hirshleifer, *supra* note 69, at 572 (because of the possibility of speculation on prior knowledge of invention and the uncertainties of "irrelevant" risks, patent protection may or may not be necessary in order to produce an appropriate incentive to invention).

It also makes one a little skeptical to note that, when done by economic analysts of law, this ad hoc balancing of empirically unspecified and unquantified factors tends to track the distinctions made by the existing case law with surprising fidelity—surprising, that is, unless one had already assumed that the common law was working its way towards the economically efficient solution. *See* George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977). In recent years, however, it seems that economists have begun to acknowledge that the problems in reconciling efficiency and incentives in information issues go deeper than this. *See*

prices must perfectly reflect available information. Yet information is costly to obtain. If prices perfectly reflect available information, with no part of the price going to the producer of the information, then there is no incentive to produce more information. To postulate efficiency in the production of information we must assume away the incentive necessary to produce. To postulate the incentive is to make efficiency impossible. It looks like a classic paradox. This is not an observation confined to those skeptical of information economics, some of the most sophisticated economists writing in the area have acknowledged this problem: "There is a fundamental conflict between the efficiency with which markets spread information and the incentives to acquire information."[75] Are property rights in information a transaction cost that impedes the full and efficient circulation of information? It might seem obvious that they are. After all, perfect information is one of the elements of the perfect market. If information can be commodified, then a host of transaction costs are introduced into information flow and a limited monopoly is granted in the midst of a system supposedly based on competition.[76]

Yet the picture changes when information is viewed not as an element within the theoretical structure of the economic system, but rather

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Grossman & Stiglitz, *supra* note 69, at 405. Lawyers, too, have had their moments of skepticism, the most famous being Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs,* 84 HARV. L. REV. 281 (1970). The most sophisticated recent analyses have been those of Wendy Gordon. *See* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors,* 82 COLUM. L. REV. 1600 (1982); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory,* 41 STAN. L. REV. 1343 (1989) [hereinafter Gordon, *Merits of Copyright*]; Gordon, *supra* note 19.

75. Grossman & Stiglitz, *supra* note 69, at 405.

76. This clash is a general one, not limited to information questions. Judge Easterbrook has recently argued that both judges and economists overstate the extent to which intellectual property rights (and in particular, patent rights) confer a monopoly. Intellectual property rights, he argues, are no different from rights to tangible property.

> Problem: Patents are not monopolies, and the tradeoff is not protection for disclosure. Patents give a right to exclude, just as the law of trespass does with real property. . . . A patent *may* create a monopoly—just as an auto manufacturer *may* own all of the auto production facilities—but property and monopoly usually differ.

Easterbrook, *supra* note 65, at 109. If Easterbrook is merely pointing out that the economic consequences of granting different patents will be different given the varying possibilities of substitute goods and so forth, the point is a good one. Indeed, it is precisely such empirical difficulties that undermine economists' more sweeping statements about the efficiency of the patent system as a whole. *See* Hirshleifer, *supra* note 69. As to his other point, Easterbrook may be right that judges overestimate the monopolistic qualities of *intellectual* property.

Nevertheless, his article, like many pieces of economic analysis, seems to commit the opposite error—to underestimate the extent to which *all* property rights can have monopolistic or quasimonopolistic effects. Property rights are frequently trumps *against* market forces; this point causes considerable problems for economic analysis. Thus, an economist would ask: "If I value your house more than you do (measured by our relative ability and willingness to pay), why should I not be able to compel you to sell it to me whether you like it or not?" Indeed, the general tendency in Chicago-school economic analysis is to use offering price rather than asking price as a measure. *See* Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique,* 33 STAN. L. REV. 387 (1981); *cf.* C. Edwin Baker, *The Ideology of the Economic Analysis of Law,* 5 J. PHIL. & PUB.

as a commodity produced and distributed according to the rules of that system. In fact, most economic analysis of information takes this "commodity perspective."[77] From that perspective, the goal of the analysis is to discover the level of property rights that will produce the optimal level of production. Take the classic case of *International News Service v. Associated Press.*[78] Associated Press (AP) operated a news-gathering service. An international network of correspondents and wire services provided news which was printed in the AP papers. Unfortunately for AP, International News Service (INS), which operated a far less expansive news-gathering apparatus, made a practice of free riding on AP's efforts. INS employees would gather news from AP's noticeboards and from early editions of its East Coast newspapers and would then reprint the news, often taking advantage of the time differential between the east and west coasts.

The *INS* case raises a difficult question for economic analysis. One line of rhetoric and analysis indicates that we should secure to producers the fruits of their labors, and thus induce them to produce more. Without some legally protected interest in the news it gathers, AP will presumably be under a competitive disadvantage. News will become a "public goods problem." Unable to exclude its competitors from the fruits of its efforts, AP will be driven to cut back its news-gathering activities—as will all the other newspapers. Thus, though consumers might be willing to pay for a higher level of news gathering, it will be impractical for any individual newspaper to provide such a service. Put this way, the majority's creation of a legally protected interest in freedom from

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AFF. 3 (1975). Under that measure, a forced sale would be moving resources to their highest use value.

But because we make a pretheoretical classification of the issue as being about "settled property rights," we use asking price rather than offering price as the measure of value. You get to keep the house unless your asking price is equal to or lower than my offering price—in other words, unless you are willing to sell it to me. Yet, if there is a "public interest" involved, or an existing clash of land uses, we shift doctrinal boxes into eminent domain or nuisance and change our measure of valuation back to offering price. We need a general principle or algorithm that would identify those issues that should be analyzed in terms of the free-flowing calculus of utility (and offering price) and those issues that should be analyzed in terms of settled property rights (and asking price). Absent such a principle, economic analysts seem to be guilty of exactly that kind of mushy ad hoc balancing for which they reproach other legal scholars. *See* Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980).

It is, of course, true that there may be no problem as to any given property right. You may loathe my house, and the patent may be for a device that no one wants to use. This hardly resolves the more general theoretical problem, however, and it also tends to reduce all property (and intellectual property) questions into endlessly particular, empirical inquiries—negating the possibility of exactly the kind of grand statements about the efficiency or inefficiency of entire doctrinal areas for which economic analysis is renowned.

77. Obviously, there are a number of reasons for this—many of them good ones. Later in this Article, I will suggest that one of the not-so-good reasons is an unacknowledged and largely unconscious reliance on a particular model of authorship as the norm against which to measure all information issues. *See infra* Section X.B.

78. 248 U.S. 215 (1918).

unfair competition in news gathering is the perfect solution to the public goods problem. By allowing commodification, it ensures continued production and avoids the prisoner's dilemmas set up by the alternative regime.

Yet one cannot solve the problems of economic analysis merely by adopting the commodity perspective—leaving perfect competition and information efficiency concerns aside. The problem of the free flow of information reappears within the new model. For example, should we approach the question of "fair use" in copyright through the lens of the commodity perspective? If we do so, will we only tolerate limitations on intellectual property rights when those limitations are necessary to minimize transaction costs or accomplish well-defined public goals? The most sophisticated scholarly analysis takes this approach.[79] Consequently, it tries to preserve incentives for creators, even establishing a typology of "fair uses"—assigning or denying property rights in part according to whether those uses would tend to reduce the reward available to the author.[80] Yet the analysis largely ignores the opposite perspective, that of the efficient flow of information. If we switch the perspective, we see that one important purpose of "fair use" law is to make sure that future creators have available to them an adequate supply of raw materials. From this perspective, too many "incentives" could convert the public domain into a fallow landscape of private plots.

To their credit, some economic analysts have attempted to reconcile the two perspectives. Thus, for example, Landes and Posner describe copyright as constructed by the tension between the need to grant legally protected interests to authors in order to motivate them and the need to limit the rights of authors so as to allow future creators legal access to the raw materials they need.[81] This seems reasonable enough, but it also leaves them dangerously close to the mushy "balancing" analysis from which economics was supposed to provide surcease. At the same time, the *aporia* reappears in the question of classification *within* the theory. For instance, how are we to classify a telephone directory of agents and

79. *See* Fisher, *supra* note 22.

80. *Id.* at 1766-79.

81. Landes & Posner, *supra* note 22, at 326. In another context, one might expect that Landes and Posner would engage in one of those charming "assume a can opener" flights of fancy, in which we merely assume that authors will contract for the right to use exactly the inspirational sources needed, no less and no more. After all, Judge Posner can imagine that contingency fee lawyers will come flocking to prisons in order to pursue meritorious claims for damages: "Encouraging the use of retained counsel thus provides a market test of the merits of the prisoner's claim. If it is a meritorious claim there will be money in it for a lawyer; if it is not it ought not to be forced on some hapless unpaid lawyer." McKeever v. Israel, 689 F.2d 1315, 1325 (7th Cir. 1982) (Posner, J., dissenting). Why should he not imagine T.S. Eliot paying small royalties to everyone from Dante to the inventors of the tarot pack? Interestingly, Landes and Posner seem to assume from the beginning that such a solution is completely impractical. Instead, the best way to encourage production is to limit the creator's legally protected interests *ab initio.* Perhaps authors are allowed to exist in a world less stringently constricted by the devices of economic fantasy.

publishing houses or an index price measure in a futures market in books? Is the former—the information necessary to make the market run—something that should be freely available? Is the latter a commodity in which the creators must be able to claim a legitimate intellectual property right if we are to encourage continued production of information? Or is it exactly the other way around?[82]

My argument is not merely that analysts are concentrating too much on motivating creators and not enough on the free flow of information. I am claiming that a change in the focus of the analysis does not dispose of these difficulties; it merely reverses their "polarity." There are issues that economists tend to analyze by thinking of information *as information* rather than as a commodity—for example, the discussion of the efficient capital market hypothesis. Yet, as some economists have pointed out, unless the questions of commodification and incentive are worked into the analysis, the theory ends in paradox as soon as the slightest costs or imperfections are introduced into it. The best example comes from Grossman and Stiglitz's description of the self-destructing futures market.

> [W]henever there are differences in beliefs that are not completely arbitraged, there is an incentive to create a market. (Grossman, 1977, analyzed a model of a storable commodity whose spot price did not reveal all information because of the presence of noise. Thus traders were left with differences in beliefs about the future price of the commodity. This led to the opening of a futures market. But then uninformed traders had two prices revealing information to them, implying the elimination of noise.) But, because differences in beliefs are themselves endogenous, arising out of expenditure on information and the informativeness of the price system, *the creation of markets eliminates the differences of beliefs which gave rise to them, and thus causes those markets to disappear*. . . .
>
> Thus we could argue as soon as the assumptions of the conventional perfect capital markets model are modified to allow even a slight amount of information imperfection and a slight cost of information, the traditional theory becomes untenable. . . .
>
> . . . [B]ecause information is costly, prices cannot perfectly reflect the information which is available, since if it did, those who spent resources to obtain it would receive no compensation.[83]

82. Recourse to the traditional categories of copyright law—expression may be owned but not ideas or facts—merely begs the question. We *could* choose to analyze expression in our "commodity" mode and facts and ideas in our "free circulation of information" mode. Having thus assumed away the very *aporia* we need to resolve, we could study the production of texts under the current regime—to find our methodology triumphantly confirmed as we rediscovered the very pattern of choices that we ourselves had made moments before.

83. Grossman & Stiglitz, *supra* note 69, at 404-05 (emphasis added). The time lags, or other

Switching perspectives again, we might think that commodification is the answer. A futures market produces information—in the form of the price of futures contracts. We do not normally think of price as a public good, but it seems to fit all of the criteria. In this case, it is a valuable commodity that takes considerable effort to create and is available thereafter at a marginal cost near zero.[84] If we wish to eliminate the

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imperfections in the transmission of information through price, that are necessary for those who create information to trade on it, are crucial to the discussion of insider trading. *See infra* Part VIII. In an article that studies the informational mechanisms of market efficiency, Ronald Gilson and Reinier Kraakman have argued that the "efficiency paradox" occurs only when the market is fully efficient: "While we do argue that an evolutionary bias pushes the market *toward* efficiency, the Efficiency Paradox arises only when *full* efficiency is achieved. Our very emphasis on information costs recognizes that prices need not be perfectly efficient with respect to any particular information." Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 623 (1984). Nevertheless, they acknowledge that this notion of limits does not explain the apparent inconsistency between Grossman and Stiglitz's conclusions and their own analysis of two particular market mechanisms—universally informed and professionally informed trading—an analysis which does "explicitly point[] to reaching just such an efficient equilibrium." *Id.* To their eyes, however, "the conflict between these perspectives is more apparent than real." *Id.* Their solution is an interesting variation of an analysis that should be familiar by now. Briefly put, their idea is that the first trader who gains access to or develops some useful information will be able to profit from it—thus receiving an adequate incentive—and that the equilibrium can thereafter be maintained at a very low cost.

> The empirical literature does not demonstrate that the originators of [a useful] insight failed to earn a return on their efforts. Rather, it is reasonable to suppose that they did earn an acceptable return on the information, but that the secret was subsequently dissipated through discovery by competitors (or even academics). So understood, the question posed by the Efficiency Paradox is not whether incentives exist to induce the *original* innovation. Rather, the puzzle is to explain how an efficient equilibrium is *maintained* once the innovation becomes so widely known that profit is no longer possible for those who exploit it.
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> . . . Because of joint cost characteristics, maintenance of the equilibrium is effectively costless, and the Efficiency Paradox disappears.

Id. at 625 (footnote omitted). The first part of the argument, which locates the incentive in the originator's temporally limited monopoly in trading on the value of the information, is very similar to Hirshleifer's musings about the patent system, *see* Hirshleifer, *supra* note 69, as well as to Manne's description of insider trading as the necessary compensation for entrepreneurial acts, *see infra* text accompanying notes 224-40. Given a privilege to trade, the originator does not need a legally protected interest (on the model of copyright or patent, say) in order to encourage future information creation. The second part of the analysis employs a traditional philosophical method for getting around state/process paradoxes—paradoxes such as Zeno's tale of the arrow that can never reach its target since it must pass though an infinite series of smaller and smaller distances. With the initial process simply postulated, we have no trouble thinking about the arrow quivering in the target, the equilibrium being maintained. Yet, as I think Kraakman and Gilson would agree, if we move from the abstract modeling of *possible* market mechanisms to the actual analysis of a particular market, we have moved too quickly, because to postulate this is to assert that which must be proved. In the abstract there is no way of knowing whether the temporal advantage of being first in possession of information and having a privilege to trade is an *inadequate* compensation, requiring greater intellectual property rights, or an *over*compensation that will encourage too many traders to invest too much in the acquisition of information so as to gain an advantage over other traders. *See* Eugene F. Fama & Arthur B. Laffer, *Information and Capital Markets*, 44 J. BUS. 289 (1971).

84. *Cf.* Harold Demsetz, *The Private Production of Public Goods*, 13 J.L. & ECON. 293 (1970). As Demsetz points out, the key feature of the public good is that "it is possible at no cost for additional persons to enjoy the same unit of a public good." *Id.* at 295. Why, then, is price not a public good?

public goods problem, the answer might be to commodify the price measure—to assert an intellectual property right in the price output of the market—in order to prevent others from gaining free access to the information. Yet if there is one thing that microeconomics cannot justify treating as a public good, surely it is price.

If all of this seems like an Alice-in-Wonderland conclusion, it is worth considering the case of *Board of Trade v. Dow Jones & Co.*,[85] in which the court recognized that Dow Jones had a "proprietary interest in its indexes and averages which vests it with the exclusive right to license their use for trading in stock index futures contracts."[86] The court pointed out, however, that "[t]he extent of defendant's monopoly would be limited, for as defendant points out, there are an infinite number of stock market indexes which could be devised."[87] The *Dow* case does not go as far as the "secret stock market" I proposed half-jokingly, but it does exemplify the ineradicable tension between the notion of perfect information and frictionless markets and the notion of commodification and property rights.

This internal tension in the analysis always leaves open the question whether a particular issue is to be classed as a public goods problem for which the remedy is commodification,[88] or a monopoly of information problem for which the remedy is unfettered competition.[89] The problem

85. 456 N.E.2d 84 (Ill. 1983). For the connection between this case and the *INS* case, see Douglas G. Baird, *Common Law Intellectual Property and the Legacy of* International News Service v. Associated Press, 50 U. CHI. L. REV. 411 (1983).

86. *Dow Jones*, 456 N.E.2d at 90.

87. *Id.*

88. Alternatively, the solution could be some form of state tax and transfer scheme to accomplish the same ends. This "commodification" solution may seem to run against the conventional wisdom that public or collective goods are those from which others cannot be excluded. If the good can be commodified, one might ask, surely that means that it was never a public good in the first place? From my perspective, this difficulty hinges on a certain confusion over baseline assumptions about legally protected interests, a confusion that is relatively common in the writing of nonlegally trained economists. Economists tend to think that an undifferentiated property concept has resolved many of the questions of internalization/externality, tend to lay no clear distinction between the physical and the legal exclusion of users of public goods, tend to underestimate the extent to which property rights can be fragmented, and tend to insist on a somewhat naive separation between public and private law. The real problem with public goods is that a failure by their users to internalize their full costs will lead to underproduction. (Although some economists believe that in some cases, it may actually lead to *over*production. Hirshleifer, *supra* note 69, at 569.) Demsetz makes a similar point.

> Frequently there is confusion between the public good concept, as I understand it, which states that it is possible at no cost for additional persons to enjoy the same unit of a public good, and a different concept, that might be identified as a collective good, which imposes the stronger condition that it is *impossible* to exclude nonpurchasers from consuming the good.

Demsetz, *supra* note 84, at 295. A central idea behind much of the law and economics literature since Coase is that many of the problems traditionally solved by recourse to the state taxation system can be just as well served by a system of limited property rights such as those found in copyright or patent.

89. For example, consider the following:

of classification is not merely an empirical one. Even the existence of precise empirical evidence (of a kind currently unavailable for any area of information regulation except, arguably, stock market prices) would not, alone, reveal the right answer unless we had also decided on what level of generality the analysis was to be undertaken. In *Feist Publications v. Rural Telephone Service Co.*,[90] for example, the Supreme Court denied copyright protection to the compilers of a white pages phone directory. The logic of the analysis I just applied to the *INS* case might seem to indicate that it was necessary to give the compilers of the directory some protection. After all, directories raise classic public goods problems. The cost of creation is high, yet it is possible at minimal extra cost for additional users to enjoy the same unit of the good thus created. In other words, it is expensive to make and cheap to copy. The Court was not disposed to agree. Partly by means of doctrinal line-drawing (copyright rather than unfair competition) and partly by means of definitional fiat (telephone directories are not original, so in that sense nothing truly new is being created), the Court moved away from the "sweat of the brow" theory and denied the compilers copyright protection.

At first, it appears that the *Feist* opinion has nothing to tell us about economic analysis. On closer inspection, it becomes apparent that the Court was not so much rejecting the commodity perspective as it was changing the level of generality of the analysis. From Justice O'Connor's perspective, it was the structure of copyright law as a whole that strikes the right balance between the need to reward producers and the need to maintain competition and the free flow of information. Since copyright law as a whole allows the commodification of expression but not the ideas or facts which that expression contains, and since the Court finds this particular arrangement of facts to be "unoriginal," no legally protected interest can be recognized. It is only once this prior decision about

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> It is true that under a patent system there will, in general, be some shortfall in the return to the inventor, due to costs and risks in acquiring and enforcing his rights, their limited duration in time, and the infeasibility of a perfectly discriminatory fee policy. On the other side are the recognized disadvantages of patents: the social costs of the administrative-judicial process, the possible anti-competitive impact, and restriction of output due to the marginal burden of patent fees. As a second best kind of judgment, some degree of patent protection has seemed a reasonable compromise among the objectives sought.
>
> But recognition of the unique position of the innovator for forecasting and consequently capturing portions of the *pecuniary* effects—the wealth transfers due to price revaluations—may put matters in a different light. The "ideal" case of the perfectly discriminating patent holder earning the entire technological benefit is no longer so ideal. For, the same inventor is in a position to reap speculative profits, too; counting these as well, he would clearly be over-compensated.
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> . . . Do we have reason to believe that the potential speculative profits to the inventor, from the pecuniary effects that will follow release of the information at his unique disposal, will be so great that society need take no care to reserve for him any portion of the technological benefit of his information? The answer here is indeterminate.

Hirshleifer, *supra* note 69, at 571-72 (footnote omitted).

90. 111 S. Ct. 1282 (1991).

the level of generality has been made that the questions of efficiency and incentive can intelligibly be posed.

For all of these reasons, economic analysis of information regimes is extraordinarily indeterminate. A person reading the confident statements of legal scholars about the superior efficiency of the patent regime over the copyright regime,[91] or the economic inefficiency of insider trading regulation[92] and of the law of fraud,[93] would be surprised to find that economists cannot agree over the basic question of whether, in the absence of commodification, there will be under- or over-investment in the production of information. Kenneth Arrow takes a position that seems to support the Court's result in *INS.* He argues that without property rights, too little information will be produced, because producers of information will not be able to capture its true value.[94] Fama and Laffer, on the other hand, argue that too *much* information will be generated, because some information will be produced only in order to gain a temporary advantage in trading, thus redistributing wealth but not achieving greater allocative efficiency.[95] In other words, in the absence of information property rights, there may be inefficient investment of social resources in activities that merely slice the pie up differently, rather than making it bigger. Hirshleifer gives a similar analysis of patent law, ending with the conclusion that patent law may be *either* a necessary incentive for the production of inventions *or* an unnecessary legal monopoly in information that overcompensates an inventor who has already had the opportunity to trade on the information implied by his or her discovery.[96] It is hard to think of a more fundamental uncertainty.[97]

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91. *See* Wiley, *supra* note 64.

92. *See infra* text accompanying notes 224-40.

93. *See* Easterbrook, *supra* note 1; Kronman, *supra* note 55; Levmore, *supra* note 55.

94. Kenneth Arrow, *Economic Welfare and the Allocation of Resources for Invention, in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 617 (National Bureau of Economic Research ed., 1962). The Arrow article itself offers some lovely examples of the tensions between efficiency and anticompetitive provision of incentives. It is interesting to note that Arrow, writing for The RAND Corporation, believes that even with intellectual property rights it is unlikely that sufficient knowledge will be produced. He therefore suggests that "for optimal allocation to invention it would be necessary for the government or some other agency not governed by profit-and-loss criteria to finance research and invention." *Id.* at 623. Arrow uses this idea to offer a partial defense of the "cost-plus" method of developing weaponry for the military. "This arrangement seems to fly in the face of principles for encouraging efficiency, and doubtless it does lead to abuses, but closer examination shows both mitigating factors and some explanation of its inevitability." *Id.* at 624. Michael Perelman, most emphatically *not* writing for The RAND Corporation, uses a similar logic to reach a conclusion sufficiently indicated by his title. *See* Michael Perelman, *High Technology, Intellectual Property, and Public Goods: The Rationality of Socialism,* 20 REV. RADICAL POL. ECON. 277 (1988).

95. Fama & Laffer, *supra* note 83, at 298.

96. Hirshleifer, *supra* note 69, at 572-73.

97. The problem is further compounded by the fact that many professional economists seem to have a naive, prerealist understanding of law. In particular, I found the following recurrent mistakes. Professional economists often talk as though there was a natural suite of property rights that automatically accompanied a free market. They make strong and unexplained assumptions that

It is my argument in this Article that much contemporary economic analysis conceals these tensions, *aporias,* and empirically unverifiable assumptions by relying unconsciously on the notion of the romantic author. I have tried to show that most issues in information economics could be portrayed (in the absence of more detailed empirical information) as *either* public goods problems for which the state has wisely chosen the remedy of commodification in order to avoid underproduction *or* as potential monopolies in which intolerable transaction costs are introduced into the free flow of information. In later Parts, I will argue that this choice is often concealed by an implicit reliance on the author notion, a reliance that tends to push the analysis towards the incentives/commodity vision of information. This could have serious negative consequences since it will lead analysts (and governments) to support a greater commodification of information than is actually warranted. Such a discourse could also be used cynically to protect existing information monopolies. Economists would be mainly concerned by the possible efficiency losses implicit in such a result. In the Conclusion, I argue that there are also profound distributional issues which should concern us—particularly if we believe that information is becoming one of the primary resources in the international economy.

So much for the theory. What about the facts? The empirical evidence, of which there is surprisingly little, seems to justify these conclusions, or at least to cast doubt on current assumptions about the level of international intellectual property protection necessary to promote research and innovation. A historical, statistical study of the effect of patent protection on the development of drugs in both developed and developing countries from 1950 to 1989 found:

> [T]he existence of a patenting system is not a prerequisite for inventions.
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> . . . .
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> The relationship between patent systems and their influence on the inventive capacity of developed countries was also tested. Two different tests using Yule's coefficient showed conclusively

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certain types of activities (for example, trading on superior information) will "naturally" be allowed, but that certain others (for example, trading on superior physical strength) will not be. This kind of error also creeps into the work of some lawyer-economists such as Easterbrook and Levmore. *See generally infra* Part VIII (discussing insider trading). To the extent that they do use the concept of property, economists tend to assume that "absolute" property rights are the default position. The debates between Laffer and Arrow show the results of these shortcomings. For example, both Arrow and Laffer seem to assume that the "natural" unregulated position is that one would have "privileges" but not "rights" to trade in information. But if there is no such thing as a natural, unregulated market, we would have to compare the efficiency of *all* of the possible legal positions—particularly since the legal system actually uses the full suite of Hohfeld's jural correlates in its regulation of different kinds of information. For an excellent description of the many different legal relationships around valuable information, see Easterbrook, *supra* note 1, at 313-14.

> that, for those countries in which nearly all inventions are made, the relationship is not significant.
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> . . . The hypothesis that the number of inventions would increase along with the world-wide increase in patent systems was also considered, but it was concluded that there is no significant relationship between these two variables, either in the United States or in the world at large.[98]

The certainty of these conclusions warrants some skepticism. A small correlation (Yule's association coefficient = 0.15) between patent protection and invention was observed in developed countries.[99] As the authors observe, there is a much more significant correlation between economic development and invention (Yule's association coefficient = 0.94).[100] Yet when the question is what level of intellectual property rights to maintain domestically, the latter correlation is of dubious relevance—at least for developed countries. On the other hand, the absence of a strong correlation between patent and invention is significant, and the study certainly tends to undermine the claims made by the developed world that a stronger international regime of intellectual property is necessary to encourage innovation.

Finally, while all such studies warrant methodological skepticism, the studies that support intellectual property protection seem even more problematic. One study estimated that without patent protection sixty-five percent of new drugs produced by the U.S. pharmaceutical industry would not have reached the market.[101] The analysis was based, however, on data supplied by the pharmaceutical industry in response to a questionnaire on the impact of patent protection on research and development. The problems with such a method are fairly obvious.

In another context, the paradoxes and empirical uncertainties of economic analysis might be of mainly theoretical interest. In discussions of information, they are of immediate practical relevance to almost every issue. In part this is because economists—to their great credit—have been in the forefront of attempts to treat information holistically.[102] Another reason may lie in the perception that information issues are somehow more "intangible." Escaping more easily from the absolutist, formalist, and physicalist notions of tangible property, information has historically seemed more amenable to a utilitarian calculus.[103] Conse-

98. Pablo Challú et al., *The Consequences of Pharmaceutical Product Patenting,* 15 WORLD COMPETITION 65, 115 (1991).

99. *Id.* at 68.

100. *Id.* at 70.

101. Edwin Mansfield, *Patents and Innovation: An Empirical Study,* 32 MGMT. SCI. 173, 174-75 (1986).

102. *See supra* note 1.

103. To my knowledge, copyrights and patents are the only types of property that have an explicitly utilitarian constitutional basis. Congress is empowered "[t]o promote the Progress of

quently, these issues are often debated in economic terms—both inside and outside the academy. When the U.S. Trade Representative argued that the General Agreement on Trade and Tariffs (GATT) should be used to pressure other countries to increase their levels of intellectual property protection, she turned to the language of necessary economic incentives, rather than to the labor theory of property or the language of natural rights.[104] Once again, the simplistic claim arises that more protection of intellectual property means more innovation and invention.

There is another reason that economics shapes the debate of information issues. Neoclassical price theory is not only the most sophisticated utilitarian language available, but also the one whose disciplinary assumptions—consumer sovereignty, exogenous preferences, and so on—best reflect a liberal vision of the production, distribution, and exchange of information.[105] The "marketplace of ideas" is more than just a ran-

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Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 1, cl. 8. The Clause demonstrates two important characteristics of intellectual property. First, intellectual property seems more *chosen*—more of a social artifact—than other types of property, though in fact it is not. Second, partly because of this, intellectual property is almost always discussed in terms of the social benefits it will bring. The person who is asked why he should have the right to pile his flax by the tracks regardless of the inconvenience to the railroad company is likely to say "because it's *my* land." The author who is asked why he should have some legally protected interest in a work after it has been conveyed through the marketplace cannot appeal so easily to any naturalistic or physicalist notion of property. This phenomenon is evidenced also in respect for different types of property rights; "nice" people, who would not steal a record from a record store even if they were sure they were unobserved, nonetheless tape albums they did not buy. For all of these reasons, intellectual property intuitively seems a fit subject for a utilitarian calculus of social interests. What better language than economics in which to discuss "the way in which the incentive to produce information and the demands of current use conflict"? Easterbrook, *supra* note 1, at 314. As a result, intellectual property in particular was subject to economic analysis long before other doctrinal areas. *See, e.g.*, Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167 (1934). Interestingly, this 1934 article argues for *diminished* copyright protection. *Id.* at 194-95.

104. My preferences, as I earlier said, would be for complete protection of intellectual property. And so the higher the protection, the more I think it benefits the developing countries, who thereby then attract the transfer technology, investment, and creative endeavor. And of course, the more you protect intellectual property, those established firms are willing to pour more into research and development to try to address mankind's problems, whether they be disease or constructive building of agricultural crops or what have you, all for the benefit of peoples wherever they may be located.

News Briefing by U.S. Trade Representative, FED. NEWS SERVICE, Jan. 17, 1992, *available in* LEXIS, Nexis Library, FEDNEW File (Carla Hills, Remarks on the Signing of a Bilateral Memorandum of Understanding with the People's Republic of China).

105. There may also be a more indirect relationship between the exaltation of individuality, creative innovation, and utilitarianism. Schumpeter thought there was:

> [T]he typical entrepreneur is more self-centered than other types, because he relies less than they do on tradition and connection and because his characteristic task—theoretically as well as historically—consists precisely in breaking up old, and creating new, tradition. Although this applies primarily to his economic action, it also extends to the moral, cultural, and social consequences of it. It is, of course, no mere coincidence that the period of the rise of the entrepreneur type also gave birth to Utilitarianism.

SCHUMPETER, *supra* note 14, at 91-92. The reader may notice the similarity between Schumpeter's vision of the entrepreneur and the idea of authorship described here. This connection will be explored in the discussion on insider trading. *See infra* Part VIII.

dom metaphor: it is an accurate summation of many of the assumptions that our society brings to the discussion of information issues. In a moment, I will argue that this metaphor brings still more problems in its wake.

If microeconomics has become one of the most attractive languages in which to discuss questions of information, then it is almost inevitable that the specific blindnesses[106] of economic analysis will be replicated in information policy. Thus, to the particular difficulties of the economic analysis of information are added the more general difficulties of the economic analysis of law—baseline problems, wealth effects, and so on. These have been analyzed elsewhere, so I will not dwell on them here.

To sum up, there are at least two types of theoretical problems in microeconomic analysis of information. The first stems from the contradictory roles that information plays in the market and in microeconomic theory—information as both perfect and imperfect, property rights in information as both necessary incentives and dubious transaction costs, and so on. The second type of problem stems from the conflict between the assumptions of microeconomic analysis and actual social behavior. For example, when poor schoolchildren are convinced by relentless advertising and peer pressure that they "need" hugely expensive basketball shoes, even a staunch advocate of liberal economics may begin to doubt both the descriptive accuracy and prescriptive fairness of an unswerving application of the norms of "consumer sovereignty" and "exogenous preferences."[107]

What conclusions do we draw from the combination of these two theoretical problems? The pessimistic conclusion would be that one of the most influential ways we have to discuss issues of information is a theory so indeterminate that it frequently functions as a Rorschach blot for dominant social beliefs and the prejudices of the analyst. At the same time, this theory tends structurally to undervalue issues of power and inequality.

Call that the pessimistic conclusion. Is there an optimistic one? My answer would be a guarded "maybe." It is a good idea to focus on incentives to production, on transaction costs, and on the problems created by the presence or absence of legally protected interests. It is certainly a good idea to try to discover actual effects of a particular regime of infor-

106. I do not necessarily mean this as an insult. *All* theoretical schemes function like blinders, focusing attention on certain phenomena while ignoring others. In its current incarnation, the economic analysis of law tends to ignore wealth effects, structural ("irrational") oppression, the possibility of manufacturing needs as well as products, and so on. To the extent that a more or less sophisticated version of economic analysis becomes the discourse of power in the regulation of information, such issues would *tend* to be ignored or at least marginalized. From my perspective, these seem to be exactly the issues that deserve our attention.

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

mation regulation. By and large, economists have not actually done this, but at least they have talked about it. The tendency of economic analysis to go at least one layer below reified doctrinal concepts is also to be welcomed. One could imagine a type of information economics that was sensitive to baseline errors, offer-asking problems, and wealth effects, that questioned the reality of exogenous preferences, and that openly acknowledged the tension between perfect information and "information as commodity." If this economics also paid more attention than is currently fashionable to the diminishing marginal utility of wealth, I, for one, would be pleased.

If all of these things were done, what epistemological *status* and practical *effect* would information economics have? It would be a little less imperial, a lot more modest, and much more empirical. Its conclusions would be more carefully hedged than they are now, and it would openly declare its partiality—the inherent prejudices of any utilitarian, efficiency, or welfare-maximizing calculus and the political consequences of the distinction between allocation and distribution.

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, surely it is useless?—no matter how chastened its conclusions. The answer, I think, is that economics is only useless if one makes a particular positivist and scientistic set of 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—and not merely those from the Chicago school—sound in their more expansive moments as if they subscribe to those assumptions. But that is no reason for the rest of us to do so. Neoclassical price theory is a valuable tool 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 reminders 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 Article, often conceals its indeterminacy through romance. To understand the origins of that romance, we must first look at the liberal conception of property.

V
PROPERTY IN THE LIBERAL STATE

Like information, property has a vital role in liberal state theory. That role imposes certain conflicting requirements on the concept of property itself.[108] 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 way in which we attempt to reconcile our desire for freedom and our desire for security.[109] How can we be free and yet secure from the freedom of others, secure and yet free to do that which we want to do?[110] 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 protection from harm, the contradiction vanishes.[111]

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. Vandevelde states the problem in the following way:

> [A]t 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

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108. *See generally* Francis S. Philbrick, *Changing Conceptions of Property in Law,* 86 U. PA. L. REV. 691 (1938); Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld,* 1982 WIS. L. REV. 975; Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property,* 29 BUFF. L. REV. 325 (1980).

109. 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, e.g.,* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (holding that the condemnation of property for the purpose of limiting the concentration of property ownership constitutes a public use within the meaning of the Fifth Amendment); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) (allowing a municipality to condemn and transfer private property to a development corporation for the public purpose of expanding its economic base). Constitutional rights, on the other hand, are generally a strong 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, *supra* note 108, and I am indebted to his analysis.

110. *See* THOMAS HOBBES, LEVIATHAN 139-43 (Bobbs-Merrill 1958) (1651); JOHN S. MILL, ON LIBERTY 70-86 (David Spitz ed., Norton 1975) (1859); Boyle, *Thomas Hobbes, supra* note 10; Duncan Kennedy, *The Structure of Blackstone's Commentaries,* 28 BUFF. L. REV. 205, 209-21 (1979).

111. Singer, *supra* note 108, at 980.

> 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 still was 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 to be considered property, finding and justifying the criteria for separating property from nonproperty would be difficult.[112]

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 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 Railway*[113] is used in many a first-year class to illustrate the conceptual shift. Could a flax maker be found guilty of contributory negligence for piling its stacks of flax too close to the tracks? The majority bridled at the very thought. The flax maker was piling its flax on its own property, after all. "[T]he 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."[114] Though the majority's circular reasoning[115] carried the day, it is Holmes' partial concurrence that pointed to the future. Rather than imagining an absolute sphere of rights surrounding the property lines like a glass bubble, Holmes would be 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 even a

112. Vandevelde, *supra* note 108, at 328-29.

113. 232 U.S. 340 (1914).

114. *Id.* at 350.

115. If the railroad had a duty not to cause the destruction only of 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 their property?

prudently managed engine."[116] He also directed a few sanguine, if vaguely crocodilian, comments towards 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 on 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.[117]

Presumably, the majority consoled itself with the fact that its concern with absolutism and universality was 2000 years out of date. In any event, the writing was on the wall. Property was no longer conceived of as absolute, as a guaranteed trump against the interests of the majority or the state, or as 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's land merely because there would be utilitarian benefits to letting the railroad run unmolested, then why not from 100 yards, or from the whole parcel? 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 girded the traditional conception of property, we will see not only an attempt to clothe a newly invented romantic author in robes of juridical protection, but also 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 simultaneously. It must provide a conceptual apparatus that appears to mediate the various tensions associated with the role of information in liberal society. Thus, for example, it must

116. *LeRoy Fibre,* 232 U.S. at 353 (Holmes, J., concurring in part).

117. *Id.* at 354 (citation omitted).

explain why a person who recombines information from the public sphere is not merely engaging in the private appropriation of public wealth. It must explain how 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 carve out a sphere of privacy and at the same time ensure 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 respects existing disparities in wealth, status, and power in the private. And all of these things must be accomplished while using a conception of property that avoids the theoretical impossibilities of the physicalist, absolutist conception, but that at the same time is not too obviously relativistic, partial, and utilitarian.

VI
COPYRIGHT

So far, I have argued that because of the contradictions and tensions I have been describing, 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, and in this case copyright—we will find a pattern, a strategy that attempts to resolve these tensions in the liberal view of information. On one level, understanding this pattern helps to make sense (if not coherence) of the otherwise apparently chaotic world of copyright. On another level, understanding the conceptual strategy developed in copyright illuminates most of the other areas that concern information—even if those areas are not conventionally understood as relating to copyright.

Although intellectual property has long been said to present insuperable conceptual difficulties, it actually presents exactly the same problems as the liberal conception of property generally. It merely does so in a more obvious way and in a way which is given particular spin by our fascination with information. All systems of property are both rights-oriented and utilitarian, rely on antinomial conceptions of public and private, and present insuperable conceptual difficulties when reduced to mere physicalist relations. But when they are conceived of in a more abstract and technically sophisticated way, systems of property 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* shows, of course, it is not at all clear that such

confidence is justified, but at least physical property presents itself as an apparently coherent feature of social reality. This is a fact of considerable ideological and political significance. In intellectual property, the response 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, by several apocryphal tales of writers who were household names yet still lived in poverty, and by 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.[118]

Along with this problem go two more fundamental ones. The first is the recurrent question of how we can give property rights in intellectual products and yet still preserve the inventiveness and free flow of informa-

118. Christian S. Krause, *Uber den Büchernachdruck*, 1 DEUTSCHES MUSEUM 415-17 (1783) (emphasis added), *quoted in* Woodmansee, *supra* note 1, at 443-44.

tion that liberal social theory demands. I shall return to this question in a moment. The second problem is the more fundamental one. On what grounds can we justify giving 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, humour, 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 an invented concept of relatively recent provenance. Medieval church writers actively disapproved of the elements of originality and creativity that we now think of as essential components 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 scholars in their view 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.[119]

Woodmansee quotes a wonderful definition of "book" from a mid-eighteenth-century dictionary that merely lists the writer as one mouth among many—"[t]he scholar and the writer, the papermaker, the type founder, the typesetter and the printer, the proofreader, the publisher, the book binder, sometimes even the gilder and brass-worker, etc."—all of whom are "fed by this branch of manufacture."[120] Other studies show that authors were seen as merely another type of craftsman—an appellation which Shakespeare might not have rejected—or at their most exalted, as the crossroads where learned tradition met external, divine inspiration.[121] But since the tradition was mere craft, and the glory of the divine inspiration was to be offered to God rather than to the vessel he had chosen,[122] where was the justification for preferential treatment in

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119. ERNST P. GOLDSCHMIDT, MEDIEVAL TEXTS AND THEIR FIRST APPEARANCE IN PRINT 112 (1943) (emphasis added), *quoted in* JOHN W. SAUNDERS, THE PROFESSION OF ENGLISH LETTERS 20 (1964).

120. GEORG H. ZINCK, ALLGEMEINES OECONOMISCHES LEXICON col. 442 (3d ed. n.p. 1753), *quoted in* Woodmansee, *supra* note 1, at 425.

121. *See* Boyle, *supra* note 1, at 628-33.

122. This view persisted for some time:

> Nevertheless, I had to be told about authors. My grandfather told me, tactfully, calmly. He taught me 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

the creation of property rights? As authors ceased to think of themselves as either craftsmen, gentlemen,[123] or stenographers 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.[124]

> 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 that 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 (Bernard Frechtman trans., 1964).

123. 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 that 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 & SUSAN GUBAR, THE MADWOMAN IN THE ATTIC: THE WOMAN WRITER & 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 & ENT. L.J. 279 (1992).

A significant exception to this line of thought is provided by Professor Linda Lacey who, in a fascinating and thought-provoking article, provides a feminist-influenced view of authorship that I would argue is just as romanticized as the vision I discuss here. Linda J. Lacey, *Of Bread and Roses and Copyrights,* 1989 DUKE L.J. 1532. Professor Lacey argues that authors have been stigmatized as female and therefore, *unlike all other rights-holders,* have had their property rights limited. I would disagree with the tendency to romanticize the individual creator for the reasons given in this Article. Moreover, I simply cannot agree that other forms of property are not limited for reasons of social policy, commonweal, convenience of administration, or what-have-you. For a criticism of this kind of "absolutist" picture of property rights, see *supra* note 108, *infra* text accompanying notes 243-49.

124. For comprehensive development of these ideas, see Boyle, *supra* note 1; Jaszi, *supra* note 2. This line of thought can be traced back to Foucault. Michel Foucault, *What Is an Author?, in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141 (Josueé V. Harari ed., 1979). Woodmansee provided the paradigm for actual research, and her article gives a marvellous account of the "rise" of intellectual property in Germany. Woodmansee, *supra* note 1. 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* N.N. FELTES, MODES OF PRODUCTION OF VICTORIAN NOVELS (1986). *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 HIST. 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 CATHY N. DAVIDSON, THE REVOLUTION AND THE WORD: THE RISE OF THE NOVEL IN AMERICA (1986). My ideas on this issue were strongly influenced by participation in the 1991 Conference on Intellectual Property and the Construction of Authorship at Case Western University. Some of the papers from that Conference have been collected in the *Cardozo Arts and Entertainment Law Journal.* Symposium, *Intellectual Property and the Construction of Authorship,* 10 CARDOZO ARTS & ENT. L.J. 277 (1992). I should note here that I am concentrating on the romantic vision of the author, because that is the image with which I am most familiar, and the rhetoric of which seems most persuasive. I do not mean to imply that a similar project could not be undertaken using some different version of the romantic creator—the great inventor, say. In either case, originality provides the hook with which one can both justify and limit monopoly.

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.[125]

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 mastery of a prior set of rules, but instead by the transformation of genre, the revision of form. Originality became the watchword of artistry.[126] 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

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125. Woodmansee, *supra* note 1, at 427.

126. The notion of originality brought its own burdens, particularly during the mid-19th-century zenith of the cult of the romantic author. The pitiable account of the obsessive author in George Borrow's *Lavengro* is a fine example.

> [The misfortune which befell me] was neither more nor less than a doubt of the legality of my claim to the thoughts, expressions, and situations contained in the book; that is, to all that constituted the book. How did I get them? How did they come into my mind? Did I invent them? Did they originate with myself? Are they my own, or are they some other body's? . . . I at length flung my book, I mean the copy of it which I possessed, into the fire, and began another.
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> But it was all in vain; I laboured at this other, finished it, and gave it to the world; and no sooner had I done so than the same thought was busy in my brain, poisoning all the pleasure which I should otherwise have derived from my work. How did I get all the matter which composed it? Out of my own mind, unquestionably; but how did it come there—was it the indigenous growth of the mind? And then I would sit down and ponder over the various scenes and adventures in my book, endeavouring to ascertain how I came originally to devise them, and by dint of reflecting I remembered that to a single word in a conversation, or some simple accident in a street, or on a road, I was indebted for some of the happiest portions of my work; they were but tiny seeds, it is true, which in the soil of my imagination had subsequently become stately trees, but I reflected that without them no stately trees would have been produced, and that, consequently, only a part in the merit of these compositions which charmed the world—for they did charm the world—was due to myself. Thus, a dead fly was in my phial, poisoning all the pleasures which I could otherwise have derived from the result of my brain sweat.

GEORGE BORROW, LAVENGRO 332-33 (Ernest Rhys ed., Everyman's Library 1909) (1851). (In keeping with the theme of this footnote, I should say that I am indebted to Peter Jaszi for pointing out this passage to me.) To understand the contemporary attitude towards sources, it is worth comparing this notion of originality, and its profound "anxiety of influence," with the classical one described *infra* note 128.

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."[127] To the theorists and polemicists of romantic authorship, the reproduction of orthodoxy would have been proof that they were not the unique and transcendent spirits they hoped themselves to be.[128]

It is the originality of the author, the novel creation the author fashions out of the raw materials provided by culture and the common pool, that "justifies" the property right. At the same time, the postulate of originality 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 which 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.

> [E]ach writer must give his 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

127. HAROLD O. WHITE, PLAGIARISM AND IMITATION DURING THE ENGLISH RENAISSANCE 202 (1935). During the mid-16th century "imitative composition enjoyed general and unquestioned acceptance." *Id.* at 42. It was not until the very end of the century that any writer made use of Martial's figurative expression "plagiarius" (man-stealer) with the connotation literary thief. *Id.* at 120.

128. Contrast the views of the mid-16th century: "As for the theoretical treatises which discussed literature, they were unanimous in asserting the necessity of imitation, varying only in the emphasis they placed upon the classical safeguards for originality." *Id.* at 59. Even in the 1580s, as writers began to object to imitation,

> [o]f all the objections to imitation which were raised, only those of Churchyard and of one anonymous author were directed against imitation *as such.* All the rest opposed only what classical critics had pointed out as incorrect: piracy, secrecy, perversity, servility, superficiality. And of all those who demanded originality of invention, not one used the term in its modern sense of individual fabrication. All sought originality just as classical critics declared that it should be sought: through individual adaptation, reinterpretation, and, if possible, improvement of the best which each writer could find in the literature of his own and earlier days.

Id. at 118-19. The difference between the classical sense of originality (which defined itself around the adaptive reproduction of past knowledge) and the romantic conception of originality (which demanded radical innovation) could hardly be more marked. The former vision celebrates, while the latter vision minimizes and even denigrates, the influence of "sources"—genre, tradition, past learning, and shared language. This tendency to underemphasize and devalue sources is of profound importance to the law of information in general and intellectual property in particular.

exclusive property.[129]

American copyright law strikes exactly the same theme. In the famous case of *Bleistein v. Donaldson Lithographing Co.*,[130] which concerned 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' opinion shows us both the advantages and the disadvantages of a rhetoric that bases property rights on "originality."[131] 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. 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[132] 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 we will explore further later in the Article. 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 . . . ."[133] 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.

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

129. Johann G. Fichte, *Proof of the Illegality of Reprinting: A Rationale and a Parable* (n.p. 1793), *quoted in* Woodmansee, *supra* note 1, at 445 (emphasis added by Woodmansee).

130. 188 U.S. 239 (1902).

131. *See id.* at 248-52.

132. In fact, of course, Shakespeare engaged regularly in activity that we would call plagiarism but which Elizabethan playwrights saw as perfectly harmless, perhaps even complimentary. This not only shows the historical contingency of the romantic idea of authorship, 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. *See* Boyle, *supra* note 1.

133. *Bleistein,* 188 U.S. at 250.

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.

A passage from Professor Litman bears repeating at this point:

> 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.[134]

I would say that we find the answer to Professor Litman's 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, the idea/expression division which has so fascinated and puzzled copyright scholars apparently manages, in one stroke:

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

2. To provide a *moral and philosophical justification* for giving the author such a property right. After all, through his originality of spirit, the author has created something entirely new out of the raw material of the public domain. 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 á 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, not the workers of the world. Even after it is analogized to sculptures and paintings, software and music, it will still have an attractively circumscribed ambit.

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134. Litman, *supra* note 2, at 999 (footnotes omitted).

3. To resolve (or at least conceal) the *tension between public and private*. In the double life that Marx described, information is both the lifeblood of the noble, disinterested citizens of the public world and, at the same time, a commodity in the private sphere to which we must attach property rights if we wish our self-interested producers to continue to produce.[135] 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 greed.

Thus, the combination of the romantic vision of authorship and the distinction between idea and expression appears to provide a conceptual basis and a moral justification for intellectual property, does not threaten to spread dangerous notions of entitlement to other kinds of workers, and mediates the tension between the schizophrenic halves of the liberal world view. Small wonder that it has been a success. Small wonder that, as I hope to show in this Article, 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 some articles decry the language of "idea" and "expression" and offer the prediction that those terms will be used as mere summations of the underlying economic analysis[136]—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 Article 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[137] 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

135. *See supra* text accompanying note 40.

136. *See, e.g.*, Wiley, *supra* note 64, at 123-24.

137. *See supra* Part IV.

scholarly economic analysis—providing the vital initial choices that give the analysis its subsequent appearance of determinacy and "common sense" 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.

In the next Part I turn to the question of blackmail. One of my aims in this Article is to pick examples that illustrate different aspects of the structure of information regulation I describe here. Copyright offers the idea of romantic authorship as a way of reconciling the demands of private property and the public realm. By contrast, blackmail is 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.

VII
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.[138] 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 that morass, however, it is worth focusing on the qualities that make blackmail problematic in the first place. When scholars talk about the difficulties of explaining blackmail, they are generally referring to a restricted subsection of the doctrine. It is easy to explain attempts to extort money by threats that would be illegal to carry out and to explain why a blackmailer cannot ask money as the price of keeping silent about some violation of the law. 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."[139] 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.[140] In Hohfeldian terms, the sale of a privilege

138. By far the best survey comes from Professor James Lindgren. *See* Lindgren, *supra* note 27. Though I disagree with Lindgren's own explanation of blackmail, his article is an excellent introduction to the field, and one to which I am indebted.

139. *See supra* text accompanying note 25.

140. 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, *supra* note 27, at 670-71 (footnotes omitted). While this is clearly an advance on other formulations, it tends to gloss over the variety of the legally protected interests

has been criminalized but the privilege itself has been retained. How is this different from any other situation in which one economic actor makes a bargain with another to forego a legal course of action that the second party wishes to avoid? To put it another way, what is the qualitative difference between a blackmailer's demands for money and a baseball team's demands for tax breaks, rezoning, and direct grants as the price of not moving to another a city?[141]

The attempts to explain the criminalization of blackmail point in very different directions, and I could not begin to cover the full range of explanations here. Instead, I will use this Part to illustrate three kinds of attempted explanations: economic theories, libertarian theories, and third party theories. I will argue that all three fail to explain blackmail, and that we need a theory that focuses on the various roles that information is expected to play within our society. Admittedly, such a theory gives an answer of a different type than the ones sought by the theorists I cite here. To me, however, that answer seems both more credible and more useful.

A. Economic Theories

Landes and Posner believe that the prohibition of blackmail springs from the state's attempt to prevent (inefficient) private enforcement of the law. In other words, the prohibition of blackmail is supposed to help the state keep its monopoly in law enforcement.

> Were blackmail, a form of private enforcement, lawful, the public monopoly of enforcement would be undermined. Overenforcement of the law would result if the blackmailer were able to extract the full fine from the offenders . . . . Alternatively, the blackmailer might sell his incriminating information to the offender for a price lower than the statutory cost of punishment to the criminal, which would reduce the effective cost of punishment

involved. The legal relationships involved are not all actually "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 this Article, 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. It is in this context that blackmail should be understood.

141. There is something else in the blackmail question that makes it an irresistible puzzle for legal scholars, but a matter of little concern for courts, practicing lawyers, or citizens. Blackmail just *seems* undeniably bad. It is the combination of the rule's intuitive moral sense and the lack of an obvious theoretical justification that leads scholars to believe that there is an answer out there if only they think hard enough about it. In that sense, blackmail is like other jurisprudential puzzles, such as the definition of law, which intrigue the novice and tantalize the professional by their apparent simplicity, only to confound and confuse anyone who proposes a theory.

This idea of the tasks of jurisprudence is rendered problematic by the essentialist vision of language on which it rests. *See* Boyle, *Ideals and Things*, *supra* note 10; Boyle, *Thomas Hobbes*, *supra* note 10. I will argue here that a related problem besets the analysis of blackmail.

to the criminal below the level set by the legislature.[142]

The first problem with this argument is its assumption that legislators will identify the optimal level of activity and set fines accordingly. What mechanism would operate to make self-interested legislators, concerned mainly with reelection, choose the correct level of an activity?[143] This argument appears to presume too easily the existence of a perfect market for legislation.

The second problem with the argument is that it does not explain the hard case I mentioned earlier—the case when both revelation and silence on the part of the blackmailer and the act on the part of the victim would be entirely legal. Thus, for instance, if George Bernard Shaw is secretly eating rack of lamb despite his publicly announced vegetarianism, his butcher may not make him pay for the privilege of silence.[144] At the beginning of their section on blackmail, Landes and Posner note that blackmail appears at first sight to be an efficient way of enforcing the law, "the moral as well as the positive law."[145] Yet (rightly or wrongly) Shaw is not assumed by most people in this society to be violating a moral law—thus the threat of over- or underenforcement does not seem to arise.

Perhaps realizing these difficulties, Landes and Posner then offer a slightly different explanation for the criminalizing of the sale of humiliating as well as incriminating information.

> The social decision not to regulate a particular activity is a judgment that the expenditure of resources on trying to discover it and punish it would be socially wasted. That judgment is undermined if blackmailers are encouraged to expend substantial resources on attempting to apprehend and punish people engaged in the activity.[146]

This is an ingenious suggestion, but there are a number of problems with it. First of all, the implications Landes and Posner draw from "the decision not to regulate" seem problematic in the extreme. All over the United States there are parents trying to find out if their children—whether infant or adult—are eating their greens, doing their homework, smoking cigarettes or dating the "wrong people." The idea that the legal system ought to step in to prevent them from investing time in checking up on any legal activity does not survive prolonged scrutiny, no matter

142. Landes & Posner, *supra* note 26, at 42.

143. *Cf.* DENNIS C. MUELLER, PUBLIC CHOICE (1979) (surveying legislator and voter behavior from an economic point of view); Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice,* 67 NOTRE DAME L. REV. 183 (1991); Jonathan R. Macey, *Special Interst Groups Legislation and the Judicial Function: The Dilemma of Glass-Steagall,* 33 EMORY L.J. 1 (1984).

144. Nor for the silence of the lambs.

145. Landes & Posner, *supra* note 26, at 42.

146. *Id.* at 43.

how attractive it might be to the children involved. To put it another way, it is already stretching a point to claim that criminal statutes are accurate judgments of the efficient level of an activity. It is going altogether too far to claim also that the *absence* of criminal statutes represents a measured judgment by the legislature that "research" on such behavior would be inefficient.

The second problem with the argument is its leap to the deduction from negative evidence. It is strange to imagine that by failing to criminalize behavior we are making a reasoned judgment that information about that behavior should never be gathered. One can imagine all sorts of reasons we might have for failing to criminalize behavior that would not prevent us from wanting to have news gathered and spread. A politician makes repeated sexist or racist jokes, an air force officer in charge of nuclear weapons is a moody alcoholic, a candidate for a teaching position has awful teaching evaluations at a prior school—in each case, we can acknowledge some social value to the information despite the fact that the behavior concerned is perfectly legal. Posner and Landes would need to show *both* that: (1) noncriminalization was a conclusive judgment that the information was not worth the investment of social resources and (2) forbidding citizens to trade in it would have a meaningful effect on its acquisition. Yet (2) seems empirically doubtful in the extreme, while (1) seems just plain wrong.

One response to these problems might be that Landes and Posner object only to monetary incentives to engage in this kind of research. Where affection and sentiment or public or private interest supply the motive, we might hope that all is for the best—my examples notwithstanding. Of course, if there are enough nonmonetary incentives to investigate legal behavior, then the prohibition of monetary incentives would be irrational, a use of the state's cumbersome and expensive machinery in the service of a goal that is already unreachable. But even if the empirical question were dealt with adequately (and Posner and Landes do not deal with it at all), such a response brings a new school of problems in its wake. If we concentrate only on occasions involving monetary incentives to gather information, the theory as stated seems unable to distinguish rationally between paid concealment and paid revelation. If adultery is legal in this particular state, does that represent a judgment that we do not want resources devoted to the discovery of adultery? Thinking of the blackmailer, Landes and Posner would presumably say, "Yes." Does this logically require that we prohibit newspaper reporters from following Gary Hart, or one spouse from hiring private detectives to check on the other?

Just at this point in their article, Landes and Posner reverse tack, apparently without realizing it: "We therefore predict that in areas where there is a public monopoly of enforcement, bribery, like blackmail,

will be prohibited, while in areas where there is no public monopoly it will be permitted. And so we observe."[147] This may seem to deal with the spouse example. But it completely undercuts their idea that the decision not to regulate implies a judgment that resources should not be spent trying to acquire the information. There is no public monopoly of enforcement of George Bernard Shaw's vegetarianism, yet "private enforcement"—through blackmail—is illegal. In many states there is no public monopoly of enforcement of prohibitions against adultery, certain types of plagiarism, or violation of the individual's professed creed—yet blackmail is not permitted.

Perhaps Landes and Posner are saying that we should minimize the gathering of information about activities that are not illegal and which private parties have no right to restrain. If that is the idea, then they seem again to be ignoring the possibility that blackmail may well be one of the least important motives for gathering information. Prurience, moral disapproval, or simple curiosity can lead citizens to pry, as can the desire to help another human being, to gain status as a gossip, or to achieve political power. Surely if we wished to avoid this kind of wasteful "research," the solution would be to criminalize it, or at least to allow the injured party to bring suit under an enormously expanded tort of intrusion on seclusion. Under their plan, the only person deterred will be the person who wants to sell directly to the individual concerned. Sales to other parties—the tabloids, for example—are untouched, as are all the other nonmarket incentives for engaging in investigation. If this is an attempt to prevent the socially wasteful investment of resources, then it is a signally ineffective one.[148] Though thought-provoking, Landes and Posner's theory focuses on probably the least important market and on only one motive for gathering information. It also neglects empirical considerations that might rob it of any significance, deploys the concept of monopoly enforcement in apparently contradictory ways, and ignores the case in which the information-gathering is paid for *ex ante* rather than *ex post.*

147. *Id.*

148. Lindgren also makes some of these points in his critique of Posner. At the same time, however, he makes what I consider to be an error, at least tactically, in his criticisms of Posner and other economic theorists such as Ginsburg. In both cases, he criticizes theories that focus on the inefficiency of investing resources in acquiring "blackmailable" information, because they cannot explain the prohibition of blackmail using accidentally acquired information. To this, I think Posner would simply respond that problems of formal realizability and difficulties of proof would more than justify drawing the rule so as to include the person who accidentally learns of some scandalous behavior as well as the person who waits, night after night, with camera in hand. In my discussion of Coase and Ginsburg, I reformulate this criticism in a way that does not appear to be countered by the formal realizability argument. *See infra* text accompanying notes 149-52.

Ginsburg[149] and Coase[150] take a more promising economic approach. Both focus on the fact that, if blackmail is allowed, there will be incentives for potential blackmailers to invest in discovering information that could be used to blackmail others. "Blackmail involves the expenditure of resources in the collection of information which, on payment of blackmail, will be suppressed. It would be better if this information were not collected and the resources were used to produce something of value."[151] This is, in fact, an ingenious explanation of blackmail. But again there are a number of problems.

The first problem, as Lindgren points out, is that it does not explain the prohibition of "accidental blackmail" (such as the clergyman seen *in flagrante delicto* through a wind-fluttered curtain). Let us assume the response to this critique is, as I suggested earlier, that of formal realizability. Drawing the boundaries this way will make it easier to enforce. The second problem is that the argument appears to rest on an unacknowledged empirical assumption about the prevalence of accidental blackmail as opposed to "deliberate blackmail" (the individual who sets out to "get the dirt on someone"). If the information necessary for deliberate blackmail is costly relative to the likely benefits to be gained, then rational actors would be deterred anyway. Thus, even when the practice is legalized, most blackmailers would be of the accidental type. Yet the accidental blackmailer's discovery of the information is unaffected by the rule change. Thus we might be forbidding a potentially productive exchange, leaving the accidental blackmailer who would rather have been paid off than gossip, but would rather gossip than keep quiet, to spill the beans. To make the argument with any confidence we would need to figure out the proportion of accidental blackmail to deliberate blackmail under both rule systems, and the relative utility functions of gossip for both types of blackmailers. It could be the case that our attempt to prevent the socially wasteful investment of resources will block mutually beneficial transactions—those between eager victims and accidental blackmailers who place a low value on gossip.

The third problem is the quick move to judgment that "nothing of value" has been produced. The measure being used here is not the subjective willingness of the parties to pay. Because of its moral repulsiveness, it seems intuitively believable that blackmail produces nothing of value. But is this really the case? What measure of social value is being used? On the part of a victim, the blackmail payment represents "the avoidance of a loss," rather than a "gain," but we are surely not saying that all situations where parties pay to avoid losses are criminal. Con-

149. Douglas Ginsburg, Blackmail: An Economic Analysis of the Law (n.d.) (unpublished manuscript, on file at the Harvard University Law Library).

150. Coase, *supra* note 26.

151. *Id.* at 674.

sider the behavior of the baseball team, negotiating with its host city for a better deal. As Coase himself admits at the end of his article,

> The problem is that all trade involves threatening not to do something unless certain demands are met. Furthermore, negotiations about the terms of trade are likely to involve the making of threats which it would be better if they were not made (and in this Pigou is right). But it is only certain threats in certain situations which cause harm on balance and in which the harm is sufficiently great as to make it desirable that those making them should be prosecuted and punished.[152]

Having implicitly accepted that all of the theories would criminalize transactions now understood to be perfectly legal, Coase concludes by wondering whether the British system, with its broad grant of discretion to judge and jury, represents the best answer. This seems a perfectly sensible response on the level of policy. Yet it also represents an abandonment of the rationalist project in this case, with no consideration of the more general questions that such a rejection seems to raise.

These are not the only possible criticisms of economic theories of blackmail. We could turn Landes and Posner on their heads and argue that blackmail would function, by and large, as an effective way to police social norms, coupled with a relatively efficient buyout provision. If the victim was willing to pay more for the information than the public would (whether through tabloid bounty or Gennifer Flowers celebrity), then the blackmailer would sell silence. On its face, a resource has been moved to its highest use-value. Only Landes and Posner's rather dubious assumption about the efficiency of both positive and negative judgments by legislatures allow them to avoid this interpretation. Viewing blackmail as a secondary method of social control, it is not entirely clear how one can both stay within the strange world of economic assumptions and yet declare that the information "has no value." For all of the reasons listed, the economic theories of blackmail seem to fail according to their own standards.[153] This is a point that Coase seems almost to acknowledge at

152. *Id.* at 675-76.

153. When I presented this paper at Harvard Law School, Professor Henry Hansmann suggested that blackmail theorists could come up with a new variant of the economic explanations—arguing that by denying the possibility of direct sale, blackmail operates as an incentive to encourage the revelation of information in which society has an interest. Although this was a spontaneous creation (to the best of my knowledge) it seems to be the least problematic of the economic hypotheses. Nevertheless, it still runs into some of the same problems as the other economic theories; in particular, it asserts—without evidence—that the gain from the total value of the information revealed by the existence of blackmail doctrine would be greater than the loss caused by the blocking of many potentially efficient transactions between blackmailers and victims eager to pay for silence. If disclosure of items in the public interest is the goal, why do we not rely on the economists' default assumption that the market will provide? There *is* a market for tidbits of disgraceful news about the mighty, whether that market is *The New York Times* or *The National Enquirer.* In other situations, economists are prone to say that—if the public interest is truly great enough—then the market will

the end of his article.

Perhaps the central problem with all such theories from my perspective, however, is that they seem so far from the social understanding of blackmail. Would social judgments about the normative status of blackmail turn on empirical issues about the relative frequency and costliness of its accidental versus its deliberate varieties? Of course, explanations of the law do not have to assume that social actors understand their own institutions. Yet in the case of blackmail, the goad to answer the puzzle comes partly from the juxtaposition of the almost universal sense that the practice is wrong and the difficulty of distinguishing it from "lawful" transactions. To discard the importance of social perceptions is also to challenge a large part of the motive for undertaking the theoretical inquiry in the first place. Finally, as I will point out later, there seems to be a particular problem here for economic analysts. How do we move from a picture of relentlessly rational actors, consumer sovereignty, and exogenous preferences to a world in which we assert that citizens think blackmail has nothing to do with information costs, but are deluded? For me at least, that is a puzzle. It looks like a theory of false consciousness. But that is exactly the kind of theory most economic analysts of law claim to be avoiding.

B. Libertarian Theories

Blackmail is also a very troublesome topic for libertarians. If contract is the central metaphor for mutually beneficial social relationships and government intervention in free exchanges is a paradigmatic evil, how can blackmail be wrong? Driven by this logic, some libertarians are willing to argue that blackmail is permissible,[154] but two of the most prominent libertarians, Robert Nozick and Richard Epstein, think it should be criminalized, though each gives a different explanation for this apparent exception to their principles.

Epstein, in his article *Blackmail, Inc.*, argues that if blackmail were legal, it might lead to further crimes as the victim sought money to pay off his blackmailer.[155] This idea seems extremely implausible, being both logically unrequired and subject to some obvious practical difficulties. Why should we suddenly start assuming that this particular monetary pressure would drive the victim to crime? Consider the entirely legal forms of "pressure" that can be put on individuals in our society—ranging from the advertising that encourages us to define our self-worth in

price the resource appropriately. In other words, the victim would lose the bidding war. Why assume, in this particular instance, that transaction costs are high enough that we must rely on a paternalistic clause which forbids parties to contract?

154. *See* WALTER BLOCK, DEFENDING THE UNDEFENDABLE 53-54 (1976); MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY 124-27 (1982).

155. Epstein, *supra* note 26, at 564-65.

terms of consumer goods that not all of us can afford to the action of a company in laying off workers, many of whom have mortgages or medical bills that place an intolerable financial burden on them. Each of these might conceivably lead to crime. Yet somehow it seems doubtful that Epstein would criminalize the advertising of Air Jordans, or the practice of plant closings. Besides, as Lindgren points out, it would be in Blackmail, Inc.'s interests to set the payments at a level not likely to provoke rash criminal activity.[156] An incarcerated victim is an unpromising target for blackmail.

Epstein also speculates that the blackmail victim, unlike other persons needing money, would probably not be able to get a loan because of the difficulty of specifying the reason she needed the money. Again, this seems implausible. In my (admittedly limited) experience, providers of consumer credit, credit cards, and home equity loans care only about one's ability to pay. The liberal state may or may not be indifferent as to "ends," but lenders certainly seem to be.

There also seems to be a familiar baseline error here: imagining a hypothetical change of rule, but failing to adjust behavior to conform to the new rule. If blackmail were *legal,* surely lenders would find it an acceptable investment. Imagine a lender contemplating a further loan to a borrower who already owes the lender money. If paying off Blackmail, Inc., will allow the borrower to keep a lucrative job or social position, then a blackmail loan would seem like a better investment than a loan for a new car. If lenders are supposed to be irrational, presumably Blackmail, Inc., would be smart enough to develop a good credit division. Rather than exploring either of these possibilities, Epstein imagines that Blackmail, Inc., will stupidly encourage the victim's slide into crime. Thus, not only will they open themselves to suit and to criminal charges for conspiracy, but they will also forfeit the advantages Epstein has just conferred on them by legalization. Admittedly, a firm this stupid doesn't deserve a break, but why assume such irrationality on the part of all concerned?

Finally, as Epstein himself notes, it would seem intuitively plausible that a rational blackmail industry would pick rich victims—victims who might not *need* credit. Blackmailers would prefer rich victims because of the diminishing marginal utility of wealth[157] and because there would probably be a statistically significant correlation between those who have something to lose in terms of reputation and association and those who

156. James Lindgren, *More Blackmail Ink: A Critique of* Blackmail, Inc., *Epstein's Theory of Blackmail,* 16 CONN. L. REV. 909, 921 (1984).

157. This is an economic concept about which Chicago-school economists (and econo-libertarians such as Epstein) generally maintain an intriguing silence. Of course, one *can* differentiate between wealth-maximizing and more strictly utilitarian versions of economic analysis. But what is the advantage of doing so?

have money. The street person is an unlikely victim of blackmail, the minimum wage worker scarcely more likely, and, if there are any costs of investigation at all, we would need some empirical evidence of the break-even point before we could say whether those who are most likely to be blackmailed would not also be likely to have substantial resources or credit on demand. Epstein's conclusion that, unlike kindred transactions, "only blackmail breeds fraud" seems, like religious encyclicals about the depraving effects of rock music, to have little in the way of logic to recommend it.

Epstein has another string to his bow. Working from libertarian assumptions, he sees most nonphysical crimes to be grounded in fraud or deceit. Thus, for him, "[t]he puzzle . . . is somewhat transformed, as the question might be better asked, why is it that [the victim] escapes criminal punishment for deception, not why is [the defendant] punished for blackmail."[158] In the end, he cannot entirely solve this problem so he pushes it to one side, confident that the blackmail problem, at least, has been resolved: "Blackmail should be a criminal offense even under the narrow theory of criminal activities because it is the handmaiden to corruption and deceit."[159] We have already dealt with the corruption argument. What about deceit? The trouble here is that this answer seems to avoid the question. The blackmail puzzle asks why the law allows citizens to keep secrets, and to reveal secrets, but not to make others pay for the keeping of secrets. To say that secret-keeping in some wider sense should be illegal, and to use this as an explanation of blackmail's illegality, is hardly likely to satisfy those who have been seeking a solution to the problem. For someone like Lindgren, this is similar to "solving" Epinimides' paradox (that all Cretans are liars, Epinimides himself being from Crete) by suggesting that Epinimides was actually from Ios.

In another interesting libertarian analysis, Robert Nozick has argued that blackmail should be illegal because it is "not a productive activity."[160] The proof of its "unproductivity" comes, for Nozick, from his belief that one party to the exchange would be no worse off if it were prohibited.

> Though people value a blackmailer's silence, and pay for it, his being silent is not a productive activity. His victims would be as well off if the blackmailer did not exist at all, and so wasn't threatening them. And they would be no worse off if the exchange were known to be absolutely impossible.[161]

This idea is an interesting one, but it collapses as soon as it is exposed to the world of legal powers, privileges, and immunities. There are many

158. Epstein, *supra* note 26, at 565.
159. *Id.* at 566.
160. NOZICK, *supra* note 26, at 85.
161. *Id.* (footnote omitted).

cases in which I would be better off (in some sense) if the other party did not exist at all. The neighboring landowner wishes to build a structure that will deprive my courtyard of sunlight, but is willing to forego building for payment. Perhaps Nozick would respond that even if this landowner did not exist, some landowner must exist and thus—at least potentially—I would face the same problem. But even this kind of confession and avoidance does not solve the problem.

Nozick seems to be relying on an implicit but indefensible baseline. The alternative to blackmail is silence, and thus the victim may seem better off if blackmail is illegal. But the alternative to blackmail may be, not silence, but revelation. This is a point that those libertarians who believe blackmail should not be criminalized have made loudly and often.[162] To put it another way, Nozick is making a category error, confusing the *person* with the legally protected interest. The victim might be better off if the blackmailer did not exist, but Nozick instead is arguing for the disappearance of one of the blackmailer's legally protected interests, leaving intact exactly the ones that can do the victim harm. It is true that all those with secrets to hide would be better off if no one ever discovered them. But the law of blackmail cannot get rid of the person who discovers a secret; it merely makes it impossible for him to sell that secret. Nozick has not stripped the blackmailer of the privilege of disclosure, but merely the ability to commodify silence. He is therefore wrong to say that victims "would be no worse off if the exchange were known to be absolutely impossible."[163] In such a situation, blackmailers who put a low value on the celebrity of being a gossip, but who would instead have accepted a small payment for silence, will now disclose. In such a situation, victims might justifiably conclude that they would have been better off if *Nozick* had never existed!

Nozick might choose to reformulate his position by combining the incentives point discussed by Coase with his own definition of unproductive exchanges. The idea here would be that prohibiting blackmail would discourage rational actors from investing resources in trying to "get the dirt on someone" and thus minimize the number of "unproductive exchanges." Such a response, however, has two major problems. First and most fundamentally, there is the difficulty in crafting a noncircular definition of unproductive exchanges, and one that does not also criminalize a host of other transactions. So far, this is something that Nozick has been unable to do. Second, this argument appears to rest on the same unacknowledged empirical assumption about the prevalence of accidental blackmail as opposed to deliberate blackmail. Thus Nozick might be forbidding a potentially productive exchange, leaving the accidental blackmailer who would rather have been paid off than gossip, but

162. ROTHBARD, *supra* note 154, at 243.

163. NOZICK, *supra* note 26, at 85.

would rather gossip than keep quiet, to spill the beans. To make the argument with any confidence we would need to figure out the proportion of accidental blackmail to deliberate blackmail under both rule systems, and the relative utility functions of gossip for both types of blackmailers. Of course, neither Nozick nor Epstein can do this.

C. *Third Party Theories*

James Lindgren's analysis offers to resolve the paradox of blackmail by reference to third party interests.

> [M]y own view is that the key to the wrongfulness of the blackmail transaction is in its triangular structure. As Epstein notes, the transaction implicitly involves not only the blackmailer and his victim but always a third party as well. This third party may be, for example, the victim's spouse or employer, the authorities, or even the public at large. When a blackmailer tries to use his right to release damaging information, he is threatening to tell others. To get what he wants, the blackmailer uses leverage that is less his than someone else's. Selling the right to go to the police involves suppressing the state's interests. And selling the right to inform others of embarrassing (but legal) behavior involves suppressing the interests of those other people. Why should this threatener be able to gain personal advantages by coercing others, using leverage that is not really his?[164]

In one sense, Lindgren is on the right track here. Certainly his article contains an impressive survey and critique of other theories, and his theory at least asks us to look at the reaction of other individuals in the society. But the analysis is flawed by a series of errors based on conceptual slippage in the definition of key terms. In what sense, exactly, is the leverage that the blackmailer uses "less his than someone else's"? First of all, one should note the vagueness of the terms. Is a legally protected interest being asserted here, or merely an "interest" in the same sense that many people have an interest in seeing Madonna's new video? At times, Lindgren seems to be moving from the latter to the former, thus presuming the point he is obliged to prove. Second, if Lindgren is asserting that the blackmailer has "no right" to capitalize on the latter kind of interest, he seems to be restating the very problem he has set himself to solve. For the realist scholars of the 1920s, the slippage from "no right to control" to "no saleable privilege to reveal" represents a prototypical Hohfeldian error. The ability to analyze such issues clearly is exactly the thing that distinguishes post- from pre-Hohfeldian analysis.[165]

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164. Lindgren, *supra* note 156, at 922-23. Lindgren's full explanation of his theory is given in Lindgren, *supra* note 27.

165. *See* WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (Walter W. Cook ed., 1923); *see also* Hitchman

Third, whatever kind of "interest" this is, Lindgren is mistaken if he believes that one may not sell access to something one does not own. Many bargains involve one party using access to a resource or market he or she does not own as leverage to persuade another party to contract. If I sell a popcorn concession in my baseball stadium to you, you will be interested only because you know this will give you access to a group of potential consumers. You would never pay me merely for refraining from exercising my right to deny you access to the physical space that I own. Without the crowd, my sale of this right would be worthless to you, just as the blackmailer's promise to forebear from exercising the privilege of revelation would be worthless without third parties who will not otherwise be told of the secret. I own neither those consumers nor their appetites, but I do control access to them while they are at the game. Is this transaction somehow despicable because the economic leverage I use is access to someone else's appetite, whether for popcorn or for gossip? I will probably lease the stand to the person who pays the most, perhaps increasing the cost of popcorn to those who attend the game. In some sense, therefore, I sell my right of exclusion, using the "interests" of others as my economic leverage, and yet I am not forced to incorporate their interests fully into my calculation.[166]

When we renegotiate, I may threaten to lease to someone else unless you pay me more. As far as one could tell, Lindgren's analysis is unable to distinguish this case from blackmail. "Why should this threatener be able to gain personal advantages by coercing others, using leverage that is not really his?"[167] But as this analogy should make clear, the phrase "not really his" contains a fatal ambiguity. The leverage is not really mine, in the sense that I do not own the baseball fans and their appetites, or the audience for gossip, but it is "really mine" in the sense that I have legally protected interests that allow me to grant or withhold physical *or informational* access. If we ignore the judgmental possessive, "mine," with its associated connotation of the absolute concept of property, then the legal relationships become much clearer. Lindgren's theory—at least in any strong form—fails to distinguish blackmail from innumerable legal transactions.

Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 152-56, 193-202 (forthcoming Oxford University Press) (unproofed ed.); Walter W. Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779 (1918).

166. The baseball example, like many cases of blackmail, involves a situation close to a bilateral monopoly. Obviously, there are limits—for example, substitute goods (other baseball teams, other activities, other foods)—but the ability to sell the legally protected interest still gives considerable power to the party possessing it.

167. Lindgren, *supra* note 156, at 923.

D. Shared Problems

Before I finish the critical part of my coverage of blackmail, I would like to point out three characteristics of the articles I have discussed so far. The first is best exemplified by Nozick, Posner, and Epstein. Their arguments show an interesting willingness to relinquish, or at least modify, a principle they normally hold dear. The principle is consumer sovereignty, or the personal definition of self-interest. Why is blackmail such a difficult case for them? Seeing that the law prohibits a transaction, seeing that the transaction is apparently dependent only on the coercion involved in the relinquishment of a legal privilege, and yet finding the transaction indefensible, they are placed in an agonizing position. To suggest, as the legal realists did, that coercion is inherent in the legal system, that the core of a consensual *laissez faire* system is completely dependent on institutionalized coercion, is not a solution that appeals to them.[168] Besides, it is not clear that even that admission would solve the puzzle of blackmail. (In formal terms, it would merely put other transactions on the same level as blackmail—hardly an attractive solution in either theoretical or practical terms.) At the same time, all three wish to put the law of blackmail within the class of "rational social institutions," and thus they must find some logical explanation of its wrongfulness. The explanation must contain some principle to distinguish between this state interference in a "consensual transaction" and all the other state interferences in "consensual transactions." Otherwise, they might be seen to have accepted the premise of liberals and radicals that paternalistic intervention is frequently necessary in the economic system in order to mitigate the effects of unequal power.[169]

Second, it is also noticeable that even in combination, all the theories—but particularly the economic and libertarian ones—fail to grasp the social meaning of blackmail. Put another way, I doubt that anyone—even on the streets of Cambridge—would respond to the question, "Why is blackmail illegal?" by appealing to notions of inefficient incentives for information production or of unproductive exchanges. Of course, there is nothing wrong with giving an explanation for a body of law that conflicts with the explanations of those in the society governed by such laws. But Nozick, Epstein, Posner, and Coase are increasingly forced towards theories that diverge so widely from popular ideas that the only explanation for the discrepancy seems to be the false consciousness of those concerned. For theorists in other traditions this would be unexceptionable. Yet for libertarians and economic analysts to accept

168. *See* Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

169. *See* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

the idea of false consciousness is to throw their theories—strongly dependent on a particular version of rational choice—into doubt.

The third observation could be made about all of the articles, but it is most clearly at work in Lindgren's. We could call it "Kantian anthropology." At times, Lindgren seems to assume that because there is a rule prohibiting blackmail and the practice seems intuitively bad, there must be a single general principle underlying both prohibition and revulsion. The task that he sets himself, and that he (rightly) sees as the basic goal of the other studies of blackmail, is to find this missing principle. This is certainly one way to understand legal institutions. Its premise is that social institutions should have a rational basis, expressible in terms of general principles, and those that do not should disappear from the earth. Its descriptive, rationalist anthropology dovetails nicely with its prescriptive, principled critique. As a method of legal studies, its premises are so widely shared that they are not often subject to question. Its weapons also have undeniable critical bite, particularly when deployed against someone who is working within the same genre of scholarship. Indeed, the persuasiveness of my critique of the other blackmail theorists depends on both author and reader presupposing these background conventions. But just as information questions make more apparent the weaknesses in the liberal vision of property and in the conceptual structure of efficiency and incentive discourse in economics, so too they highlight the contentious quality of this vision of legal scholarship.

I would claim that we cannot understand blackmail unless we look at it in the context of the ideology and institutions of a liberal society, a society that often presupposes different theories of justice and methods of treating people in the realms of the family, the market, and the state. We get a different picture if we look at legal institutions and moral beliefs in light of the history, social arrangements, and ideology of this actual society, rather than in an unspecified and featureless world of legal hypotheticals and pure rationality.

Let us use a nonblackmail hypothetical for a moment. Consider the contract rules about penalty clauses and liquidated damages. We could come up with a rationalistic explanation of the difference, based perhaps on allocative efficiency or the Rawlsian original position. But although such an explanation would be useful, it would also ignore the absolute terror that liberal social theory in general and classical legal thought in particular have of private law assuming a redistributive function. This concern is built on moral ideals and ideas of political theory, but it is also built on concerns of legitimacy and of the apparent soundness of an entire ideological view of the world.

Any study of legal ideology would note two problematic conclusions deduced from the supposedly nonredistributive nature of contract law: (1) the court should merely interpret the will of the parties, because to

go further would be to move from being an instrument of the parties' bargain to being an independent redistributive actor; and (2) punitive damages are inappropriate in contract law, which functions only to achieve the results the contract would have reached. The obvious conflict comes when the parties apparently *specify* punitive damages. If it shares that ideological background, the court is faced with a contradiction. That contradiction helps explain the confused and confusing distinction between illegitimate "punitive damages" and legitimate and mutually agreed upon "liquidated damages." The perspective of rational managers of the legal system, dealing with one technical problem of doctrine at a time, underestimates the extent to which these answers fit into a world already structured by history, ideology, and political vision.[170]

How does this insight help us to understand blackmail? To answer that question I must return to my discussion of public and private. My thesis here is that one of the main reasons that blackmail is illegal (and strongly perceived to be wrong) is that there is a strong social belief, sometimes consciously articulated and sometimes unconsciously held, that not everything should be reduced to the universalizing logic of the money relation. In particular, the private realm of home and hearth should be protected against the relentless instrumentalism of market transactions. This belief is given a particular "spin" by our practice, within that sphere, of defining the norm of justified protection largely by reference to the right to withhold and control information. Intuitively, blackmail seems like the intrusion of market logic into the realm that should be most "private." To put it another way, we do not think that we should commodify relationships in the private realm. To commodify is itself to violate the private realm.[171] To commodify a violation of privacy, then, is doubly reprehensible.

Two features of blackmail doctrine seem to me to support this inter-

170. This is not to say that, since societal institutions have nonrational elements, we must give up the tools of reason (although my claim is that those tools are less powerful than is often assumed). But it does offer an interesting insight into the kind of theorizing that assumes the correctness of a strongly held social belief and works to fashion a principled justification for it—rather like putting a slipcover onto an existing chair.

Looking at issues in the way I suggest here also helps us to understand the connections between apparently diverse questions. The will theory of contracts, the doctrine of no duty to act, and the continued constitutional challenges to punitive damages, for example, all share certain premises about the role of private law *vis-à-vis* the distribution of wealth. Thus, an attack on one principle is often perceived as an attack on them all.

171. In this, as in much of the discussion of commodification in this Article, I have found Peggy Radin's work to be invaluable. Margaret J. Radin, *Market-Inalienability,* 100 HARV. L. REV. 1849 (1987). Professor Radin does not discuss blackmail, or information issues as such, nor does she use the public/private split to explain social reluctance to commodify certain types of information. Nevertheless, she does discuss many of the issues analyzed here, including the commodification of body parts, and I found those discussions to be extremely helpful. She also touches on the commodification of celebrity personae, *id.* at 1857 n.33, and on the issue of market inalienability in tort law, *id.* at 1876-78.

pretation. First, by and large we allow the victim (and the blackmailer's assessment of the victim's subjective beliefs) to determine whether or not particular information involves a "disgraceful defect." A vision of blackmail that did not focus on privacy, but instead wanted to prohibit the commodification of information about a particular menu of behavior and practices, would either list topics about which individuals could not be blackmailed or appeal to an objective or community standard. In fact, we choose to protect George Bernard Shaw's secret carnivorousness to exactly the same extent that we protect secret marital infidelity, despite the different tolerance for such practices in society as a whole. The comparison to the law of libel is instructive.

Second, we only prohibit the *commodification* of private information. This reinforces my earlier arguments about the multiple contradictory stereotypes about information. Unless I have gone so far as to commit an additional tort such as intrusion upon seclusion, I am allowed to reveal all of the information I discover—without penalty. The privilege is retained, but the sale of the privilege is criminalized. When freely revealed, information—even relatively private information—fits readily into the public, First Amendment stereotype: information is the lifeblood of the public realm, that which we must not regulate if we are to maintain the free flow of ideas. The attempt to commodify, however, undermines the First Amendment stereotype, allowing the privacy vision to take over. In the Part on insider trading, I will argue that the reverse mechanism explains the prohibition of trading on material, nonpublic information.[172] There, the "public" view of information, the idea of presumptive equality in this resource alone, operates to give insider trading law a powerful rationale.

Seen this way, blackmail is analogous to a different set of crimes. To understand blackmail we would not compare it to the robber's demand for a wallet. Instead, we would compare it to other situations where commodification of something "private" is made illegal, despite the fact that, at a slightly greater level of abstraction, the transaction looks like an ordinary market exchange. Thus the analogies would be to the voidability of contracts for sexual services or the prohibition of baby-selling. I can give sexual favors, but not enforce a contract for them. I have the power to arrange a private adoption of my child, yet I cannot sell that power, nor the child.[173]

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172. *See infra* Part VIII.

173. There are many other examples. In the wrongful birth cases, the refusal of many courts to include the costs of raising a child as part of the "damage" attributable to a neligently performed sterilization operation stems partly from the desire to keep the market out of the realm of home and hearth. Courts produce a whole set of arguments ranging from the ineffable benefit of extra children to the difficulty of quantification, the duty to mitigate damages, and the impossibility of tracing the chain of causation. Yet a moment's analysis of each of these reasons reveals that other tort issues pose far greater difficulties. In the end, one is hard put not to conclude that the court is really

Many scholars find this kind of response unsatisfying. Even if there are "irrational" or "sentimental" or "romantic" reasons behind a legal institution, should we not work to complete the Enlightenment project—to bring institutions to account in the court of reason? I have both a fancy philosophical response and a mundane practical response to this suggestion. The fancy philosophical point is that there *is* no pretheoretical, preclassified reality from which we can begin to analyze our institutions. *This* context or *that* context may not be inevitable, but there will be some context, some prior social construction of reality. Wittgenstein's analysis of language games,[174] Feyerabend's and Kuhn's (very different) work on the scientific method,[175] Rorty's neopragmatism[176]—all seem to cast doubt on the idea of a world not already socially constructed, while leaving open the question of consequences that flow from exploring the limits of the particular, overlapping contexts in which we find ourselves.

My more mundane response is that it is important to understand the limitations of a system that "decides" issues by typing them as public or private. To say that, however, is not to hold up the possibility of a pure analysis that would treat the issue of blackmail in a "neutral" framework. No such framework is available. On a local basis, I still believe in arguments about the desirability of a prohibition of blackmail—arguments based on judgments about consequences, on analogies to other kinds of behavior, even on the idea of incentives to engage in particular kinds of information-gathering. Those arguments, however, will not discover some universalizable principle that underpins both the proscription of blackmail and its social support. Instead, they will be both over- and underinclusive. They will point towards the prohibition of acts that we allow, while not explaining our prohibition of other transactions. The goal of the blackmail theorists, to provide the single rational explanation is not only unmet but—I would argue—unreachable.

What then is the benefit of the analysis I offer here? What does it profit us to understand that information issues are resolved partly by the typing of issues into "public" or "private" categories? How does it help us to understand that blackmail prevents the commodification of subjectively defined private information partly because of a romantic notion of privacy, home, and hearth, and an associated belief that we must keep the market away from that realm if we hope to maintain it? First, I think

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imposing a particular belief about those areas that should not be subject to market quantification—no matter how real the loss.

174. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 3d ed. 1953).

175. PAUL K. FEYERABEND, AGAINST METHOD: OUTLINE OF AN ANARCHIST THEORY OF KNOWLEDGE (1975); PAUL K. FEYERABEND, PROBLEMS OF EMPIRICISM (1981); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

176. RICHARD RORTY, CONSEQUENCES OF PRAGMATISM (1982); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979).

it is descriptively useful. To understand how information issues should be resolved, we need first to understand how they *are* resolved.

Second, the analysis gives us an ability (albeit very limited) to prognosticate. In the Conclusion, I point out that any analysis of an "information society" has to deal with the conflicting valences of our various visions of information as public and as private, as commodity and as "that which must never be commodified." Blackmail doctrine points out the lengths to which we are prepared to go to give individuals sovereignty over information pertaining to them. This surely is an important idea in any society in which the collection, manipulation, distribution, and use of information plays a significant role.

Third, dealing specifically with the blackmail puzzle, the analysis sets out a reason for the problems with the existing blackmail literature. The very notion of "reason," "theory," and "principle" adopted by the blackmail theorists makes it almost impossible for them to find such a reason, theory, or principle underlying blackmail. There is an old joke about a drunk looking for his car keys under a street light, even though he had dropped them several hundred feet away. When asked to explain his behavior, he points out that while the keys might not be there, it was the only place he could see anything. To a certain extent, the Kantian anthropology of the blackmail theorists has the same problem. They wish both to engage and to ignore the socially constructed nature of markets, coercion, and privacy. To put it another way, the society in which the kind of principle for which they are looking could be found would be the society in which social forms were already transparent to rational analysis; that is to say, the society for which it was not necessary.

Finally, the persistent mistakes made by the most sophisticated analysts of blackmail—the category and baseline errors, the failure to take into account changes in behavior if a new rule is presumed, the conflation of different legally protected interests into an undifferentiated "right" concept—all of these turn out to be mistakes that are instructive for the remainder of the literature on law and information. In the next Part, the analysis of insider trading doctrine will reveal the persistence of such errors in a case in which the commodification of information is apparently prohibited because of the public rather than the private stereotype of information. At the same time, examination of the germinal critique of insider trading doctrine will show that the language of romantic authorship can appear where least expected.

VIII
INSIDER TRADING

> Our era aptly has been styled, and may well be remembered as, the "age of information." Francis Bacon recognized nearly 400 years ago that "knowledge is power," but only in the last

> generation has it risen to the equivalent of the coin of the realm. Nowhere is this commodity more valuable or volatile than in the world of high finance, where facts worth fortunes while secret may be rendered worthless once revealed.[177]

The above quotation comes from an insider trading case. Anthony Materia worked as a copyholder for a financial printer. One of his duties involved reading documents aloud to a proofreader who checked their accuracy. In this case, the documents concerned a forthcoming tender offer. Although the names of the companies had been erased, Mr. Materia—whom the Court of Appeals described as "an avid market watcher"[178]—was able to work out the identity of the intended target. He did this by checking the details revealed in the tender offer documents against a variety of publicly available types of information. In another context, one could imagine Mr. Materia's wit, hard work, and eye for an opportunity being held up as exemplary American entrepreneurial virtues. In the context of this case however, with its persistent overtones of fraud and deceit, the Second Circuit found little to admire in Mr. Materia's conduct and disapproved of the enthusiasm with which he pursued his extracurricular interests. At one point Judge Kaufman noted drily, "If copyholding was Materia's vocation, the stock market appears to have been equally consuming."[179] Having determined the identity of the target company, Mr. Materia invested heavily. "Within hours of each discovery, he purchased stock, and within days—after the offer had been made public—he sold his holdings at substantial gains."[180]

In the broadest possible terms, we could say that the question presented by *Materia* is, "When may an individual profit from access to material, nonpublic information?" In an earlier case, *United States v. Chiarella,*[181] which had strikingly similar facts, the same court had held that "*[a]nyone*—corporate insider or not—who regularly receives material nonpublic information may not use that information to trade in securities without incurring an affirmative duty to disclose."[182] The Supreme Court did not agree. To Justice Powell, writing for the majority, the court of appeal's decision was too concerned with one particular goal of the Securities Exchange Act.

> Its decision . . . rested solely upon its belief that the federal securities laws have "created a system providing equal access to information necessary for reasoned and intelligent investment decisions." The use by anyone of material information not gener-

177. SEC v. Materia, 745 F.2d 197, 198 (2d Cir. 1984), *cert. denied,* 471 U.S. 1053 (1985).
178. *Id.* at 199 n.2.
179. *Id.* at 199.
180. *Id.*
181. 588 F.2d 1358 (2d Cir. 1978), *rev'd,* 445 U.S. 222 (1980).
182. *Id.* at 1365.

> ally available is fraudulent, this theory suggests, because such information gives certain buyers or sellers an unfair advantage over less informed buyers and sellers.[183]

Justice Powell was not inclined to see the Securities Exchange Act as a document with such relentlessly egalitarian aims or such a broad reach to effect them. "Formulation of such a broad duty, which departs radically from the established doctrine that duty arises from a specific relationship between two parties, should not be undertaken absent some explicit evidence of congressional intent."[184]

In *Materia,* the Second Circuit tried again. Having seen their general duty to "disclose regularly received material nonpublic information" rejected by the Supreme Court, they recast the issue in terms of misappropriation.[185] Seen this way, Mr. Materia's offense was that he had "misappropriate[d] nonpublic information in breach of a fiduciary duty and trade[d] on that information to his own advantage."[186] It was this action that violated Section 10(b) of the Securities Exchange Act and Rule 10b-5. This time, with the issue framed not as the existence of formally equal public access to information, but instead as the protection of private information from something the court called "misappropriation,"[187] the Supreme Court was not inclined to disagree.[188] Given our earlier discussion of tensions in the regulation of information, this choice between an equal access view and a quasiproperty rights view should not be surprising.[189]

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183. Chiarella v. United States, 445 U.S. 222, 232 (1980) (quoting *Chiarella,* 588 F.2d at 1362).

184. *Id.* at 233 (citation omitted). The majority seemed to feel that some degree of inequality inheres in the very idea of a market. Thus, "not every instance of financial unfairness constitutes fraudulent activity under § 10(b)." *Id.* at 232. In the later case of Dirks v. SEC, 463 U.S. 646 (1983), the Court amplified its acceptance of the idea that certain participants in the marketplace could be allowed to exploit their position of informational advantage as a form of compensation for some real or imagined public function.

> Congress has expressly exempted many market professionals from the general statutory prohibition set forth in § 11(a)(1) of the Securities Exchange Act. . . . We observed in *Chiarella* that "[t]he exception is based upon Congress' recognition that [market professionals] contribute to a fair and orderly marketplace at the same time they exploit the informational advantage that comes from their possession of [nonpublic information]."

Id. at 657 n.16 (quoting *Chiarella,* 445 U.S. at 233 n.16). Market professionals are private actors who perform a public function and are given license to exploit the information that comes their way, as a payoff. The private right secures the public role. Again, the parallel to copyright is striking.

185. This theory had been suggested in the *Chiarella* case, but since it was never submitted to the jury, Chiarella's conviction had been overturned and the resolution of the issue left "for another day." *Chiarella,* 445 U.S. at 238 (Stevens, J., concurring).

186. SEC v. Materia, 745 F.2d 197, 203 (2d Cir. 1984), *cert. denied,* 471 U.S. 1053 (1985).

187. *Id.* at 202-03. The court was understandably vague in explaining the idea of misappropriation. Was the information property, and if so, whose? If it was not property, could it be misappropriated? Would a third party, overhearing the same information in an elevator, have been "misappropriating" it? Or was the court merely saying that Mr. Materia's contractual fiduciary duties authoritatively allocated opportunities for information gathering, thus conditioning the offense on the breach of a private agreement?

188. Materia v. SEC, 471 U.S. 1053 (1985), *denying cert. to* 745 F.2d 197 (2d Cir. 1984).

189. This choice also split the Supreme Court. Whereas the majority in *Chiarella* saw

The conflicts between the court of appeals and the Supreme Court in *Materia* and *Chiarella* are variations on a deeper thematic conflict. Why should insider trading be illegal at all? Earlier in this Article, I pointed out that we live in a society that distributes wealth through a market system built on the inequality of economic power and that normally exalts an individual who is able to convert some temporary advantage into a position of market gain. Even those who think insider trading should be criminalized agree that "[t]he case law barely suggests why insider trading is harmful."[190] Critics of the current law argue that insider trading is consistent with norms found elsewhere in society,[191] that it injures no one,[192] that insider trading would be impossible in an efficient capital market,[193] that insider trading operates as a method of compensation for entrepreneurial excellence,[194] and that corporations would regulate it themselves if they believed it to be harmful.[195]

My attitude toward these criticisms is somewhat unusual. Critics of insider trading regulation could rightly claim that it is inconsistent with many of the norms that we apply to market behavior. There is something strange in the discovery of a statutory island of egalitarianism at the very heart of capitalism. But this island is not the only manifestation of egalitarian ideals in the rules defining market transactions. The law of fraud and mistake, the rule against perpetuities, the doctrine of unconscionability, and (the populist understanding of) antitrust all have

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disparities of information as an inevitable part of a market, the dissent believed that the mere fact of disparate access is crucial to a 10b-5 case. Thus, in the view of Justices Blackmun and Marshall, an earlier Supreme Court case "len[t] strong support to the principle that a structural disparity in access to material information is a critical factor under Rule 10b-5 in establishing a duty either to disclose the information or to abstain from trading." *Chiarella*, 445 U.S. at 251 (Blackmun, J., dissenting) (citing Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972)); *see also* United States v. Chestman, 947 F.2d 551, 564-67 (2d Cir. 1991) (en banc) (plurality opinion), *cert. denied*, 112 S. Ct. 1759 (1992). On the multiple confusions of the case law, see 6 ALAN R. BROMBERG & LEWIS D. LOWENFELS, SECURITIES FRAUD & COMMODITIES FRAUD § 7.5(510)-(513) (1991). For scholarly reactions to the misappropriation theory, see Manning G. Warren III, *Who's Suing Who? A Commentary on Investment Bankers and the Misappropriation Theory*, 46 MD. L. REV. 1222 (1987); Elliot Brecher, Note, *The Misappropriation Theory: Rule 10b-5 Insider Liability for Nonfiduciary Breach*, 15 FORDHAM URB. L.J. 1049 (1987); Karen A. Fischer, Comment, *The Misappropriation Theory: The Wrong Answer to the* Chiarella *Question*, 32 N.Y.L. SCH. L. REV. 701 (1987). Of course, as I tried to show earlier, the conflict goes far beyond insider trading. For an application to intellectual property of cognate principles derived from the *INS* case, see *supra* text accompanying notes 77-82, as revised by a countervailing desire to promote competition, see Leo J. Raskind, *The Misappropriation Doctrine as a Competitive Norm of Intellectual Property Law*, 75 MINN. L. REV. 875 (1991).

190. Cox, *supra* note 28, at 628.

191. Hetherington, *supra* note 28.

192. "[I]nsiders' profits are not outsiders' losses but evidence of more efficient resource allocation." Moran, *supra* note 28, at 1.

193. "The SEC first should recognize that in an efficient market, where prices are by definition 'fair,' it is impossible for investors to be cheated by paying more for securities than their true worth." Saari, *supra* note 66, at 1069 (footnote omitted).

194. *See* MANNE, *supra* note 29, at 138-41.

195. *See* Carlton & Fischel, *supra* note 66, at 862-63.

egalitarian components.[196] These rules are not all concerned with informational egalitarianism. Nevertheless, there is something undeniably counterintuitive about the prohibition against insider trading. One might expect that those who are normally skeptical of egalitarian regulation of market transactions would make much of this apparent anomaly, while those more hospitable to egalitarian notions would be keen to explore the dynamics of this egalitarian theme in the treatment of information. The former group might be expected to defend inequality in this particular context in straightforward normative terms—much as Rand or Hayek do,[197] for example. The latter group might be expected to investigate this apparent "information exception" to our tolerance for market inequality. Does the structure of public and private which I described earlier mean that it is easier to argue for egalitarian results with issues that are presented in terms of inequalities of information, rather than straightforward inequalities of wealth or power? The popular support for insider trading regulation offers some support for that hypothesis, as does the marked absence of articulate explanations of what is wrong with insider trading in the first place. Consequently, one might expect to find the informational-equality hypothesis explored at some length.

In fact, the actual scholarship on insider trading is often very different. In particular, the area is dominated by economic analysis that, with some significant exceptions, exemplifies in a rather unreflective way the *aporia* in information economics that I described earlier.[198] The analyses

196. Kim Scheppele's work is particularly good at showing how economic analysis fails to explain the concern of the courts hearing fraud cases with issues of power and inequality—exactly the types of issues that a more egalitarian (or in her case, Rawls-influenced contractarian) vision of the law of "legal secrecy" would concentrate on. *See* SCHEPPELE, *supra* note 1; *see also* Kronman, *supra* note 55.

197. *See* FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 81-102 (1960); FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY (1979); FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944); AYN RAND, THE VIRTUE OF SELFISHNESS (1964).

198. *See supra* text accompanying notes 69-98. With the exception of Gilson and Kraakman, very few scholars have attempted to integrate the literature dealing with the efficient capital markets hypothesis with the actual mechanisms of market efficiency and the associated problems of incentive and transaction cost. *See* Gilson & Kraakman, *supra* note 83. Gilson and Kraakman argue that (in at least two market mechanisms) the limited temporal monopoly on information will allow the first party to develop it to reap a reward, while subsequent imitation or learning by other traders will move the market towards an efficient equilibrium, thus harmonizing the "incentive" and the "efficiency" sides of the information debate. I am skeptical about this idea—or at least about its more general implications—for the reasons given in the discussion of information economics. *See supra* text accompanying notes 82-93. Gilson and Kraakman propose the legalization of (certain kinds of) insider trading together with a requirement that insiders identify themselves and the size of their trade at the time of the trade. Gilson & Kraakman, *supra* note 83, at 629-34. I believe that such a proposal must be based on a firm empirical analysis of the costs and benefits of allowing insider trading (including the incentives that result from existing disparities in information, *see* Hirshleifer, *supra* note 69) versus the costs and benefits of prohibiting insider trading (including lessened incentives to produce the information that would otherwise be traded, *see* Fama & Laffer, *supra* note 83, at 297-98). Kraakman and Gilson explicitly acknowledge this problem, but do not consider it to be a fatal flaw.

of insider trading regulation tend to be divided into two broad camps: those scholars who see insider trading as primarily an issue of the incentives necessary to produce information, and those scholars who focus on the efficient capital markets hypothesis. Both analyses face a fundamental problem. Just as physicists must think of light as both a particle and a wave, so economists must see information as both a prerequisite for market efficiency and a good whose producers must be motivated. If incentives are to be offered for the gathering of information, then the market cannot be informationally efficient. On the other hand, if no incentives are offered, the theory cannot explain how the information is

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> To be sure, any increase in informational efficiency from insider trading may alter the incentives to create the information because it reduces the opportunity to exploit informational disparities through trading. Because the derivatively informed trading mechanism does not disclose the information itself, however, it will not reduce the returns to information creators who exploit their information through production rather than trading, and concern over an impact on allocation is thereby minimized.

Gilson & Kraakman, *supra* note 83, at 632 n.218.

This claim would depend, presumably, on two things: first, that there is the opportunity to exploit the information through production rather than trading, and second, that the trading mechanism informs traders sufficiently to make the market move towards an efficient equilibrium but insufficiently to permit others to guess the information, thereby nullifying the information creator's trading advantage. Imagine an insider under the old rules who invests time and money to deduce that one of Polaroid's rivals has developed a newer and better instant camera. Such a person could trade on the knowledge through production, or by selling Polaroid shares short. Because some insider trading rules allow delay in reporting the trade or disclosing the information, the trader could benefit from the time lag—again, either in production or through trading. Now imagine the same trader under the new rules. Kraakman and Gilson seem to argue that while the incentives offered by trading have been changed, the returns offered by production have not. I am not sure why this is the case. Under a regime of instant disclosure of identity and size of sale, many traders might draw negative conclusions about Polaroid from short sales by industry insiders. There would certainly be less incentive to invest in information creation for trading. Why would investment in production be any different? What difference would it make if the trader buys the Polaroid license cheaply and floods the market with cut-price Polaroids before the new camera arrived on the scene, rather than, say, selling Polaroid short? It seems dubious to assume that because this is classed as "production" the returns would not be diminished—"production," too, is a datum, and other traders and consumers might draw similarly negative inferences. There seems to be no reason to assume that, as a general matter, production decisions can benefit more from *precise* knowledge (in other words, that a new camera is coming out, rather than just that the stock price is going down). The important distinction is not so much between production and trading as between the creation of information that is and that is not socially valuable. Actually, we might benefit from prohibiting traders from investing in this kind of information creation, although to say so for sure we would need to know more about the frequency of serendipitous, socially valuable discoveries occurring in searches originally designed to yield a trading advantage.

Perhaps when Kraakman and Gilson talk about "production" they have in mind something like the production of the Polaroid camera in the first place, and thus the incentives they are talking about are incentives to engage in fundamental research and development, not distributionally advantageous market research. In that case, the conclusion seems more intuitively convincing. Part of the reason that it is convincing, however, might be that the creator of the information would have some kind of intellectual property right to exploit through production, rather than having a mere privilege to trade. Yet, as I argued in the discussion of information economics, to identify those "creators" who should be the beneficiaries of property rights, we must first resolve exactly the tension that Kraakman and Gilson are dealing with—the tension between incentive and efficiency. *See supra* Part IV.

supposed to get to the market in the first place. By itself, this kind of theoretical conflict might not seem to be cause for alarm. After all, physicists can tell us a lot about refraction, reflection, and light-sails even if they must use the contradictory metaphors of particle and wave to do so. Yet as I tried to show earlier,[199] when it comes to some practical questions of information regulation—such as fair use or insider trading—the choice between which aspect of information is to be stressed seems to create a corresponding uncertainty in the results of the analysis.

In the next Sections, I attempt to extend this analysis by focusing on some of the most influential economic scholarship on the disclosure of information and then on the first real scholarly challenge to insider trading. My claim is that a concentrated study of the economic literature on disclosure shows the extent to which the indeterminacy of the underlying analysis is concealed only by a number of conceptual baseline errors and ad hoc assumptions. When I turn to Henry Manne's challenge to the regulation of insider trading, I argue that it is reliance on a notion remarkably similar to romantic authorship that gives his analysis its apparent determinacy. In the conclusion I argue that this ensemble of baseline error, non sequitur, and romance is worthy of study because it is used to justify expansive intellectual property rights far beyond insider trading.

A. Economic Analysis of Information Disparities

The more expansive law-and-economics literature treats insider trading as a case study in regulating the disclosure of valuable information. To the skeptical outsider, the outstanding features of this analysis—whether supporting or opposing the prohibition of insider trading—seem to be: (1) persistent baseline errors, (2) the use of ad hoc claims about behavior in order to give the analysis a spurious determinacy, and (3) the tendency to ignore contradictions or *aporias* in the theory at the moment policymaking conclusions are to be drawn.

1. Baseline Errors

The best examples of baseline errors in discussions of insider trading probably come from the cases,[200] but the law-and-economics literature

199. *See supra* text accompanying notes 74-97.

200. For example, Chief Justice Burger in *Chiarella* said,

> As a general rule, neither party to an arm's-length business transaction has an obligation to disclose information to the other unless the parties stand in some confidential or fiduciary relation. This rule permits a businessman to capitalize on his experience and skill in securing and evaluating relevant information; it provides an incentive for hard work, careful analysis, and astute forecasting. But the policies that underlie the rule also should limit its scope. *In particular, the rule should give way when an informational advantage is obtained, not by superior experience, foresight, or industry, but by some unlawful means.*

Chiarella v. United States, 445 U.S. 222, 239-40 (1980) (Burger, C.J., dissenting) (emphasis added)

runs a close second. Consider the following analysis of the economics of disclosure requirements, drawn from Professor Levmore's *Securities and Secrets: Insider Trading and the Law of Contracts,*[201] the article that introduced the happy phrase "optimal dishonesty."[202] Professor Levmore's argument rests on an exploration of the intersections and analogies between insider trading and the more general rules of disclosure in contract law. According to Professor Levmore, legal rules forcing a mining corporation to disclose discovery of a large ore deposit on a farmer's land would "hurt both present and future shareholders and, in some instances, society as a whole."[203] But the shareholders are "hurt" only if we assume that they are entitled to the amount of profit to be made in nondisclosing situations. And that is the very thing we are trying to decide. Are the Chicago Bears' shareholders "hurt" by the criminal law rules which prohibit the employment of their linebackers as muggers after the game is over? The assumptions about the regime of rules dictate which advantages (in strength, knowledge, information) may be exploited and which may not. Levmore's comment is either redundant (any change of entitlements will hurt those who lose protection and help those who gain it) or circular. He assumes the current rule is right, uses that as the baseline to measure losses—but not gains—and then finds the choice of rule mysteriously confirmed.[204]

Judge Easterbrook uses exactly the same example, and makes a similar baseline error, although in his case it leads him to overgeneralization and non sequitur. "Is it unfair for a geologist, after studying the attributes of farmland, to buy the land without revealing that the land likely covers rich mineral deposits? If the answer is yes, then fairness means that no one may appropriate the value of the information he has created."[205] But this simply is not true. Imagine an argument that if we prohibit an athlete from using his strength to take my money by force, fairness means that we must also prohibit him from using his strength to get a job on a football team. Again, the assumptions about the regime of rules dictate which advantages may be exploited and which may not. To

(citation omitted). Since the definition of insider trading identifies exactly what *are* "unlawful means," the use of "unlawful means" to define insider trading is an underwhelming analytic technique.

201. Levmore, *supra* note 55, at 133-44.

202. *Id.* at 140.

203. *Id.* at 133.

204. The same problem bedevils many other articles. For example, Carlton and Fischel argue that if insider trading were harmful, companies would prohibit it themselves. *See* Carlton & Fischel, *supra* note 66, at 862-66. This seems dramatically to underestimate the importance of the fact that under the current rules insider trading *is already illegal*. Manne's argument that entrepreneurs will seek employment inside firms so as to engage in insider trading is subject to the same difficulties. MANNE, *supra* note 29, at 138-41.

205. Easterbrook, *supra* note 1, at 324.

say that a particular advantage may not be exploited in one area does not commit us to the view that it may not be exploited in another.

We find a similar mistake in Easterbrook's argument that an attack on insider trading is an attack on the division of labor itself.

> People do not have or lack "access" in some absolute sense. There are, instead, different costs of obtaining information. An outsider's costs are high; he might have to purchase the information from the firm. Managers have lower costs (the amount of salary foregone); brokers have relatively low costs (the value of the time they spent investigating); Sherlock Holmes also may be able to infer extraordinary facts from ordinary occurrences at low cost. The different costs of access are simply a function of the division of labor. A manager (or a physician) always knows more than a shareholder (or patient) in some respects, but unless there is something unethical about the division of labor, the difference is not unfair.[206]

Again, the conclusion simply does not follow. Easterbrook seems to be operating on two assumptions. The first is that anyone in a position of power has some kind of natural right to the advantages they would be able to wring from that position if unrestrained by rules. The football player example sufficiently demonstrates the flaws in this argument. Alternatively, perhaps the assumption is that a market comes with an automatic set of default positions and one of them is "allow trading on superior information." It would be hard to find any lawyer since the legal realists who would defend this position. His second assumption seems to be that if we prohibit any person from profiting from any position of inequality, we are logically committed to a root and branch attack on all inequalities everywhere. But this would be obviously incoherent. If the assumption is the narrower one—that forbidding citizens to profit from a single one of the advantages conveyed by the division of labor implies that we must forbid anyone to profit from any advantage from the division of labor—then Judge Easterbrook is making a category mistake. Dogs have four legs and cats have four legs, but that does not imply that cats are dogs or that rules affecting cats must be applied to dogs—unless, of course, we have previously committed ourselves to treating all four-legged animals alike.

The second typical baseline problem in discussion of trading on superior information occurs at the moment when the analyst imagines a change in the rules, but fails to modify the rest of the analysis. For example, when Levmore does think of shifting the baseline to a different pattern of entitlements, he assumes either irrational behavior or a failure to adjust behavior to the new regime. In his argument about mineral

206. *Id.* at 330.

exploration, for example, he claims that under a full disclosure regime farmers would ask prices so high that they would hold up the sale or even stop exploration altogether—his assumption being that no company would prospect if it had to disclose the fruits of its efforts to sellers.[207] He offers no reasons why rational parties would suddenly begin to engage in holdout behavior after the change in rules. He also seems to ignore the fact that changes in rules produce changes in behavior. Under the new regime, we would expect extensive use of pre-exploration option contracts on promising pieces of land, for example. Such contracts would allow companies to factor in estimates of exploration costs, potential profits discounted by the likelihood of a find, and so on. Farmers would simply do the same type of calculation in reverse. By ignoring this kind of possibility, Levmore can premise his examination of a new rule on the continuation of the pattern of dealing that would have been produced by the old rule. Needless to say, the new rule looks irrational.

None of this should be taken to imply that it is wrong to worry about the level of reward necessary to produce information. One could imagine a situation, *not* constructed with baseline fallacies, circular definitions of "damage," and inconsistent assumptions of irrational behavior, in which a society would be hurt by contracts made on the basis of fuller disclosure.[208] But to have any impact on policy, the analysis would have

207. Levmore, *supra* note 55, at 133.

208. An unpublished essay by Steven Shavell from Harvard Law School's "Discussion Paper Series" avoids most of these pitfalls. Steven Shavell, Acquisition and Disclosure of Information Prior to Economic Exchange, Discussion Paper No. 91 (Apr. 1991) (unpublished manuscript, available from Harvard Law School). Limiting his conclusions to the world of his model, Professor Shavell argues that sellers should be required to disclose so that they do not have unduly high incentives to acquire information, but that buyers should sometimes be allowed to conceal their information. Briefly stated, the argument is that we must distinguish between information that has social value and that which has no social value. We only want to encourage production of the former. Professor Shavell takes as a definition of "socially valuable information" "that which allows an action to be taken that raises the value of the good to the party who possesses it." *Id.* at 4 n.6. Professor Shavell wishes to avoid rules that would simply achieve a different distributive effect with no impact on allocative efficiency. We do not wish to give incentives to acquire information that will merely make one party or the other richer, but we do wish to give incentives to produce information if it will help in moving resources to their use-value. Under a rule of compulsory disclosure for sellers, sellers will only invest in information-gathering when the chances of the information revealing something positive, multiplied by the amount of the increase in value the information would allow the seller to recoup, would be greater than the chance of the information revealing something that would *decrease* the value of the property multiplied by the amount of the decrease in value.

Shavell is careful not to generalize his approach to other issues of information inequality. Interested by the method, I have tried to imagine how one might do so. One difficulty would be that once we go beyond the model, we can contemplate situations in which the seller can profit by "selling short" (such as in insider trading)—offsetting the losses involved in the sale of his current portfolio by trading on the knowledge that the price of similar goods is likely to fall. This raises some problems for the baseline measurement of socially valuable information. In certain kinds of markets, the seller will be able to "raise the value" of his property whether the information is positive or negative. But the increased value depends at least partly on the possibility of silence. A basic problem appears to arise here. The decision whether or not we want individuals to invest in

to show that the hypothetical situation was actually likely to be *our* situation. This is exactly what Levmore does not do.

2. *Ad Hoc Claims About Behavior*

The same article offers a fine example of ad hoc claims about behavior by different parties under different sets of rules. Professor Levmore sets himself the task of deciding whether disclosure rules are necessary for (1) termite-infested-house sellers and (2) farmers and mineral companies. "Homeowners . . . need not be offered an incentive [by a rule which allows sellers to withhold information] to inspect for termites. As soon as there is a fleeting rumor of a termite infestation in the neighborhood, every sensible owner calls in the experts and prepares to take corrective measures."[209] Thus Levmore argues that when society does not compel disclosure, both buyers and sellers will inspect, leading to a waste of resources.

> This efficiency-based distinction is most compelling in the case of the ore discovery. Unlike the owner of an infested house, the farmer is not likely to drill in his fields for minerals. There will be a net societal loss if we do not encourage exploration, and there is no reason to think that the farmer will be inclined to explore unless he is privy to the buyer's information. *The buyer, of course, will not explore if he must disclose the fruits of his efforts.*[210]

Levmore fails to offer proof for any of these generalizations. The first two seem to rest on stereotyped assumptions about the relative foresight and sophistication of home buyers and farmers. Similarly, they assume an absence of a well-functioning secondary market in geology experts or mining options. The last statement, that no mineral explora-

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information depends on the effect of the research on the asset's price, but the asset "price" depends on the postulated rules of disclosure. In the concrete example given, the rule of compulsory disclosure would tend to undermine the possibility of selling short. Therefore, sellers would not invest in acquiring information when they knew it was likely to be of this kind. (Since the "seller" is also a "buyer" with respect to other units of the fungible good, the possibility of trading advantageously would appear to depend on the relative *in*efficiency of informational market mechanisms similar to those discussed in Gilson & Kraakman, *supra* note 83.)

Factoring in the empirical uncertainties of information costs, we might find that a compulsory disclosure rule would produce underinvestment by sellers in information likely to be negative, or that the absence of a compulsory disclosure rule would lead to inefficient investment in information gathering merely to gain an advantage over other traders, thus causing distributional changes but no increase in allocative efficiency. *See* Fama & Laffer, *supra* note 83, at 292. Once again, the efficiency claims seem to be in tension with the incentive claims, *see* Grossman & Stiglitz, *supra* note 69, while the baseline price measure appears both to decide and to depend on the regime of information disclosure. I am unsure whether a similar point could be made about the capital asset pricing model used to determine the existence of efficient markets. *See* Gilson & Kraakman, *supra* note 83, at 561 n.41.

209. Levmore, *supra* note 55, at 135.

210. *Id.* (emphasis added).

tion will ever take place if the explorer has to pay (postdisclosure) market price for mineral-bearing land, is simply false. Gathering information does have costs, but one cannot stipulate *a priori* that they must always be so high that concealment is necessary to protect the information.[211] The claim is also analytically incoherent for the reasons discussed in the subsection concerning baseline errors.[212]

3. *Ignoring Contradictions in the Theory*

The influential Note, *The Efficient Capital Market Hypothesis, Economic Theory and Regulation of the Securities Industry,*[213] provides an example of the ingenious use of contradictory economic analysis, and baseline errors at the same time. The Note's author, Christopher Saari, admits that unregulated markets "may or may not" lead to optimal production of information and cites economists to prove it. The Note points out that Kenneth Arrow argues that production of information will be "*less* than optimal because producers of information will not be able to capture its true value due to inability to acquire necessary property rights" in the information they produce.[214] The same footnote proceeds to cite Jack Hirshleifer and Eugene Fama and Arthur Laffer, who argue that "production of information will be *greater* than optimal because some information will be produced solely for trading advantages that produce wealth distribution rather than for allocational purposes."[215] These two charmingly contradictory arguments do not lead the author to question the determinacy of the analysis, but instead to cite yet another economist for the proposition that "production of information in unregulated markets may not be strictly optimal, but will lead to better resource

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211. *Cf.* Hirshleifer, *supra* note 69.

212. *Supra* Section VIII.A.1. And these failings are made even more disturbing by the fact that many of these articles use a persistent rhetoric of scientific certainty to cover up their extreme judgmental moralism. Here is Professor Levmore excoriating a farmer who is nasty enough to ask the mineral company *questions* about what they are doing. He begins by comparing the farmer to a house owner who holds out on (and holds up) a development.

> The owner of the 3001st tract of land who demands a high price is really the despicable character. Similarly, the seller who, to preserve a fraud claim, asks specific questions *about activities he would otherwise never engage in* is really the contemptible party. Like eminent domain, optimal dishonesty operates to deny a windfall to a passive party when to do otherwise might lead to a net societal loss.

Levmore, *supra* note 55, at 142 (emphasis added). Of course, the question of whether the farmer would engage in the activities *himself* is irrelevant. (Wasn't that Adam Smith's basic point?) And to call the farmer "passive" strikes one as judgmental labeling rather than economic science. It also seems to go against everything Coase ever taught us about joint activities. If, on the other hand, these statements reflect the ideology of the romantic author, then we might expect that the parties who get the rights are those who can most readily be portrayed as active romantic innovators, rather than passive, unoriginal sources. *That* picture seems to fit fairly well.

213. Saari, *supra* note 66.

214. *Id.* at 1068 n.197 (emphasis added) (citing Arrow, *supra* note 94, at 617 n.190).

215. *Id.* (emphasis added) (citing Fama & Laffer, *supra* note 83; Hirshleifer, *supra* note 69).

allocation than any other alternative."[216] That is, we cannot agree what happens in "unregulated" markets—but "regulated" ones are bound to be worse.

This assessment is political dogma masquerading as analysis. In fact, given economists' acknowledgement that "public goods" may require regulation in order to avoid free rider problems and their frequent claim that information is a public good, this is the worst place to make such a claim. It does not help to find that Arrow and Laffer agree that "unregulated" markets will not produce the right amount of information, but can't agree whether they will over- or underproduce. Worse still, later in his analysis of markets for the production of information, Arrow states that—even allowing for commodification of information—"unregulated" markets will underproduce and that some major form of state intervention is probably necessary.[217] This position is hardly consistent with the earlier proposition that "production of information in unregulated markets . . . will lead to better resource allocation than any other alternative."

The claim is not only analytically unsupported, it is also conceptually incoherent, depending as it does on a completely untenable set of assumptions about the ground rules in a "natural" market. Would those rules require disclosure, or not? The question has no answer, in part because there is no "natural," unregulated state of affairs. Without the rules of contract, tort, and property there would not be a market. Barring a belief in classical legal thought, how could we claim that the particular set of (common law?) rules found in this country at this time is any more natural, neutral, or nonregulatory than the rules imposed by the SEC? As I pointed out before, reading much of the economic literature, one might imagine that the legal system came with preset, default positions that sounded something like this: "Protect owners against physical invasion of land, allow formation of contracts when information is concealed, nullify contracts where lies are told."[218] But this is silly. The choice is not between "regulated" and "unregulated" but between different kinds of regulation.[219] Judge Posner has claimed that economic analysis is the true heir of legal realism. On the evidence of these arguments one is tempted to call this "the case of the murdering heir."

B. Insider Trading Law as a Puzzle

For my purposes, the interesting thing about insider trading law is that it represents a commitment to a far-reaching, publicly popular, egal-

216. *Id.* (citing Harold Demsetz, *Information and Efficiency: Another Viewpoint,* 12 J.L. & ECON. 1 (1969)).

217. Arrow, *supra* note 94, at 623.

218. *See, e.g.,* Easterbrook's arguments discussed *supra* text accompanying notes 205-06.

219. *See* Hale, *supra* note 168, at 626-28.

itarian program of regulation—a commitment that is valued despite the fact that the program is expensive to administer and difficult to police. What is more, the prohibition of insider trading is merely the capstone of a larger structure that places affirmative obligations to reveal information on companies involved in the securities market. This structure is defended by far-reaching appeals to egalitarian norms.

The SEC puts relatively onerous reporting requirements on both companies and individuals and even attempts to police the information revealed to make sure that it is not misleading. Thus, for example, income projections that might gull an unsuspecting investor are forbidden, and the form of disclosure required is designed explicitly to put the novice, so far as is possible, on par with the experienced investor.[220] Courts, administrators, and scholars say things about the evils of disparate access to information that they would never say about disparate access to wealth or to other forms of power or property. They even worry about the evils of structural disparities in access, not merely about cases where one individual has mistreated another. This concern is hardly popular nowadays, even in a presumably hospitable field such as civil rights.[221] Yet all this takes place in the securities market, in the very heart of capitalism, and in the face of practical difficulties of administration and sustained academic criticism. Surely this is a puzzle.

In this Section, I examine the internal structure of this puzzle, tracing its competing, circular arguments and its self-swallowing definitions. My claim is that the internal structure of the debate over insider trading reproduces once again the matrix of ideological tensions in the liberal theory of justice that I identified earlier—public versus private, free flow of information versus property, the norm of equality versus the norm of return to the *status quo ante,* and so on.

Using this framework I would argue that it is precisely the fact that insider trading is trading on information that helps us to understand why it is ideologically feasible to subject it to egalitarian regulation. After all, this trading is a market transaction. In the repetitive and contradictory division of the world into public and private, the market is supposed to be exactly the place that stands outside the norm of equality. Rich and poor both get one vote. Leaving the voting booth as formally equal citizens, they turn instantaneously into members of civil society. One returns to the stock exchange, the other to the unemployment line. The writ of equality does not run to the marketplace. Yet the nonrational

220. Professor Epstein would probably argue that it was an uncompensated taking of the latter's hard-won expertise. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

221. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (evidence that skilled, high-paying jobs are filled predominantly by whites and unskilled, low-paying jobs are filled predominantly by minorities is insufficient to establish a prima facie case of discrimination).

association of information with the public sphere, with the world of debate and discussion, makes it easier to talk about insider trading using the language of equality and fairness.

What is more, we are dealing with something commonly thought of as "market information." As I pointed out earlier, the basic model of the perfect market in microeconomics depends on the idea that all parties are "informationally equal," in that they all possess perfect information. It does not, needless to say, depend on all parties being equal in wealth or possession of legally protected interests. Thus, at first blush it might seem that one would be "arguing downhill" in claiming that a party should not be able to trade on the basis of undisclosed nonpublic material information.[222] At the very least, it would seem that microeconomic discourse would be more hospitable to this precise form of egalitarian regulation. As we will see, things are actually much more complicated. Yet the unreflective first plotting of information as a "public" matter and (to a lesser extent) the apparent congeniality of economic theory to ideas of informational egalitarianism remain vitally important to the political acceptability of the insider trading laws.[223] One thesis of this Article is that our intuitive ideological mapping matters, whatever the outcome of more prolonged reflection.

If the analysis presented so far is correct, some idea akin to "authorship" ought to be offered as a device to mediate these tensions between public and private, between the norm of equality and the norm of return to the status quo, between imperfect information as property *in* a market and perfect information as a property *of* a market. What would an

222. Although, of course, the transaction costs involved make this simplistic assumption extremely problematic, and the section on law and economics shows some of the other possible conclusions one could draw. In one sense, I see this issue as a playing out of the "paradox" proposed earlier. *See supra* text accompanying note 70.

223. If this hypothesis were right, one would expect to see a diverging pattern of treatment of informational inequalities and (other kinds of) wealth inequalities—particularly after the abandonment of the most Lochneresque visions of *laissez faire*. In the late nineteenth century, courts would seldom allow plaintiffs to get out of bargains by showing evidence of *either* wealth inequalities or information inequalities. (Though there is certainly a convincing story in American legal history that claims that classical legal thinkers had to work quite hard to ignore older doctrines such as "just price." These were the doctrines that allowed juries to inquire into the relative wealth and power of the parties—whether this particular merchant was "grinding the faces of the poor." As such, these doctrines were anathema to a legal consciousness built on the beliefs that Marx described—the idea that the inequalities of civil society were taboo as far as the state was concerned.) In any event, under the influence of a will theory of contract and a *caveat emptor* theory of bargaining, it was hard even to explain why there should be contractual redress for disparities in information or power.

But note the relative changes in these doctrines since the early part of the twentieth century. Courts are still uneasy about striking down bargains merely because of disparities in wealth or power between the parties. Yet they seem much more comfortable imposing disclosure requirements, extensive and non-derogable "duties to warn," and even requirements that the particular class and educational requirements of potential purchasers be taken into account in constructing warnings. Informational egalitarianism is clearly not as threatening as economic egalitarianism—hardly an unimportant fact to understand as we enter the "information age."

author figure look like in insider trading, and what would be its most important characteristic? From my perspective, the key feature of authorship as a mediating device lies in its romance—by which I mean both the homage to imagination, originality, and the unique spirit that is typical of the Romantic movement in literature and the actual romanticization of the character of this original creator and destroyer—this Faustian figure.

In the stereotyped story line that goes with this construct, the romantic author spurns convention and loathes routine. He may even violate social mores. Nevertheless, society gains so much from the original creations he throws off that these matters can be overlooked or perhaps even cherished. If the theme of originality supplies the conceptual basis on which to rest the claim to property, the romanticization of the author supplies both the emotional justification for the normative claim and the device by which it can be limited where necessary. Who can resist the argument, "Senator, you're no Van Gogh"? (Although, as *Bleistein* shows, the same rhetoric allows even the humblest contributions to be conclusively presumed "unique.")

Insider trading scholarship is the last place one would expect to find odes to romantic authorship. And yet my claim has been that the author device is almost irresistible because of the conceptual neatness and emotional appeal of the way in which it mediates the contradictions in the regulation of information. If we find the language of romantic authorship incongruously used to defend insider trading, I would claim that my argument is strengthened.

The germinal defense of insider trading comes from Henry Manne.[224] His supporters claim that all subsequent discussions of the criminalization of insider trading "raise, without acknowledging it, the questions first raised by Henry Manne."[225] Manne's book begins with a lengthy economic analysis of insider trading and with a consideration of the effects of various insider trading rules. But after 110 pages of such analysis, he has this to say:

> This somewhat laborious discussion of what happens in the stock market does not constitute a strong argument *against* a proposal to bar all insider trading. Indeed it is not intended for that purpose at all, but merely to point out that no strong arguments along these lines are available in *defense* of such a proposal. . . .
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> But the debate is far from over. . . . [T]he argument developed in the following three chapters is that a rule allowing insiders to trade freely may be fundamental to the survival of our corporate system. People pressing for the rule barring insider

224. MANNE, *supra* note 29.

225. Carney, *supra* note 66, at 868.

> trading may inadvertently be tampering with one of the wellsprings of American prosperity.[226]

The wellspring to which he is referring is entrepreneurship. Manne begins his normative argument with a reprise of Schumpeter's argument on the role of entrepreneurship and its likely demise under the rigid and routinized conditions of modern organizational life—conditions which might seem inimical to the entrepreneurial spirit.[227]

Schumpeter's basic argument was that without dynamic innovation from inventors and entrepreneurs, competition would lead to diminishing returns on capital—as more capital goods were added to a market in which the supply of labor was (at least relatively) fixed.[228] Eventually such a process could lead to the point where no further capital accumulation took place. Inventions and recombinations of productive factors make capital more productive, shifting the factor-price frontier to the right. Yet as soon as a great innovator arises, competitors will imitate the innovation, returns on capital will be driven down once again, and the process will repeat itself. Thus, for both Manne and Schumpeter, originality, iconoclasm, and innovation are simultaneously the keys to economic development and the identifying characteristics of the entrepreneur.[229] Manne takes pains to point out that this innovation is crucial

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226. MANNE, *supra* note 29, at 110.

227. *Id.* at 124-27. Manne has to tread carefully here. As Schumpeter describes him, the entrepreneur is the enemy of tradition whose "conduct and . . . motive are 'rational' in no other sense. And in *no* sense is his characteristic motivation of the hedonist kind." SCHUMPETER, *supra* note 14, at 92. This tends to fit the idea that routinization and bureaucracy will undermine the opportunities for entrepreneurship. But when Manne goes on to argue that entrepreneurs need more profits if they are to be motivated, the entrepreneur suddenly switches hats from the nonrational creator and destroyer to the economically rational actor who, presumably, would find a modern corporation entirely congenial.

228. SCHUMPETER, *supra* note 14; *see* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 113, 188-89 (14th ed. 1992).

229. Schumpeter lists the entreprenuer's principal motivations as

> the dream and the will to found a private kingdom . . . the will to conquer: the impulse to fight, to prove oneself superior to others, to succeed for the sake . . . of success itself. . . . Finally there is the joy of creating, of getting things done, or simply of exercising one's energy and ingenuity.

SCHUMPETER, *supra* note 14, at 93. Dream, will, success for the sake of success, nonrational imperatives, and above all, the joy of creating and transforming—these descriptions paint a picture of the genius romantic author, particularly when he claims that the entrepreneur comes from that portion of society distinguished by "super-normal qualities of intellect and will." *Id.* at 82 n.2. His analysis is certainly an interesting answer to a wider question: to whom do we attribute the growth of civilization, of culture, of capital—to the individual who makes the change, or to the society, culture, public domain, and workforce that make that change possible? Schumpeter's book is a premier (and unusually convincing) example of the argument that attributes growth to the iconoclastic individual. The argument takes the form of "but for" causation—"but for the entrepreneur . . ." Manne goes one step further, concluding from the "but for" argument an entitlement to some share of the proceeds—both on grounds of just dessert and on utilitarian grounds to encourage further production. This style of argument is of course exactly the style of argument that justifies property rights for the (great) author and then, by analogy for all authors—provided only they make something original. Originality and individuality become the central

even though the entrepreneur seems (like the author) merely to be recombining elements that already exist. Those elements are information and productive factors in the former case, language, genre, and perhaps even plot in the latter.

> For Schumpeter the entrepreneur's function is to make new combinations of productive factors, that is, to bring them together in a new way. Routine business management is a critical function in the successful operation of a corporation, but it will characterize the work of corporate executives *only after* productive factors have been successfully combined for the first time.[230]

Entrepreneurs have been identified as the agents of development, and creative originality has been identified as the mark of the entrepreneur.[231] Manne now turns to the question of incentives. Following Berle and Means, he believes that ownership and control are separated in the modern corporation. Diverging from them, he argues that entrepreneurs will probably seek positions within firms and make their money from stock trading rather than stock ownership. In making that argument he also diverges from Schumpeter, who did not believe that large returns were necessary to motivate the entrepreneur. Rather, Schumpeter believed that the satisfaction of innovation or creation sufficed.[232]

> At first, Schumpeter's point that large returns are not a necessary incentive for entrepreneurial effort seems correct. The supply would appear to be determined solely by personal, psychological forces. Entrepreneurs do appear in government and in salaried

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qualities we look for in conferring property rights. It should be noted, however, that Schumpeter thinks that economic reward to the entrepreneur is not central to entrepreneurship—precisely because the motivations of the iconoclast are not "rational" money-grubbing ones. This tension between romaticizing the author and making utilitarian arguments about the need to encourage authorship reappears throughout this study. In the English edition of the book, Schumpeter also denied the charge that he was glorifying the entrepreneur.

> [O]ur analysis of the the rôle of the entrepreneur does not involve any "glorification" of the type, as some readers of the first edition of this book seemed to think. We do hold that entrepreneurs have an economic function, as distinguished from, say, robbers. But we neither style every entrepreneur a genius or a benefactor to humanity, nor do we wish to express any opinion about the comparative merits of the social organisation in which he plays his rôle, or about the question whether what he does could not be effected more cheaply or efficiently in other ways.

Id. at 90 n.1.

230. MANNE, *supra* note 29, at 116. At another point Manne describes the entrepreneur in decidedly Faustian terms, as "this upsetter of stable societies, this creator of disruptive forces." *Id.* at 119.

231. "[T]he typical entrepreneur is more self-centred than other types, because he relies less than they do on tradition and connection and because his characteristic task—theoretically as well as historically—consists precisely in breaking up old, and creating new, tradition." SCHUMPETER, *supra* note 14, at 91-92.

232. Schumpeter makes explicit the point that, although he views the entrepreneur as the engine of capitalist development, economic gain is not a vital motivation for the entrepreneur. In his view, two out of three of the goals of the entrepreneur "may in principle be taken care of by . . . social arrangements" other than the profit motive. *Id.* at 94.

> positions, and the temperament for innovation may turn up in such nonentrepreneurial professions as the clergy or teaching. But surely these are the exceptions, and, though data would be difficult to obtain, the indications are that entrepreneurial talent tends to concentrate in those industries, professions, and positions providing the greatest potential for very substantial profits.[233]

Thus, where Schumpeter saw the rigidity of modern bureaucratized capitalism and the swings of the business cycle as the major enemy of entrepreneurship, Manne sees an absence of reward to the entrepreneur as the biggest problem. In one of his more lyrical and romantic moments, he uses exactly the Faustian imagery we saw earlier to introduce his claim that we need to secure to entrepreneurs the fruits of their labors: "What then is the nature of the return to this upsetter of stable societies, this creator of disruptive forces?"[234] His answer? Profits from insider trading. The argument here gets a little incoherent.

> Certain events or developments lend themselves peculiarly to exploitation by insiders. Not surprisingly, many of these are items that corporate employees or others close to the corporation will have produced. Higher earnings or the concommitant [sic] dividend increase are clear examples. New products or inventions, new ore discoveries, oil finds, or successful marketing or management techniques also will generally be known first to those in the company responsible for the development.[235]

The clear implication is that insider trading will be the result of *beneficial changes* produced by innovative "upsetters of societies and creators of disruptive forces." Society benefits by the improved allocation of productive resources and thus should not begrudge the entrepreneur/insider his or her cut.[236] This is nice rhetoric but bad analysis. The insider makes money off information that will cause the future stock price to diverge widely from the current price in either direction. Thus, being a lousy manager and selling short before the impending bankruptcy becomes public knowledge will net the same return as being a good manager and recouping part of the increase in stock price. Manne has based his argument on originality and uniqueness, but something can be uniquely bad as well as uniquely good.

The idea is confusing in other ways. The unsupported claims about the placement of entrepreneurs and their stock trading habits, the cate-

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233. MANNE, *supra* note 29, at 122-23. Given Manne's own thesis, this would imply that, at present, either few entrepreneurs are in large companies or that they are there and are trading illegally.

234. *Id.* at 119.

235. *Id.* at 55.

236. Indeed, for the reasons given above, it is only through innovation that capital accumulation will continue.

gory errors inherent in certain of his generalizations, the difficulty in delineating those insider trading opportunities that were the result of entrepreneurial activity, all of these lead us to wonder if something else is going on under the text. At one point, Manne asks himself who should be allowed to trade. Suddenly, from the heady language of the creator and destroyer of societies, the relentless romantic innovator, Manne swoops down to the realities of corporate personnel. The conceptual whiplash is rather like that produced in *Bleistein* when the rhetoric of a Van Gogh or a Monet is used to justify intellectual property in an advertising poster.

> The last form of the "person-is-not-entitled" objection to insider trading is that individuals making insider profits are frequently far removed from a time or place or job in which they could perform any entrepreneurial service for the company. It is, however, extremely difficult to identify individuals performing the entrepreneurial function or to know the precise moment at which an individual performs an entrepreneurial act. . . .
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> Directors, large shareholders, executives, lawyers, investment bankers, or many other individuals may, at one time or another, perform an entrepreneurial function. Most of the time, however, they will not be innovating. And for any particular development, many individuals may have made contributions. Who, among the lawyers, bankers, and executives involved, can be given full credit or the correct portions of credit for conceiving the desirability of a merger, searching out the most likely firm, and effectuating the desired plan? An entrepreneurial function has been performed, and the individuals involved will have some claim against the subsequent flow of inside information. But any attempt by an outsider to correlate the contribution and the reward on a one-for-one basis will probably fail. The contribution of an individual may be so subtle—so much a result simply of his being there—and yet so critical that we must be very cautious in concluding that no reward is deserved.[237]

This magnanimity does not extend to mere menial workers whose jobs are deemed incapable of giving rise to original contributions and who thus deserve no share of the reward. Once again, "sources" get a rough break if they do not come close enough to fit the image of the great author. What is more, the dividing line seems a little arbitrary. Lawyers are author/entrepreneurs, but secretaries are not. Then again, Manne's intended audience is a legal one so we might understand a certain rose-tinted view of the lawyer's role.

To review: after spending half of his book on economic analysis of

237. MANNE, *supra* note 29, at 156-57.

the market in information, Manne concludes that his "somewhat laborious discussion . . . does not constitute a strong argument *against* a proposal to bar all insider trading."[238] Harking back to my discussion of information economics, I would agree—at least so far as the skeptical judgment about the determinacy of economic analysis is concerned.[239] Some moral or theoretical *a priori* is required in order to ground the analysis. Ultimately, Manne pins his hopes on a Faustian vision of entrepreneurship, a vision which puts innovation (and not mere labor) at the heart of the issue and which seeks to reconcile society to the granting of a monopoly rent by promising the entrepreneur the spin-off profits from her innovative actions. In all significant respects, this is the romantic theory of authorship all over again.

Manne's theory fails because it cannot separate "bad" originality from "good" originality. It fails because it can neither justify nor limit the class of people entitled to cash in on insider information. It fails because he has only the most tenuous argument to connect insiders and entrepreneurs in the first place. For these reasons and others, Manne's book has proved more influential in raising the topic of insider trading regulation than in actually solving that problem. But though the opponents of insider trading regulation may claim that they have gone far beyond his approach, they fail to grasp the crucial moment in Manne's analysis—the moment when an indefinite body of economic ideas about information is given normative content by *romance*.[240] In this case, the romance is attached to the dynamic innovator, the person who is put at the center of all economic development. Though Manne's theory fails to convince, it nevertheless offers a revealing picture of the role of romantic authorship in discussions of information regulation. In the next Part, that same romance is used to endow the manipulators, rather than the sources, of genetic information with the right to profit from its development.

IX
SPLEENS

So far, I have argued that issues of information will tend to revolve around a set of tensions—between public and private, between the norm of equality and the norm of the return to the status quo, between the public domain and the private right, between the idea of property as an absolute shield against potentially oppressive others and the idea of prop-

238. *Id.* at 110.

239. *See supra* text accompanying notes 69-97.

240. Drawing on the ideas advanced in the discussion of information economics, *see supra* Part IV, one might ask the other critics of insider trading regulation the extent to which their ideas achieve apparent determinacy without recourse to such romantic notions only by underplaying the kinds of paradoxes discussed in Grossman & Stiglitz, *supra* note 69.

erty as a bundle of rights, utilitarian in both derivation and application. Public discourse in general and legal discourse in particular must appear to mediate these tensions. Otherwise, particular regimes of information regulation will seem "ungrounded," "contrary to institutional logic," "dangerous in their precedential implications," or simply "wrong."

For example, we might have a normative theory that argued that any individual who mixes her labor with information should thereby acquire a legally protected interest in it.[241] Yet if we accept the labor theory of property for information, why not for all property? Unless we have some articulated limiting principle, our information property regime will "subvert" our general property regime.

At the same time, any information property regime requires a moral justification of the fact that the individual is being granted a private monopoly rent for recombining language, genre, and ideas that were harvested free of charge from the public domain. Coupled to this moral argument we would need a prudential argument that this particular *level* of property rights would not lead to the privatization of the fertile fields of the public domain—converting it into a patchwork of inaccessible, and increasingly barren, private estates.[242] To give an extreme example, think of granting Shakespeare's heirs a property right in perpetuity over Romeo and Juliet's plot, or Turing's estate a property right in all computer technology. How likely would future Turings or Shakespeares be under such a regime?

Finally, since information property is more obviously de-physicalized than other property rights, we would need some hook on which to

241. This is certainly a theory which reappears time and again in the regulation of information. *See* International News Serv. v. Associated Press, 248 U.S. 215, 234-42 (1918) (recognizing a quasiproperty right in news); *see also* Feist Publications v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1294-95 (1991) (rejecting the "sweat of the brow" theory, but holding that choices of selection and arrangement may imbue a compilation with sufficient originality for copyright).

242. Wendy Gordon and William Fisher provide the two most impressive examples of such a combined moral-utilitarian analysis in the field of copyright. *See* Fisher, *supra* note 22; Gordon, *Merits of Copyright*, *supra* note 74. Yet in their prudential analyses of the optimal level of property rights, both articles concentrate more on the level of property rights necessary to encourage authors to produce than on the countervailing need to keep a large amount of information free from property rights so that authors and creators will have the necessary raw materials with which to work. Using the language of this Article, the private property component of the prerequisites of information production gets more attention than the public domain component. *See* Litman, *supra* note 2. This problem occurs even in the best and most sophisticated copyright literature. One explanation of this emphasis might be the power of the vision of authorship I have described in this Article. The romantic vision of authorship emphasizes creativity and originality and de-emphasizes the importance of sources, genre, and conventions of language and plot. Thus, when economists and legal scholars come to do their analyses, most see the issue as determining the extent of property necessary to motivate and reward the creative spirit, rather than the extent of the public domain necessary to give the magpie genius the raw material she needs. (Emerson on Shakespeare.) Landes and Posner's work on copyright offers a significant exception; however, they themselves point out that this is a "neglected consideration." Landes & Posner, *supra* note 22, at 332. In this Part, the tendency of author-discourse to devalue "sources" will be an important element of my analysis of the *Moore* case.

hang the legally protected interest. In other words, we would need some convincing and apparently firm set of attributes that we could identify as the property that the author, inventor, or artist could own, even after the particular book, machine, or print has been sold. If property is to fulfill its ideological function of apparently securing the individual from the dubious affections of the state and other parties, this set of attributes would have to be something more reified than some general injunction to protect whatever today's utilitarian calculation indicates we should.

In the Part on copyright law, I argued that the figure used to "solve" these problems is the romantic author. The conceptual device of the romantic author makes credible the division between idea and expression. The romantic author stands with one foot in civil society and the other in the public domain of political, artistic, and scientific interchange. The author takes facts, genre, and language from the public domain, works on them, adds the originality of spirit presumptively conferred on him by the themes of romanticism, and produces a finished work. The ideas (and the facts on which they are based) return to the public domain, thus enriching it for the future. But because his originality has marked the form of the work as "unique," the form or expression becomes his alone. Together, the *figure* of the romantic author, the *theme* of originality, and the *conceptual distinction* between idea and expression seem to offer one of the most convincing mediations of the tensions described earlier. This assemblage of mediating devices is so convincing, in fact, that I argued we should expect to find it well beyond the familiar realm of copyright. *Moore v. Regents of the University of California*[243] seems to support that thesis.

Earlier in this Article, I described some of the bizarre features of the *Moore* opinion.[244] At first sight, the case looks as though it has been deliberately constructed to provide a foil for law professors' lectures on bad legal reasoning. The court bumbles and pontificates, apparently at random. The reader is left to make the transitions as best she can. What connects this confused discussion of the difference between the right of publicity and the right of property to the claim that limited property rights are not really property rights at all? What, if any, relevance does the question-begging discussion of whether or not Mr. Moore's cells were unique have to the idyllic picture the court paints of research carried on free from the dead hand of property rights? How is the idyllic picture reconciled with the court's later claim that the researchers themselves must be given property rights in order to provide the vital incentives necessary for their work? My claim is that these otherwise inexplicable features of the case support the theory developed in this Article. The apparently random shifts of topics, inconsistent jurisprudences of prop-

243. 793 P.2d 479 (Cal. 1990), *cert. denied*, 111 S. Ct. 1388 (1991).

244. *See supra* text accompanying notes 31-39.

erty, and ostensibly conflicting claims about originality and incentives are best explained as a manifestation of the structure I described when I discussed copyright.[245]

A. *Worrying About Property*

The court in *Moore* worries about the classification, limitation, and relativization *of* property. It also worries about the utilitarian justification *for* property. One theme of this Article is to suggest that these strands of the opinion express the same concerns in different words.

1. *Limitations* on *Property*

The best place to begin the argument is at the moment that the court confronts these issues head on, in its discussion of regulatory limitations on property. In this case, the limitations that concern the court do not come from the law of copyright, but instead from a statute that regulates the use and disposal of human tissue. "By restricting how excised cells may be used and requiring their eventual destruction, the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to 'property' or 'ownership' for purposes of conversion law."[246]

This limitation is not as extreme as the claim presented earlier by Krause in his eighteenth-century attack on the very notion of intellectual property: "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."[247] Nevertheless, there is something peculiar in seeing a late-twentieth-century California court talk about the implications we can draw from elimination of the rights ordinarily attached to property. From a practical point of view, such comments invite counterexamples. Most countries put extensive restrictions on the use, reproduction, transfer, and disposal of banknotes with-

245. My analysis here focuses on the reasons that the court gives for its decision, the assumptions on which that decision is based, and the structure of the rhetoric in which the decision is justified. I am *not* implying that the court's decision is indefensible on other grounds. One obvious concern in giving patients property rights over their own bodies is that it holds out the possibility of a market in organs in which the poor and the needy sell everything from kidneys to corneas. A court or legislature convinced of the evils of such a system might reject the commodification of organs for entirely different reasons than the court in *Moore*—although the case for prohibiting sale would be less compelling in situations where the organ must be removed for other reasons. Concerns like these seem to have been at the root of the National Organ Transplant Act, 42 U.S.C. §§ 273-274f (1988). One of the interesting things about the *Moore* case is that it says so little about these kinds of concerns and so much about the concerns that would dominate if one was viewing the issue through the author paradigm. Since my concern is with the general effect of author-thinking on the interests of sources and audience, it is that aspect of the case on which I concentrate here.

246. *Moore*, 793 P.2d at 492.

247. Krause, *supra* note 118, at 415-17, *quoted in* Woodmansee, *supra* note 1, at 444.

out prompting any soul-searching about property rights in money.[248] To a greater or lesser extent, similar types of restrictions could be found for cars, plutonium, motor oil, beachfront houses, and air conditioners.

From a slightly more theoretical perspective, the court's comment is even more puzzling. After all, in contemporary legal discourse the most common conception of property is the bundle of legally protected interests, held together by competing and conflicting policy goals. The removal of one or more sticks from the bundle should have no particular implications for the legally protected interests that remain. This point should be more rather than less obvious in questions of intellectual property. The author claims a right in the work that is severable from the material object bought by the reader. An author cannot prohibit the reader from burning the book, nor from telling acquaintances about it, nor from stealing the ideas. Even the jokes may be fair game, if retold under the right circumstances. The one prohibited act is the copying of expression—and even in that case there are exceptions. Thus, to reason from the "normal incidents of ownership" in a case like this is to adopt a formalistic and absolutist vision of property like that of Krause, and to do so in the area least suited to it.

2. *Utilitarian Justification* of *Property*

The court does not see itself as formalist, of course. The majority says explicitly that "when the proposed application of a very general theory of liability in a new context raises important policy concerns, it is especially important to face those concerns and address them openly."[249] Yet, when the court does address them, it does something very curious. The majority opinion describes the existing state of affairs—a world in which "sources" have no property rights over the products developed from their body fluids, tissue, or genetic information. "At present, human cell lines are routinely copied and distributed to other researchers for experimental 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."[250] This assessment is a fine example of the rhetoric of the public domain. Property rights of "sources" are portrayed as impediments to innovation, an unnecessary drag on research. This principle is potentially an imperialistic one. One could imagine the same argument being made against copyright, or in favor of the legalization of insider

248. Thanks to David Seipp for this example.

249. *Moore*, 793 P.2d at 488. It is interesting to contrast this view with their equally strong opinion that the "important policy concerns" worrying the dissent should be handled elsewhere. "Shedding no light on the Legislature's intent, philosophical issues about 'scientists bec[oming] entrepreneurs' are best debated in another forum." *Id.* at 492 n.34 (quoting *id.* at 514 (Mosk, J., dissenting)) (citation omitted).

250. *Id.* at 495 (footnote omitted).

trading. As I pointed out at the beginning of this Article, commodification of information can always be portrayed as *either* a time-consuming and unjust impediment to, *or* a necessary prerequisite for, the free circulation of information.[251]

Indeed, this is exactly what happens. A moment later, information property rights of scientists are portrayed as necessary incentives to innovation. This assertion is not supported by data or analysis. It simply flows from the assumptions of romantic authorship. As my discussion of information economics makes clear,[252] it is *possible* that if we do not give property rights to sources of genetic information, not enough will be brought to researchers in the first place. It is also *possible* that researchers would be given adequate incentives by the quest for scientific preeminence and by the joy of research, and that the competitive advantage of those who are first to bring a product to market would be a sufficient incentive for research and development. The court does not consider these alternative possibilities, not because they are weighed and rejected or because the existence of the patent system precludes them altogether, but because the ideology of romantic authorship makes them disappear.

3. *Characterization* as *Property*

The court also worries about the characterization of certain legally protected interests as "property" rights. The plaintiff and the court of appeal had relied strongly on analogies from privacy right cases dealing with the antinomially named "right of publicity." When the California Supreme Court addressed the cases cited by the plaintiff,[253] its main concern was whether or not the right of publicity is "really" a property right.

> These opinions hold that every person has a proprietary interest in his own likeness and that unauthorized, business use of a likeness is redressible as a tort. But in neither opinion did the authoring court expressly base its holding on property law. Each court stated, following Prosser, that it was "pointless" to debate the proper characterization of the proprietary interest in a likeness.[254]

From a legal realist perspective of legally protected interests, the question is indeed pointless: classification of the legally protected interest is dependent on the *purpose* the interest has to serve. Thus, rather than staring at the legally protected interest in an attempt to divine

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251. *Compare* International News Serv. v. Associated Press, 248 U.S. 215 (1918) *with* Feist Publications v. Rural Tel. Serv. Co., 111 S. Ct. 1282 (1991).

252. *See supra* Part IV.

253. *Moore*, 793 P.2d at 490 (citing Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974); Lugosi v. Universal Pictures, 603 P.2d 425 (Cal. 1979)).

254. *Id.* (citations omitted).

whether it was "really" property,[255] one would decide the goals of this particular interest and would then discuss whether the remedies attached to a "property" right would be sufficient to achieve them. The court, however, having tipped its hat to Dean Prosser, is not willing to follow him. "For purposes of determining whether the tort of conversion lies, however, the characterization of the right in question is far from pointless. Only property can be converted."[256] Nevertheless, having raised the question of classification, the court declines to settle it. Instead, the majority simply assumes that the "right of publicity" is not a property right, in part because of its classification as a right that protects privacy. This is a shame because, if seen a little less formalistically, the publicity rights cases themselves present a fascinating example of the tensions discussed in this Article.

B. Public and Private; Publicity and Privacy

The famous Warren and Brandeis article that formed the basis of much of the law of privacy[257] attempted to ground the right to exclude others in a person's privacy interest—the legitimate desire to keep certain information from the eyes of the public. Their article implies that the interest is more than just a property right in information about oneself. The vision they invoke is the cozy private sphere of the home, not the bustling private sphere of the market. Indeed, to allow the market to commodify one's privacy might be to accelerate exactly the trends that Warren and Brandeis found so disturbing. If one understands the concern that animates this area of the law to be the protection of privacy, rather than the protection of private property, Mr. Moore's analogy might seem to be correspondingly weaker. To a judge, taking someone's genetic information is unlikely to seem intuitively as much of a violation of "privacy" as publishing facts from a diary without the consent of the author.

Yet despite their classification under the law of privacy, the publicity rights cases on which the plaintiff relied pay great attention to the importance of commodification, alienation, and transfer of the protected

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255. *See generally* WITTGENSTEIN, *supra* note 174.

> This is connected with the conception of naming as, so to speak, an occult process. Naming appears as a *queer* connexion of a word with an object.—And you really get such a queer connexion when the philosopher tries to bring out *the* relation between name and thing by staring at an object in front of him and repeating a name or even the word "this" innumerable times. For philosophical problems arise when language *goes on holiday.* And *here* we may indeed fancy naming to be some remarkable act of mind, as it were a baptism of an object. And we can also say the word "this" *to* the object, as it were *address* the object as "this"—a queer use of this word, which doubtless only occurs in doing philosophy.

Id. at 19e.

256. *Moore,* 793 P.2d at 490.

257. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890).

interest, and little or no attention to the concerns that so worried Warren and Brandeis. The *Motschenbacher* case[258] turns on a racing driver's ability to commodify the distinctive image of his car and use it to advertise cigarettes. The *Carson* case[259] explains at length that Mr. Carson already licenses the phrase "Here's Johnny" to a chain of clothing stores in which he holds a twenty percent interest. The *Hirsch* case[260] holds that "Crazylegs" Hirsch should be able to sell the right to use his nickname, and thus that it cannot be used without his consent to promote the sale of products that remove hair from women's legs. The *Lugosi* case[261] allows Mr. Lugosi a partial monopoly over the commercial exploitation of a particular image of Dracula.

It is also worth noting that in each case the plaintiffs did not expend great labor, emotion, or even originality in creating the protectible "mark." It was Ed McMahon's distinctive voice and phrasing that made Mr. Carson's introduction more than a pleasantry. Mr. Motschenbacher did not design the car that formed the tangible basis of the image he was allowed to exploit. "Crazylegs" Hirsch was given his nickname by someone else. Mr. Lugosi's right of publicity protected a figure drawn from a book Mr. Lugosi did not write, portrayed in films he did not write, direct, or produce, and based on an historical figure[262] who actually did very different (though equally unpleasant) things.

To a greater or lesser extent, therefore, each case treats fame as a partial public good—something unique and personal that can be gainfully exploited only if it can be commodified and others excluded from its use except on pain of payment. This, of course, was exactly what Mr. Moore wanted the court to say about his genetic information. Why did they refuse? Neither formalism, nor the functional requisites of the biotechnology industry, nor the dictates of economic efficiency seems sufficient to explain the decision.

Perhaps the court is applying an authorship theory after all. Perhaps the deep assumption here is that a celebrity is the author of his or her *fame,* and that the phrases, nicknames, and images that are associated with the fame are, as Judge Kennedy put it in his dissent in the Carson case, actually expressions of the essential celebrity.[263] To be famous, after all, is to stand out from the crowd, to be thought unique. There is also a strong popular belief that having labored to create this unique mark, the celebrity is entitled to have it protected. Mr. Moore's

258. Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974).

259. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983).

260. Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129 (Wis. 1979).

261. Lugosi v. Universal Pictures, 603 P.2d 425 (Cal. 1979).

262. a/k/a Vlad the Impaler.

263. By far the most sophisticated development of this idea is in Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics and Unauthorized Genders,* 10 CARDOZO ARTS & ENT. L.J. 365 (1992).

genetic endowment could certainly be seen as something he got without expending labor.[264]

But what about uniqueness and originality, the other fundamental prerequisites for an author to have exclusionary property rights in his creation? In one of its most surprising passages, the court says that not only was Mr. Moore's genetic information produced without the relevant labor, it was insufficiently original to justify property rights.

> Lymphokines, unlike a name or a face, have the same molecular structure in every human being and the same, important functions in every human being's immune system. Moreover, the particular genetic material which is responsible for the natural production of lymphokines, and which defendants use to manufacture lymphokines in the laboratory, is also the same in every person; it is no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin.[265]

This passage is remarkable partly because it is nonsensical. It was precisely the unique properties of Mr. Moore's genetic "programs," the fact that his virus-infected cells overproduced lymphokines, that made his tissue and bodily fluids such an important part of Dr. Golde's research. If the issue was one of unique value, or unusual ease of extraction, clearly Mr. Moore's cells are not like everyone else's. Both seawater and gold ore contain gold molecules. That does not stop a cubic foot of gold ore from being more valuable than seawater containing the equivalent amount of gold. If the issue is statistical uniqueness, again it is exactly the unusual degree to which Mr. Moore's cells overproduced lymphokines that made them worth fighting about. The court offers the weak argument in support of its position that "[b]y definition, a gene responsible for producing a protein found in more than one individual will be the same in each."[266] Both Steve Timmons and I can jump and hit a volleyball. Only one of us, however, will be asked to endorse shoes, or to play on the U.S. Olympic team. But by the court's logic, since both Steve and I are "playing volleyball" we are both "volleyball players" and are therefore "the same."

But the argument about uniqueness is not merely nonsensical. It is also irrelevant to the question of whether or not Mr. Moore should be able to sue in conversion—irrelevant that is, unless the issue is once again being restated, whether consciously or unconsciously, in terms of the ideology of authorship.

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264. Although most labor theories of property have as their most basic postulate the ownership of one's own body. It is from this *a priori* naturalistic property right that labor theorists deduce the case for one's ownership of the fruits of that body's work.

265. Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 490 (Cal. 1990), *cert. denied,* 111 S. Ct. 1388 (1991).

266. *Id.* at 490 n.30.

Thus there are two distinct reasons why Mr. Moore is arguing against the grain of the implicit structure I have described. First, the market has taken from him the most "private" information of all, information about his own genetic structure. Yet our intuitive notions of privacy are constructed around the notion of preventing disclosure of intimate, embarrassing, or simply "personal" socially constructed facts about ourselves to others like ourselves. I could stare at my own genetic code all day and not even know it was mine. Even if I could "read" DNA, it is hard to imagine that I would be upset by revelation of my genetic code, or at least, that I would experience the particular complex of anger, shame, and righteous indignation that we associate with "a violation of privacy." For example, I would be less upset if someone chose to reveal that I carry the recessive gene for blue eyes than if they disclosed my preference in underwear—though neither is unusual or (to the best of my knowledge) aesthetically or socially reprehensible. There is something in the way that our culture has constructed the notion of privacy that makes it more hospitable to the protection of *"social"* facts than *"natural"* facts.[267] Even with the obvious borderline cases—hereditary diseases, for example—revelations are only thought to be violative of a person's privacy when some particular social significance has been given to the genetic coding.

The difficulty with Mr. Moore's case is that (1) no one would think worse of him for having a genetic makeup that could be mined for a socially valuable drug and (2) specialized knowledge would be necessary to make the connection between the "facts revealed" by his genetic makeup and his "inner life." One could draw the mild and reformist conclusion that our notion of privacy, based as it is on the revelation of intimate social facts comprehensible to a lay audience, does not adequately protect the interests of individuals in genetic information.

Second, if the thesis of this Article is correct, decisionmakers will tend—consciously or unconsciously—to look at questions of information through the lens of the romantic vision of authorship. The publicity rights cases seem to view protected nicknames, catchphrases, fangs, and cars as the expression of some underlying celebrity persona—the marks of a fame that is definitionally original and presumptively the result of

267. Of course, this distinction breaks down fairly quickly. For one thing, there is no such thing as a "theory free" description of facts, so that all "natural" facts can be seen as "social" facts if only one picks the right definition of "society." Thus, more precisely, we could say that the ordinary language notion of privacy protects an individual's subjectively defined "personal information" from the gaze of the peer group that the individual has chosen to recognize.

The more the revealing party seems to profit by the information, the more we allow the "victim" of the unwanted disclosure to define the sphere of privacy. Thus a butcher would probably not be found to have violated George Bernard Shaw's privacy rights if he revealed in a letter to *The Times* that Mr. Shaw secretly broke his vegetarian principles by eating pork pies. If, on the other hand, the butcher demanded £100 on pain of disclosure, we call it "blackmail" and *prohibit* the commodification of the information.

hard work. These qualities sound suspiciously like the analytical structure of romantic authorship in copyright law. If Mr. Moore's claim is not to the protection of his "privacy" *tout court,* but rather the protection of his ability to commodify the genetic information derived from his cells, then the inquiry shifts from privacy to the "right of publicity," from the home and the secret to the market and the commodity. Once that shift is made, we are led to ask, "Who is the *real* author of the genetic information at issue here?" Reading this case, however, one gets the sense that the court thinks that Mr. Moore has not exhibited that mixture of arcane labor and dazzling originality that we associate with the romantic author. This sense is deepened when the court moves on to talk about the comparative rights of Mr. Moore and the doctors and researchers.

C. The Author and the Source

Having decided that Mr. Moore does not own the actual cells taken from his own body, the court uses the University of California's patent to trump his claim to the cell line developed by Dr. Golde and the other researchers.

> Finally, the subject matter of the Regent's patent—the patented cell line and the products derived from it—cannot be Moore's property. This is because the patented cell line is both factually and legally distinct from the cells taken from Moore's body. Federal law permits the patenting of organisms that represent the product of "human ingenuity," but not naturally occurring organisms. Human cell lines are patentable because "[l]ong-term adaptation and growth of human tissues and cells in culture is difficult—*often considered an art . . .*," and the probability of success is low. It is this *inventive effort* that patent law rewards, not the discovery of naturally occurring raw materials.[268]

The conceptual structure of patent law contains many of the same oppositions as that of copyright, and in this excerpt the court deploys them to great effect. There is something wonderful in the way that Mr. Moore becomes a "naturally occurring raw material," whose "unoriginal" genetic material is rendered unique and valuable by the "inventive effort," "ingenuity," and "artistry" of his doctors. If we look at this case through the lens of the romantic author, then Mr. Moore's claim is as ridiculous as if Huey Long had laid claim to ownership rights over *All the King's Men* or the baker of madeleines to *Remembrance of Things*

268. *Moore,* 793 P.2d at 492-93 (first emphasis added) (citations and footnotes omitted). It should be noted that although the court can justifiably say that the themes of originality, inventive effort, and functional use are appropriate to a discussion of patent law, these are in fact the themes that organize the entire opinion, and not merely the section on patent law. The mention of artistry—largely irrelevant in the patent law context—further supports my thesis.

Past. Authorship devalues sources. In its implicit application of authorship analysis to this case, the court similarly devalues sources. The fact that this can be accomplished in the face of the strong naturalistic presumption that one owns one's own body, and in the face of the ethically unattractive behavior of Mr. Moore's doctors, is a testament to the rhetorical power of the ideas involved.

Thus, to a greater extent than the other issues this Article discusses, the *Moore* case may indicate both the contentious value judgments loaded into the conceptual apparatus of authorship and the way that discussions of entitlement to control information are carried out through the metaphor of "authorship," even in fields far from copyright. Seen this way, Mr. Moore's case seems to have been designed to fail the authorship test. The court thinks that his rights are already too limited to be property, that his genetic information is too natural to be a creation, that it is neither private enough to be protected by the law of privacy nor original or creative enough to be protected by the rights of publicity. Viewed through the lens of authorship, Mr. Moore's claim appears to be a dangerous attempt to privatize the public domain and to inhibit research.[269] The scientists, however, with their transformative, Faustian artistry, fit the model of original, creative labor. For them, property rights are necessary to encourage research. What should we think about this desire to cast around in every situation until we find the people who most resemble authors, and then to confer property rights on them?

There is one last irony in the *Moore* case. The California Supreme Court does not leave Mr. Moore entirely without recourse. As I mentioned in the introduction to this Article, the court acknowledges that doctors have a duty to disclose any financial interests they have in the treatment of a patient. Thus, while discussing genetic information, the court views Mr. Moore as a "naturally occurring raw material," a public domain to be mined by inventive geniuses. Conversely, when discussing his role as a consumer of medical services, Mr. Moore is transformed into a sovereign individual with an unchallengeable entitlement to the facts necessary to make informed decisions.[270] As far as the majority is

269. There is a parallel here to Levmore's discussion of farmers who own land that, unbeknownst to them, contains valuable mineral deposits. If a mineral company seeks to buy the land, should it be able to respond dishonestly to the farmer's inquiry about possible mineral deposits? Levmore is convinced the answer is yes: in fact he calls it "optimal dishonesty" and says that the farmer's behavior in attempting to find out the full value of his land is "despicable" because he has no intention of mining the land himself. Levmore, *supra* note 55, at 137-42.

270. This part of the decision spawns a whole new set of puzzles. What will be the measure of damages for the violation of this legally protected interest? Are damages to be decided with no reference to the value of the drugs or cell lines produced from the patient who has failed to give consent? What if the doctor believes that the patient will not give his or her consent to such research, but also believes that the patient's cells are likely to be invaluable in developing a hugely profitable drug? In that situation, a rational doctor in a position like that of Doctor Golde will

concerned, Mr. Moore is the author of his own destiny, but not of his spleen.

X
CONCLUSION

A. "Typing" Information Issues

There are a number of reasons that one might classify the kinds of issues I have discussed here under the heading "information." One might believe that one had a master theory—a single set of principles capable of resolving all significant conflicts, or simply a single set of functional goals to be rescued from messy doctrinal particularity. For example, as discussed earlier, Judge Easterbrook was concerned that putting information cases in traditional legal pigeonholes would cause the Court to "overlook the need to consider the way in which the incentive to produce information and the demands of current use conflict."[271] My aim here was rather different.

First of all, I had a descriptive and analytic goal. I wished to attack from a different angle a series of problems that have puzzled scholars and frustrated courts. The conventional way of addressing these issues is a particularistic one. The legal system commodifies, refuses to commodify, or makes illegal the commodification of certain kinds of information. Scholars then take each issue on its own merits. They ask, "Why is blackmail illegal?" or, "Why does the state forbid insider trading?" or even, "Why does copyright doctrine extend protection to expression but deny it to ideas?" Instead, I asked a series of questions about the roles that information is expected to play in the institutions of a liberal state—in the family, in the market, and in the world of politics and public debate. My aim was to remain faithful to the subtlety and complexity of the material by dealing with each issue in some detail. If I had to abandon that goal temporarily in order to summarize my conclusions here, I would say that the ideology of a liberal society presents different reified visions of information—as the lifeblood of the disinterested debate in the public world, as the instantaneous omniscience of the actors in the perfect market, as that which must be commodified if we are to encourage more information to be produced, as that potential public manifestation of themselves that individuals must be able to control if we are to protect the cozy world of the home, the family, and the persona. And so on, and so on.

Most analysts start by assuming a certain level of deductive rational-

decide not to inform, will pay the damages for breach of the duty to disclose or for battery and will still come out ahead. The obvious way to avoid undermining the patient's sovereign power of decision would be to base the damages in part on the patient's proportional contribution to the profitable drug. But how different is that from a "property" right?

271. Easterbrook, *supra* note 1, at 314.

ity in the construction of our social institutions.[272] They assume that there really is some logical reason that blackmail should be prohibited. After all, most of us feel so strongly that blackmail is "wrong" that it is easy to imagine that a little further reflection and a better set of analytical tools will uncover the principle that distinguishes the blackmail demand from the rent bill, or from the baseball stadium's negotiation with its host city. Alternatively, analysts critique the current position—but again, they assume the deductive rationality of the institutions they analyze. Thus, the critics of insider trading regulation seem puzzled by the fact that legislative history, scholarly analysis, and judicial exposition offer no rationale for prohibiting a practice that, when described in abstract terms, seems to them entirely compatible with the norms of a free market society. In the place of this fuzzy thinking, they offer economic analyses of secrecy, justifications of "optimal dishonesty," and models of the efficient capital market, confident that their prescriptions are not marred by the flaws of the ideas they criticize.

In my view, blackmail is illegal because we have a vision of "privateness" that is constructed in part around the control of *information*[273]—as opposed to, say, wealth, health care, or housing.[274] We "romanti-

272. For a discussion of the relevance of the assumption that social institutions are subject to critique by reason, and an analysis of the *conservative* objections to such an idea, see James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism,* 3 YALE J.L. & HUMAN. 263, 299-314 (1991).

273. *See, e.g.,* Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (defining privacy in terms of "the individual interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions") (footnotes omitted). This definition of privacy focuses on retention and control of information to protect the person and the life plan. One interpretation of this idea is that information is the only *resource* or form of wealth the need for which can be convincingly derived from the liberal theory of personhood. This may be one reason that state laws regulating abortion that incorporate theories of when life begins can be disturbing. *See, e.g.,* Webster v. Reproductive Health Servs., 492 U.S. 490, 504-07 (1989) (refusing to consider the constitutionality of the preamble to Missouri's abortion law where the theory of life contained therein was not used to justify regulation of abortion). For an interesting analysis of information rights in light of current Supreme Court doctrine, see Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy,* 71 B.U. L. REV. 133 (1991).

274. An inexact analogy may help to demonstrate the profoundly contingent, socially constructed nature of our notion of "public sphere" and "privacy." Imagine a society in which everyone lived in communal dormitories with socialized childrearing, limited taboos about public displays of sexual behavior, and so on. Imagine also that universal access to excellent health care was seen as a defining, essential quality of the society. Then imagine a person in that society who offered permanently to give up her right to health care, in return for some release from communal obligations. Such a transaction might well be seen as no more legitimate than an attempt by a citizen in this society permanently to renounce her vote or her right to counsel, perhaps even to sell herself into slavery. Such a transaction might seem to violate the "logic" of the public sphere. Conversely, imagine the way that "privacy" would be seen in such a society. Certainly, an individual whose neighbor in the dormitory threatened to reveal some unpleasant fact would be unhappy, but would that society necessarily have thought "control of information about oneself" to be an important principle of social organization, as opposed to, say, "policing those who shirk their social duties"? My point is not that certain forms of social organization *necessarily* produce certain principled normative concerns. Rather, a process by which we imagine changes in fundamental aspects of our

cize"[275] a notion of subjective control of private information, refusing to allow the information to be commodified. The best analogy to blackmail, then, is not monopoly or monopsony, but something like the "wrongful birth" cases in which many courts refuse to recognize the costs of raising a child as "damage" flowing from a negligently conducted sterilization operation. In both cases, we make a pretheoretical judgment that an activity is "private," and only then do we "deduce" that it must be kept from the ruthless, instrumental logic of the market.

Insider trading is another situation in which someone trades from a superior position in nonpublic information. This is not just any information, but information of great value. In blackmail, we pigeonholed the issue into the "private" world of information about home and family. In insider trading, on the other hand, we label the issue as "public," subject to the norms of equality rather than the norms of the market, precisely because it is material *information* and not some other form of wealth or power. Hence, there is a strand in the cases and in the scholarly writings that applies the norm of equality to *all* regular dealings in material nonpublic information. But there is also a strong vision that information should be traded just like every other commodity—a vision that would deny the special public status of information. Thus, there is an equally strong—perhaps now, a stronger—tendency to see insider trading in terms not of formal public equality, but rather in terms of private misappropriation and theft.

The disagreements in courtrooms and scholarly journals about the proper characterization of insider trading help to point out the limits of my argument. The typing I am describing is neither so deeply rooted in the culture that it can never be criticized nor so determinate that it dictates only one solution. At most, I am trying to lay out the structure within which issues are now framed, possibilities foreclosed, and so on. The structure matters, because it excludes some options from consideration (excludes them even from being seen, perhaps), or prompts a hasty leap to judgment, or because it is one of the many forces shaping the terrain of political struggle. But the process of typing is neither a giant conspiracy nor a deterministic and inevitable deep structure of thought.

Finally, let me say that this process of typing information issues as public or private[276] is not "irrational," in the derogatory sense of that

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social life reveals the *contingency* of our own beliefs. In fact, the relationship of social form to normative structure is highly contingent—perhaps a dormitory-based social system would be *more* concerned with privacy than we are—but this contingency is concealed precisely by the fact that members of any given society share a basic normative structure.

275. I use the word to mean that as a society we project onto an institution or set of actions an emotional and intellectual charge—in this case a positive one—and that we then perceive that charge as already being contained *within* the romanticized object. *See* PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1980); Boyle, *supra* note 9.

276. And typing them into the conflicting ideas about what public and private *mean.*

term. There are, to be sure, reasons why we think the control of information about ourselves is fundamental to the preservation of the self. There are reasons why a right to control private information will command more support in this society than a right to control some other critical resource—food, for example. There are reasons why the claim that "everyone should trade from a position of roughly equal information" seems merely "fair," whereas "everyone should trade from a position of roughly equal wealth" seems like socialism. Those reasons are a complex of ideology, anthropology, history, New Deal institutions, class interest, noble ideal, Enlightenment epistemology, and so on. It would take a better philosopher than I to lay them out fully, and one with more hubris to believe that exactly the correct mix could be identified. But it is in the process these "reasons" explain—the process of "typing" information issues that I have described in this Article—more than in the language of microeconomics or Rawlsian rights theory that we find answers to the question, "Why are insider trading and blackmail illegal?"

I would also draw another, modestly realist, conclusion from this process and the conflicting stereotypes about information on which it relies. During the process of typing issues as public or private, analogies and metaphors play a vital role. In some cases, however, we become the prisoners of our metaphors. While this observation has a long and distinguished history in other areas of legal doctrine,[277] the information field has been curiously immune to it.

In the area of electronic information services, the *Prodigy* case is a particularly good illustration.[278] Prodigy has been defending itself from charges that its electronic bulletin boards censored notices critical of Prodigy and did not censor anti-Semitic speech. The ACLU wanted neither form of restriction; B'nai Brith wanted only the latter. An article from *Network World* offers a series of classic "public and private" characterizations, shored up by metaphors that refer back to the information technology of yesteryear.

> Prodigy's bulletin board editing policies are, in essence, electronic publications, the spokesman added. He said Prodigy has the right to edit or delete material, just as newspapers have a right not to print letters to the editor.
>
> Jerry Berman, director of the American Civil Liberties Union's Information Technology Project in Washington, D.C., said the ACLU agrees with Prodigy's assertion that it has the

277. Cohen, *supra* note 12.

278. *See* Barnaby J. Feder, *Computer Concern Assailed on Anti-Semitic Notes,* N.Y. TIMES, Oct. 24, 1991, at A21; Barnaby J. Feder, *Computer Speech—Also Free,* N.Y. TIMES, Oct. 30, 1991, at A24; Barnaby J. Feder, *Toward Defining Free Speech in the Computer Age,* N.Y. TIMES, Nov. 3, 1991, § 4, at 5; Michael W. Miller, *Prodigy Computer Network Bans Bias Notes from Bulletin Board,* WALL ST. J., Oct. 24, 1991, at B1, B6.

> right to edit public bulletin board systems. But he said a Prodigy policy limiting the types of private electronic messages users can send is a gray area.
>
> Some new Prodigy rules prohibit users from sending unsolicited messages protesting pricing policies to the Prodigy advertisers. . . .
>
> Berman said these restrictions may be justified because Prodigy is a private service, but they could also be seen as an unjustifiable restraint of free speech.[279]

The metaphors are contested, of course. Organizations such as Electronic Frontier compare electronic bulletin boards to public parks.[280] In another article, Berman drew on the shopping mall cases to suggest that "[t]he courts may some day hold that electronic shopping networks like Prodigy are the public forums of the 21st century."[281] The process by which bulletin boards are analogized to shopping malls, which in the past had been analogized to the Roman forum, is a fascinating one. Berman then suggests that Congress should regulate electronic mail under "common carrier principles."[282]

The tropes change as the context changes. In libel cases, for example, courts have analogized electronic information services to bookshops or for-profit libraries,[283] rather than to newspapers that publish libelous information. The difficulty comes when the analogy alone seems to decide the issue.

> "There is some debate in legal circles on the extent to which videotext service providers must screen publicly posted messages," said Benjamin Wright, a lawyer in Dallas who specializes in electronic communications law. "If the law sees the provider as more like a newspaper, then the duty to screen is higher. But if the law sees the provider as more like a telephone company, a communications common carrier, then the duty is lower."[284]

Parks? The U.S. Mails? Federal Express? A telephone company? Community newspaper? Regulated television station? Common carrier? Who is to say? There are advantages—in familiarity, evocativeness and tradition—to this particular kind of analogical reasoning. Nevertheless,

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279. Barton Crockett, *DA Probes BBS Practices at Prodigy,* NETWORK WORLD, Apr. 15, 1991, at 4.

280. *See infra* note 305.

281. Jerry Berman & Marc Rotenberg, *Forum: Free Speech in an Electronic Age,* N.Y. TIMES, Jan. 6, 1991, § 3, at 13.

282. *Id.*

283. "CompuServe's CIS product is in essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications." Cubby, Inc. v. Compuserve Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

284. Peter H. Lewis, *The Executive Computer: On Electronic Bulletin Boards, What Rights Are at Stake?,* N.Y. TIMES, Dec. 23, 1990, § 3, at 8.

it is hard to repress an occasional wish to frame the issue as whether a specific type of regulation will help or hinder the kind of society that we wish to create,[285] rather than filtering it through an additional layer of simile and metaphor. The difference in the two methods is not the difference between rational analysis and figurative speech[286]—our vision of the good society is, of necessity, an analogical one too. Still, it would be unfortunate if we decided how to regulate the most important technologies of the next century based mainly on their formal resemblances to the physical environs or commercial settings in which the public information of the nineteenth century found its home.

B. The Search for an Author

The second goal of this Article was more complicated. Recognizing the existence of contradictory pictures of information and the role of the public/private distinction in information issues is only the beginning of the project. At the end of my description of the conceptual elements of information issues—property, the public/private distinction, and information economics—I outlined the ideological and practical prerequisites for the law of intellectual property. Our assumptions about state, market, family, and information present a task for the law of information. Given these assumptions, intellectual property law, and the law of information in general, must appear to reconcile a series of apparently incompatible demands if it is to appear credible.

> It must provide a conceptual apparatus that appears to mediate the various tensions associated with the role of information in liberal society. Thus, for example, it must explain why a person who recombines information from the public sphere is not merely engaging in the private appropriation of public wealth. It must explain how 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

285. The best summation of the Prodigy debate itself may have come at the end of a *Boston Globe* article:

> Industry analyst Gary Arlen has a different view. What may have happened, he says, is that Prodigy unwittingly attracted people looking for a real communications network instead of consumers eager to spend money in an electronic shopping mall.
>
> Citing a computer magazine editorial, he says, "Prodigy's message to its subscribers seems to be 'Shut up and shop.' "

Chris Reidy, *Computer Flap: Is Speech Free on Prodigy?*, BOSTON GLOBE, Jan. 30, 1991, at 35.

286. This is one of my disagreements with the economic analysts of information issues. Easterbrook, for example, believes that the problem with intellectual property issues is that abstract (and I would say, metaphoric) terms conceal from the court the real functional requisites of the information market. Yet to engage in economic analysis is (at least as Judge Easterbrook does it) to abstract certain aspects of a complex social situation, whether of blackmailing, baby-selling, book-writing or boat-covering—and to declare that this is *really* a market. And that, of course, is a metaphoric, analogical process.

> 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 carve out a sphere of privacy and at the same time ensure 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 respects existing disparities in wealth, status, and power in the private. And all of these things must be accomplished while using a conception of property that avoids the theoretical impossibilities of the physicalist, absolutist conception, but that at the same time is not too obviously relativistic, partial, and utilitarian.[287]

The constellation of ideas that seems most successfully to reduce the salience of these tensions in copyright law is the *figure* of the romantic author, the associated *theme* of originality, and the *conceptual distinction* between idea and expression. This triad manages to make it seem that intellectual property rights are more than just a utilitarian grant by the state; to limit the ambit of something that sounds very much like a labor theory of property rights; and to divide the author's creation so that the idea goes into the world of public exchange, while the expression remains the author's. In explaining the history of this constellation of ideas, I tried to show that the idea of authorship is socially constructed and historically contingent. In particular, the romantic vision of authorship plays down the importance of external sources by emphasizing the unique genius of the author and the originality of the work. This "author gambit" is so attractive that it is found far beyond conventional intellectual property law, a fact of no small importance.

The current trend seems to be to assume that economics is the most appropriate theoretical language in which to discuss questions about the regulation of information. But the turn to microeconomics does not rob the idea of romantic authorship of all significance. In my discussion of information economics, I tried to show that economic analysis of information questions is paradoxical or at least aporetic. I suggested that these problems could be traced to the fact that 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. The implication was that informationally efficient markets are not merely difficult to achieve, but impossible.

The paradoxes of information in liberal state theory reappear in microeconomics. Economists analyze some information from the "commodity" side and other information from the "perfect information" side, but they can neither produce a theoretical metaprinciple that justifies

287. *Supra* pp. 1460-61.

their shifts nor completely purge the disfavored aspect from their analysis. It seems perfectly possible to invert the hierarchies, so that one could analyze the free availability of futures market prices as a public goods problem, or copyright as an intolerable transaction cost.

The most obvious manifestation of this basic indeterminacy is the difficulty that economists have in theorizing about the amount of information that will be produced in an "unregulated" market. Will it be too much or too little? Many economists say that information is a classic public good, apparently taking as a theoretical *a priori* about public goods problems the assumption that too *little* of the good will be produced. Yet some economists think that the absence of property rights will lead to the production of too *much* information. Thus, the use of some general body of "public goods theory" to analyze information issues seems impossible.[288] Each information issue needs to be examined on its own, in a particularistic, highly empirical way—a style not often found in the current literature. In the absence of such particular, empirical data, and some convincing theoretical grounding, economics offers little more than a partial checklist of issues and tradeoffs. And that is where the author comes in again. In a strange mixture of Wordsworth and Coase, Byron and Stigler, the values of romantic authorship seem to seep—consciously or unconsciously—into economic analysis. And because in most conflicts the paradigm of authorship tends to fit one side better than the other, this romantic grounding provides economic analysis with at least the illusion of certainty. Authors tend to win.

In Parts VIII and IX, I claimed that both scholars and courts have

288. Professor Steven Shavell suggests to me that when professional economists talk about "public goods" they do *not* mean that there is a general category of goods that share the same economic characteristics, manifest the same dysfunctions, and thus benefit from similar corrective solutions. Most economists, he argues, would agree that there is no such thing as "public goods"—merely an infinite series of particular problems (some of overproduction, some of underproduction, and so on), each with a particular solution that cannot be deduced from the theory but that instead would depend on local empirical factors. If this is what economists think, I would be happy to agree. Certainly, lawyer-economists often seem to have more expansive ideas. *See* Landes & Posner, *supra* note 22, at 326 ("A distinguishing characteristic of intellectual property is its 'public good' aspect."); *see also* Demsetz, *supra* note 28; Easterbrook, *supra* note 1; Kitch, *supra* note 1. Mainstream economics texts and articles also make more general claims. JAMES M. BUCHANAN, THE DEMAND AND SUPPLY OF PUBLIC GOODS (1968); Paul A. Samuelson, *Contrast Between Welfare Conditions for Joint Supply and for Public Goods,* 51 REV. ECON. & STAT. 26 (1969); Earl A. Thompson, *The Perfectly Competitive Production of Collective Goods,* 50 REV. ECON. & STAT. 1 (1968). This seems to be true of economists of all political opinions and theoretical types. DAVID HEMENWAY, PRICES AND CHOICES: MICROECONOMIC VIGNETTES (1977); Perelman, *supra* note 94. Finally, detailed articles *by* economists often make the same mistakes that one would expect of someone working with a reified and overly general "public good" vision of information. Arrow, *supra* note 94. Nevertheless, there are articles putting forward ideas consistent with Shavell's point of view, *e.g.,* Hirshleifer, *supra* note 69, although it is noticeable that these articles generally adopt the tone of a protestant dissenter, rather than that of normal science. In the end, my conclusion has to be that Professor Shavell is committing the entirely laudable error of being too kind to his colleagues.

wide recourse to the author gambit. In the *Moore* case, the court found, like Krause,[289] that Mr. Moore's claims raise concerns about the limitation and justification of property and the nature of privacy. Eventually, it is the celebration of original, creative, artistic modification of naturally existing raw material and the need to motivate society's creators that justify giving property rights to the doctors but not to Mr. Moore.[290] Even the right-of-publicity cases seem to reflect this body of ideas, allowing the commodification of the "expressions" of a unique celebrity persona. In both areas, those who do not look like authors find that their property claims are rejected. Mr. Moore presents us with a powerful picture of the unfortunate consequences that can ensue if the court decides you are part of the public domain. Ed McMahon, the World's Foremost Commodian, and the manufacturers of Crazylegs depilatory cream may present less compelling claims to our sympathy, but they all suffer some significant consequence in part because they do not fit the author paradigm.

In Part VIII, the relevance of the romantic author to economic and utilitarian analysis becomes clearer still. As an example I used the original defense of insider trading by Henry Manne. Manne admits that his economic analysis of insider trading provides no strong reasons to legalize the practice. Again, it is a figure akin to the romantic author who provides the outcome-determinacy the analysis otherwise lacks. Drawing on Schumpeter's theory of economic development, Manne conjures up a romanticized vision of the entrepreneur/innovator as the creator and destroyer of settled arrangements. Manne, with the aid of a few category errors, declares that profits from insider trading will function as the entrepreneur's reward—temporary monopoly rents that lie at the heart of capitalism. The parallel to copyright and patent is striking.

In the other writing on insider trading and on the right to withhold valuable information, echoes of the author appear again and again. Professor Levmore's article on insider trading and contract law styles as "contemptible" the farmer who "to preserve a fraud claim, asks specific questions about activities he would otherwise never engage in" and advocates his own proposed doctrine as a way "to deny a windfall to a passive party when to do otherwise might lead to a net societal loss."[291]

289. *See* Krause, *supra* note 118.

290. In other words, the argument on behalf of the doctors that we must secure for producers the fruits of their labors in order to encourage research has an equal and opposite counterpart. The opposing argument identifies Mr. Moore as a co-producer in terms of dessert and argues that unless individuals are rewarded for allowing their genetic material to be used for research, too little genetic material will be made available to researchers. The California Supreme Court avoids, suppresses, or counters this argument by appealing to its audience's reverence for the original, creative laborer who transforms the environment, and whose property rights are appropriately limited by their very function. The ideal of authorship first *identifies* the researchers as the relevant parties and then *justifies* their property rights.

291. Levmore, *supra* note 55, at 142.

The judgmental moralism and the preference for the active, dynamic, exploring mineral company rather than for the "contemptible," "passive" farmer are not required by the economic analysis. Indeed, one could paint a perfectly respectable series of economic vignettes in which the absence of a right to expect disclosure held up transactions and encouraged strategic behavior on the part of farmers who could never rely on the representations of buyers of their land. Instead, the choice to start the analysis from a preference for the "active," inventive party seems to represent the same romanticization of the innovating, transforming author figure. If one starts from this perspective, then the farmer, like the baker of Proust's madeleines or Mr. Moore, has no *moral* right to the profits the innovator makes from the new object—even though that object was created from raw material supplied by the hapless source. Whatever coating of economics is subsequently put over this pretheoretical orientation, the outcome derives from the initially hidden, and probably unconscious, moment of romance. Judge Easterbrook's arguments about the division of labor seem to be marked by a similar pretheoretical preference for Faust and the individual creator, rather than for Job and the public domain.

I am certainly not saying that authors are bad, or claiming that we never need to give property rights to the creators of information in order to encourage further production. The protection and exaltation of authorship is a compelling and attractive idea. The need to reward producers in order to encourage continued production is a real concern, although, of course, the question of just who is a "producer" continues to be a problem. Just as the typing of information issues into public and private may produce felicitous and attractive results, the concern with the motivation of authors may, in any individual case, be exactly what is needed. But I stress the "may." Of the examples I gave above, Proust's baker may have no claim to our heartstrings or our utilitarian goals, while the farmer and Mr. Moore may have considerably more. Yet to the extent that we decide information issues by forcing them into a Procrustean concept of authorship, we risk a tendency to ignore the countervailing moral and utilitarian concerns. This risk arises not because we reject these concerns, but because the veil of authorship obscures them. Consider the following.

Centuries of cultivation by third world farmers produce wheat and rice strains with valuable qualities—in the resistance to disease, or in the ability to give good yields at high altitudes. The biologists, agronomists, and genetic engineers of a western chemical company take samples of these strains, engineer them a little to add a greater resistance to fungus or a thinner husk. The chemical company's scientists fit the paradigm of authorship. The farmers are everything that authors should not be: their contribution comes from a community rather than an individual, tradi-

tion rather than an innovation, evolution rather than transformation. Guess who gets the intellectual property right? Next year, the farmers may need a license to resow the grain from their crops. Calling this practice "the great seed ripoff," Representative John Porter actually introduced a resolution into Congress that would have called for the United States not to proceed with intellectual property negotiations under the GATT until there has been a study on "protecting the rights of those in the Third World."[292] A news article on the resolution immediately follows this observation by offering a view of this issue from the other side, that is to say, from within the author-centered view of intellectual property: "The 'industrial world' view on the issue is that poor countries pirate drug recipes or high-yield seeds, violating the patent laws of industrial countries to avoid paying royalties on the order of $3 billion a year to U.S., Japanese and European firms."[293]

Other examples abound. Shamans from the Amazon basin often have generations of lore about the properties of herbs and flowers. Some of the these plants are placebos; others are extremely valuable.[294] Drug companies have found that if they test the plants from the shamans' "black bag," they yield a high percentage of valuable drugs.

> While skeptics may argue that the lore of native healers is mere superstition, the ethnobotanists see shamanic knowledge as the result of a trial-and-error process refined over thousands of years. Ethnobotanists hope to take a scientific short cut to discovering new uses for the tens of thousands of plants with which native peoples are intimately familiar.[295]

One of the most fascinating experiments reported by the *New York Times* involved the AIDS virus. In test tube trials, "[o]f the 20 plants collected on the shaman's advice, five killed the AIDS virus but spared the T cells. But of 18 plant species gathered randomly, just one did so."[296] There is, of course, no guarantee that any of these plants would be suitable for human consumption, but they are now being tested.

A more widely publicized example concerns vinca alkaloids from the rosy periwinkle—a plant that is native to Madagascar. The plant was used indigenously to treat diabetes. It was investigated by the Lilly company and forms the basis of a compound now used in chemotherapy treatment.[297] According to the British newspaper *The Independent*, the

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292. David Judson, *Lawmaker Urges U.S. to Come Clean on "Seed Ripoffs,"* GANNETT NEWS SERVICE, July 19, 1990, *available in* LEXIS, Nexis Library, GNS File.

293. *Id.*

294. Daniel Goleman, *Shamans and Their Lore May Vanish with Forests,* N.Y. TIMES, June 11, 1991, at C1.

295. *Id.*

296. *Id.*

297. The example is actually a more complex one. When tested as a drug to ameliorate the symptoms of diabetes, the alkaloids derived from the periwinkle did not perform well. Subsequent

plant "has yielded a drug to cure Hodgkin's disease and a trade in the drug worth $100m a year."[298] The article goes on to quote the World Wide Fund for Nature to the effect that "[i]f Madagascar had received a significant part of this income, it would have been one of the country's largest (if not the largest) single sources of income."[299] In the days of recombinant DNA techniques, genetic information may be one of the largest resources of the developing countries. "Madagascar is the unique home of perhaps 5 per cent of the world's species. It is the biological equivalent of an Arab oil sheikhdom. Yet, without an income from its huge biological wealth, it has chopped down most of its forests to feed its people."[300] Now *there's* a place to deploy our economic analyses of public goods, free riders, and the tragedy of the commons. Precisely because they can find no place in a legal regime constructed around a vision of individual, transformative, original genius, the indigenous peoples are driven to deforestation, or slash-and-burn farming. Who knows what other unique and potentially valuable plants disappear with the forest, what generations of pharmacological experience disappear as the indigenous culture is destroyed. In both cases, a large part of the problem is that indigenous peoples share in none of the profits of development. While it is always possible that huge profits could destroy the culture just as effectively as penury, the decision to impose the author vision without acknowledging, or even understanding, its implications is also the decision to ignore these problems.

These facts have not gone completely unnoticed. Environmental groups and groups devoted to the preservation of indigenous peoples have criticized the way that tribal lore and biological largesse find no place in the language of intellectual property. Dr. Jason Gray, Director of Cultural Survival, put the position simply:

> "It's a question of intellectual property rights. People whose medical lore leads to a useful product should have a stake in the profits. Unless we return some profits to them, it's a kind of theft. We have to figure out ways to make the rain forests pay for themselves, so these peoples can continue to exist."[301]

This "colonial" form of intellectual property has been around for hundreds of years. In 1800 the Makushi Indians showed explorers the plant from which they extracted curare for their arrowheads. Western chemists found that curare was an excellent muscle relaxant. It is still

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testing showed that the drug had other, equally valuable uses. How, then, should we value the contribution of Madagascar's flora and indigenous medical lore? At zero? If we do, how are we to avoid the public goods problems, or tragedy of the commons problems that I discuss below?

298. Fred Pearce, *Science and Technology: Bargaining for the Life of the Forest,* INDEPENDENT, Mar. 17, 1991, at 37.

299. *Id.*

300. *Id.*

301. Goleman, *supra* note 294, at C6.

being used to this day. According to Dr. Mark Plotkin of Conservation International, "The Makushis never received any compensation for the discovery of a product worth millions."[302]

In the future, plans to set up data banks on the genetic resources of tropical rain forests raise concerns that companies will no longer have any incentive either to preserve the forest or to reward its inhabitants for the use of their lore. Precisely because of our increasing ability to record genetic information *as information,* the connection of that information to its natural habitat will become less necessary. Conrad Gorinsky, a Guyanan biologist working in Britain,

> calls the current plans "bunker biology," because they ignore the traditional tribal knowledge that is the fount of our wisdom. He fears that the [proposed treaty on genetic sovereignty] could act as an incentive for companies to loot the biological riches of the rain forests over a few years, secreting the results in their laboratories and gene banks. A gene in the lab, they will argue, is worth two in the bush. But once the riches are taken, who will save the rain forest then?[303]

A patent lawyer or an economist could argue that we cannot criticize intellectual property regimes for failing to maintain the genetic diversity of the biomass (or whatever). Perhaps that is true, although it seems highly problematic to me. But even if we close our eyes to the distributional, environmental, and other "subsidiary" effects of our intellectual property regimes, even if we analyze those regimes solely on their ability to maintain and increase the production of information, we find that, for the reasons developed in this Article, they are unlikely to achieve that very restricted goal. An author-focused regime that makes the contributions of sources "invisible" is unlikely to reward those contributions—even when an economic analysis might show this to be desirable. Sources may become a "commons" whose exploitation is justified or obscured by an author theory, leading to predictably tragic results—cutting down the genetic miracle of a rain forest to grow subsistence crops, for example. The result *may* be a reduced flow of genetic material to laboratories and a consequent reduction in research and innovation. The same general analysis can be applied to restrictive decisions about the fair use exception in copyright,[304] to the application of patent law to computer programming tricks worked out long ago by hackers,[305] and

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302. *Id.*

303. Pearce, *supra* note 298.

304. The *Kinko's* decision, for example. Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991). The restriction of the doctrine of fair use may seem initially to go the other way. In one sense, a restricted fair use exception will guarantee a higher level of payment to "sources." The difference, of course, is that you only benefit from the restriction of fair use if the legal system already classifies you as an author.

305. Some computer scientists and software developers have been resolutely opposed to the

even to the willing participation of subjects in genetic research programs.

It is not only "sources" that tend to suffer from the blindnesses of the authorial vision. Audiences suffer too—even as they sometimes benefit from the incentive mandated by the authorial vision. As I pointed out in the discussion of the conflicting roles of information, copyright scholars have recently begun to comment critically about the tensions between their discipline and the ideals of the First Amendment. They are right to do so. Whether the issue is access to electronic information, the photocopying of materials for classroom use, the quoting and paraphrasing of passages from an ex-president's biography, or the general issue of the privatization of the public domain, author-talk often *presumes* the very relationship between the incentives of property rights and the availability of information that it must *prove.* The opposing positions of the United States and the Third World on the intellectual property provisions debated during the Uruguay Round of negotiation on the GATT show the implications that these presumptions have for international development as well as for domestic debate.[306] Less obvious, but no less important, are the effects that the regime of intellectual property will have on the international audience for literary work, political debate, or scientific exchange.

My point here is a simple one. Much of the current case law and scholarly literature gives the impression that if we wished to consider issues of distributive justice, international development, or citizen interest in a thriving public domain, we would have to give up a rigorous analytical system that carefully balances incentives for production against the needs of current use. From my perspective, nothing could be further from the truth. The current analysis is massively indeterminate at every stage. It is based on claims for which there is inadequate empirical evidence. It relies on an aporetic set of economic ideas in which most issues could convincingly be portrayed *either* as a public goods problem requiring commodification *or* as a monopoly/transaction cost problem requiring competition and the free flow of ideas. As a system, it is held

application of intellectual property to information technology. One of the developers of the Lotus program, Mitch Kapor, has been a powerful critic of the effects of intellectual property on the "electronic frontier," founding a group by that name to counter the orthodox wisdom about the necessity of property rights to encourage development. Richard Stallman, an MIT computer scientist, has founded a group called the "League for Programming Freedom" specifically to challenge what he sees as the inhibiting effects of commodification on both the development of new technology and the *dispersal* of market power over information technology. Finally, an underground group called "Nu Prometheus" has dedicated itself to stealing and revealing the "source codes" for single supplier CPU's such as the MacIntosh as a way to encourage other suppliers to compete with Apple. The idea of theft in the service of competition is a perfect example of the conflicts I describe in this Article.

306. *See, e.g.*, Clyde H. Farnsworth, *U.S. Warns on Global Trade Talks*, N.Y. TIMES, Nov. 30, 1988, at D1 ("Brazil opposes stronger protection for intellectual property and freer trade in services—two major American objectives."). *See generally* Eric Wolfhard, *International Trade in Intellectual Property: The Emerging GATT Regime*, 49 U. TORONTO FAC. L. REV. 106 (1991).

together by definitional fiat, despite the fact that the definitions of "idea," "expression," "parody," "originality," "fact work," "fair use," "nonobviousness," and "natural law" merely reproduce the very tensions they were designed to resolve. Finally, the system is both grounded on and imbued with an ahistorical and romanticized vision of authorial creation: it takes as universal premise that which should be its occasional conclusion.

Admittedly, there are a number of things the authorship vision does well. It conceals the indeterminacy of much of the utilitarian analysis. More positively, the concerns it stresses are real ones. Authors and inventors often *do* need to be encouraged, protected, lauded, and rewarded. The romantic vision of authorship offers an attractive idea of creative labor—transcending market norms, incorporating both work and play, and entailing a world in which workers have a real connection to and control over the fruits of their labors. This is a vision that we might want to expand far beyond the limited realm of property in information. As currently constructed however, intellectual property in particular and information issues in general seem to be in the thrall of an idea that is taken as truth where it should be questioned as dogma.

C. The Future

In this Article, I have assumed that we are moving towards a society more centrally concerned with the production, manipulation, and use of information. As assumptions go, this seems to be a reasonable one. Obviously, any judgment about the best way to analyze information issues will depend in part on the fears (and hopes) we have about this process. Classical liberalism lays great stress on the dangers posed by a runaway state, and so liberalism as a political doctrine has much to say about the best means for the restraint of state power. What fears do we have about information and the much heralded information age? From here it is hard to tell what the future holds, or what kind of ideas and cultural traditions will be of use. Inevitably we rely on historical analogies to grasp the situation, and just as inevitably, the analogies mislead as well as enlighten. In an information world, what would be the equivalent of Hegel's and Weber's analyses of the public/private split, Marx's labor theory of value, or Pigou's analysis of externalities? Here are three possibilities that draw on the ideas developed in this Article.

1. Information Class

My concern in this Article has been with ideas and lines of thought that tend to be suppressed by the current way of thinking about information and society. This is a familiar intellectual exercise. Writing about the industrial revolution and the transformation of capitalism, Marx turned the rhetoric of private property and entrepreneurialism on its

head, arguing that wealth was socially produced but privately appropriated. According to Marx, law, ideology, religion, and philosophy all operated to obscure this "skimming off" of surplus value. In place of a market theory of value and the confused positivist/natural right theory of property of his time, he offered a labor theory of value, transforming workers from "another factor of production" into "the *real* producers of value."[307]

One danger that might be dimly prefigured in this Article is that we are moving towards a new, highly stratified class system—a world broadly divided between manipulators of information and "sources." In a society where one group compiles, modifies, redesigns, and commodifies information gleaned in part from the genes, consumption patterns, and culture of the rest of the population, the rhetoric of justification and entitlement bids fair to be based on author-talk. Just as the market/natural right vision of property could be used to claim that workers were receiving exactly the proportion of social wealth to which they were entitled, so the authorship vision can be used—both rhetorically and theoretically—to obscure, undervalue, or simply ignore the contributions of "sources." Precisely because author-talk is genuinely attractive, because it does express desirable moral and utilitarian ideas, its power is likely to be all the greater. How does one break the grip of a rhetoric of entitlement that systematically obscures and undervalues the contributions of one part of the population and magnifies those of another part of the population? One method is to propose an alternative rhetoric of entitlement. For Marx, the labor theory of value was the *true* theory, rather than a way of thinking that helped to expose the partiality and contentious quality of the settled arrangements of his society. By contrast, the argument in this Article merely aspires to show the suppressed side of information and intellectual property, not to dethrone the author and crown the source instead.

The examples here ranged from the *Moore* case to insider trading, from copyright doctrine to indigenous medical lore in the Amazon and the tragedy of the commons in the forests of Madagascar. Using them, I argued that for complex reasons relating to the ideology of public and private spheres in a liberal society, the regime of intellectual property is built around a particular romanticized conception of authorship. I argued that this regime often has the effect of devaluing sources and that, even within the conventional language of policy analysis, such a devaluation seems sometimes to have very bad consequences. (Sometimes it has very good ones—but more by accident than by design.) This, surely, is

307. This is not to say that I am arguing in favor of the labor theory of value. One of the achievements of marginalism in economics and legal realism in property law was to point out the flaws of both the Marxist labor theory of value and the conventional vision of property which it opposed.

something we want to know. Apart from this pragmatic concern, I have a more intangible one—*Ideologiekritik* rather than policy analysis. Marx's errors notwithstanding, it *is* important to see the lacunae and contentious assumptions involved in a particular society's discourse of entitlement—the language in which entitlement to that particular society's primary resources is both described and justified.[308] To have a critical understanding of the rhetoric of entitlement in an information society, one would need an analysis of conventional discourse about information as well as of the more complicated, more sophisticated, and more highly formalized version of that discourse provided by the language of microeconomics. I have tried to provide both here.

2. *Information Overload*

My second alternative future is strongly counterintuitive, for it discards not only the basic assumption of post-Enlightenment thought that more information is always a good,[309] but also the assumption that the rate of progress of science and society will vary directly with the rate of accumulation of information. I offer the idea anyway, not because I believe it will necessarily happen, but because the very possibility of this set of events tends to be suppressed by the uncritical acceptance of an Enlightenment view of information.[310]

It could be that we are headed for an information overload—a brownout caused by overproduction and consumption of information. This is an idea that ought to be familiar to the legal profession. During the '80s, bright young lawyers worked hundreds of thousands of hours on contested tender offers and leveraged buyouts. They pored through corporate documents, built up electronic databases to keep track of their research, searched for any case, treatise, or law review article that could

308. I think that Foucault would have agreed with this point, even as he would have insisted (again rightly in my view) that grand theory offers exactly the wrong method to *find* and criticize this "discourse."

309. *See* DRÉZE, *supra* note 73.

310. I say this in part because what little writing there is on the impact of "the information society" on law has been profoundly meliorist and optimistic. *See, e.g.*, M. ETHAN KATSCH, THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW (1989). Professor Katsch believes that greater access to information may undermine "abstractions of the law," "such as rights." *Id.* at 262-65. He seems to believe that this process will make the law more "humane," a word that appears here—as it does in some early critical legal theory, *see* Boyle, *supra* note 272—to be an antonym of "abstract." Yet his other positions seem marked by a mainstream liberalism that prods me into wondering whether he wants "abstractions" like "the right of free speech" to be undermined. When he says that the information age will make law more like a conversation, I find myself wondering who will get to talk and who will have to listen. Finally, when he says that privacy will "change," *id.* at 168-97, I find myself beset by dystopian images entirely unlike the ones that appear, from his tone, to be intended by that phrase. All of Professor Katsch's assessments may be right—a transformation devoutly to be wished, no doubt—but it is hard to escape the conclusion that he is able to be so vague and yet so optimistic precisely because he is talking about information—the lifeblood of the Enlightenment. It is from that feeling of unexamined possibilities, contrariness, and general "humbuggery" that this dystopia arises.

give their side an edge, and checked every possible line of authority on computerized legal research services. They even rechecked the final product an hour before filing just to make sure that no more recent decision had been added. On the other side, opposing attorneys did exactly the same thing. Even if one believes that all those takeovers actually led to a more efficient allocation of resources, it is hard to believe that the legal process would not have been just as efficient and just as equitable if both sides had commanded a slightly lower level of effort.

We could describe this legal equivalent of the nuclear arms race in terms of market failure, inefficient discovery rules, prisoners' dilemmas, or hyperlexis. But any thorough analysis would have to concede that one of the problems was not just hyperlexis, but Hyper-LEXIS—an explosion of the availability of information that, under a particular set of societal assumptions and background rules, sometimes leads to a socially irrational investment of resources. There is no *a priori* reason that the idea must be confined to the adversary system. We might imagine a world in which inventors were overwhelmed by the difficulty of searching patent banks, where specialists found it impossible to keep up in their fields, where researchers worked in increasing isolation—an isolation produced by the sheer quantity of available information. Increasing specialization, balkanization of the disciplines, an irrational fixation on "authority" and cross reference, and a scholarly habit of conspicuous citation,[311] even an erosion of public debate by information overload—these signs are not so very alien to the world we live in that we can afford to dismiss them completely. Nor are they so different from the results one would expect in a world that romanticizes authorship and focuses overwhelmingly on incentives to the immediate producer. That might be food for thought.

In the 1930s, welfare economists used the example of the factory that pours pollution into the air but pays nothing for its use. In that case, they declared, a failure to internalize all externalities causes overproduction. If the full social costs of production were taken into account, the current high levels of production might prove uneconomical. Maybe a future Pigou will write an analysis of the blindness of information economics at the close of the twentieth century[312] and will point

311. I have to say that I like the irony of saying this at the end of a huge Article whose myriad footnotes are the fruit of every electronic research service the world has to offer.

312. *Cf.* D.M. Lamberton, *The Emergence of Information Economics, in* COMMUNICATION AND INFORMATION ECONOMICS: NEW PERSPECTIVES 7, 7-22 (Meheroo Jussawalla & Helene Ebenfield eds., 1984).

> The emergence of information economics can be seen as a response to the deficiencies of economic theory based on perfect knowledge, the failures of policy, or the spectacular advent of intelligent electronics with greatly enhanced capacity for communication, computation, and control. Whichever is the preferred interpretation, it remains a personal judgment whether the battle for recognition and respectability has only just been joined, is well advanced, has been won or perhaps been lost.

Id. at 7.

out that we were oblivious to the "information pollution" we were creating, that our economics did not force us to internalize the consequences of our overproduction, leaving us free to continue to "pollute."[313] Like the welfare economics of the thirties, the economics of information might well lay part of the blame on an ideological insistence on the image of the isolated economic actor. For us, that actor is the author. Our romance is almost as great as the romance with which the classical economists endowed the self-reliant economic atoms of the *Lochner* era.

3. Information Politics

What of the realms in which the author-figure apparently does not play so great a role? What of public debate, privacy, or requirements for disclosure of information advantage in market transactions?[314] Here I am most optimistic. My own views are loosely egalitarian and I favor an expanded and decentralized view of democracy.[315] But egalitarianism and democracy are norms that liberalism confines to a comparatively narrow sphere—as evidenced by everything from the state action requirement to the notion of formal equality in the public sphere. One way to express my conclusions is that, on information issues, liberal political theory is less restrictive. Consequently, from my perspective many of the criticisms aimed at liberalism are less powerful. Precisely because information is conceived of as being different from other forms of wealth and power, precisely because it seems like an "infinite" resource, it does not get exiled to the world of civil society. Information disparities are not simply taken as "given," as a postulate that must be accepted before we begin. Thus, to me it seems that judges are more willing to strike down bargains on the basis of information disparities than other forms of (non-physical) power disparities, that legislatures are willing to criminalize

313. Because of the "infinite" vision of information I discussed earlier, we do not view information as a good, the maximization of which is sometimes harmful. But a moment's reflection should reveal occasions when the unbridled growth of information may actually be hurtful. Some decisions become *harder* with more information. *See* DRÉZE, *supra* note 73. When we think of information not as a good, but as the lifeblood of the public sphere of debate, or the perfect information of a market model, we ignore the *constraints* produced by overproduction. For example, given a retrieval system of a limited capacity, I will prefer to have a smaller database that will give me answers 50% of the time than to add the information necessary to give answers 100% of the time but which so overwhelms my abilities to retrieve and process data that I can only find the answer 40% of the time. In neoclassical price theory, these kinds of trade-offs are exactly the ones that market decisions make so well. Yet the point of this paper has been to show that the double quality of information—both part of the model and a good to be traded under the model—may prevent the operation of economic feedback mechanisms on the level of market behavior, and may make questions of microeconomic analysis undecidable on the level of scholarship. As the case of the polluting factory shows, the parallel to welfare economics operates at both levels, the practical and the theoretical.

314. Of course, as I tried to show earlier, the author ideal often does appear in that particular issue, especially when analyzed by Professor Manne.

315. While admitting that these are abstractions that do not resolve concrete cases, that they frequently contradict each other, and so on, and so on.

insider trading but not other forms of market advantage, that people who see nothing wrong in the state refusing to fund abortion clinics find *Rust v. Sullivan* troubling. When we are analyzing disclosure requirements or the extent of a duty to warn, we are more willing to look at outcomes and results, rather than uniformly equal access—to take into account the actual educational level, social class, and native language of those who are the targets of the warnings, rather than conclusively assuming a formal equality.

Whatever the practical limits of these "exceptions"—and at the moment I would accept them to be enormous—it seems that we apply egalitarian norms more broadly when we are dealing with information rather than with some other form of wealth or power. If we are indeed moving towards an "information-based society"—whatever that means—then we are doing so with a reservoir of egalitarian cultural understandings and political ideals. This fact, in and of itself, guarantees nothing at all. But it is not unimportant, and from my perspective, it is a very good thing.

What about privacy? Egalitarian and redistributive political solutions can be supported by arguments keyed to the requirements of the individual ("to flourish, every human being needs . . .") or supposedly deduced from abstract distributional principles. The interesting thing about privacy is that it follows the former strategy and thus offers up a view of human personality that has normative implications about the control of resources. To be fully a person, one must have control over (fill in the blank). The resource named is information. Again, a society that often has a hard time imagining that persons need control over food, shelter, medical care, and so on, can find room for the idea that the most intimate sphere of personhood must be defined in part by a right to control information—the right of privacy.

When Warren and Brandeis wrote their article, this may not have seemed like much of a challenge to the distribution of power in society. In a society based on the transmission, accumulation, and manipulation of information, it might seem rather more of one. Of course, it could turn out that the ideal of privacy was precisely the basis needed for a discourse of entitlement in an information society. It could be manipulated to allow an electronic society to justify the appropriation of intimate details, just as the labor theory of property was used by Locke to "boot himself up" into market society. Again, one must resist the temptation to reason from rhetoric to reality. Nevertheless, it seems to me that the gradient of argument runs the other way. Using the concept of privacy, one is arguing downhill when challenging the imperial tendencies of a data-based society and arguing uphill when supporting them.

The question that remains to be answered is whether the social harm we should be most concerned about is underproduction, overproduction,

the tragedy of the commons, the commercialization of an electronic public sphere, the corrosive effect of information technology on privacy, or merely straightforward distributional inequity. This Article cannot answer that question. Indeed, I have tried to show that there are conceptual reasons why the question is unanswerable in the abstract. But my argument does show that the way that we currently think about information may actually blind us to important aspects of each one of those problems, making us that little bit more helpless in the face of them. On the other hand, some of our current ideas about information offer reservoirs of strategy, tactics, and social belief that—when viewed in the abstract—seem egalitarian in the extreme. To someone like me, who believes a lot of our social ills come from the restriction of egalitarian norms, that fact has an optimistic ring.

We should be careful in drawing too strong a conclusion from this analysis. I have tried to offer a theory of information, but the theory is more like a road map or a tool kit than a blueprint or an algorithm. One cannot *deduce* social consequences from the existence of an authorship theory of intellectual property or an information-centered vision of privacy. This Article can point out tendencies and gradients of argument. It can describe the process of typing information as public or private, finite or infinite. It can work out some of the reasons that the romantic vision of authorship spreads far beyond copyright. It can show the *aporias* at the heart of information economics. It can prognosticate about the way that the rhetoric and ideology of the past will interact with the social arrangements of the future. It can suggest that the information age may be constructed in part around the conflicting valences of a romantic, individualistic notion of information production, an egalitarian notion of public information, and a theory of privacy based on a notion of positive liberty. Ultimately, however, it must end on a note of uncertainty. And that, it strikes me, is entirely appropriate to both its subject and its theme.